

No. 69738-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JULIE WARE,

Appellant,

v.

JESSE NELSON,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

The Honorable Judge HOLLIS R. HILL Presiding

BRIEF OF APPELLANT

Emily Cordo
WSBA # 37077
Attorney for Appellant Julie Ware
Sexual Violence Law Center
2024 3rd Ave
Seattle, WA 98121
206.436.8611

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I. INTRODUCTION

Persons in the State of Washington who are subjected to nonconsensual sexual conduct or penetration are entitled to obtain protection from their assailants in the form of a Sexual Assault Protection Order (“SAPO”). In this case Julie Ware, Appellant, petitioned for a Sexual Assault Protection Order against Respondent Jesse Nelson, alleging multiple qualifying instances of nonconsensual sexual penetration during several periods of stalking and harassment by Nelson, which spanned a 23-year period. Nelson invoked his Fifth Amendment privilege, and presented almost no evidence to dispute most of Ware’s allegations, with the exception of the most recent sexual assault in October 2012.

Despite uncontested evidence of specific, qualifying sexual assaults in 1989, 1991, 1993, and approximately ten times in 2002, the Trial Judge denied relief. The primary basis the Judge offered for doing so was her conclusion that some of the contact between the parties must have been consensual, which she said undermined Ware’s credibility, and her determination that Ware had failed to prove the 2012 rape by a preponderance of the evidence. Because Julie Ware presented uncontested evidence about multiple qualifying sexual assaults, she is entitled to a Sexual Assault Protection Order, so she respectfully requests that this

court review the Trial Judge's Findings of Fact and Conclusions of Law and reverse the denial of her Sexual Assault Protection Order.

II. ASSIGNMENTS OF ERROR

Assignment of Error 1: Substantial evidence does not support the trial court's Finding of Fact #7 – *“There is insufficient credible evidence to support Ware's allegation that she was raped by Nelson in 1989.”* – No evidence was presented to contest Ware's testimony about the 1989 rape and the Judge made no specific findings regarding why Ware's testimony and her mother's (Donna Stewart's) corroboration were not credible.

Assignment of Error 2: Substantial evidence does not support the trial court's Finding of Fact #5 – *“Ware and Nelson began a dating relationship in 1989, when Ware was 14 years old and Nelson was 17 years old. Ware and Nelson double-dated several times with Nelson's friend Matt Tisler and one of Ware's friends.”* – There is no stated basis for finding the vague testimony of Nelson's friend and unreliable hearsay testimony of Nelson's wife more credible than the detailed first-hand testimony of Ware and her mother Stewart.

Assignment of Error 3: Substantial evidence does not support the trial court's Finding of Fact #15 –

From the alleged rape in 1989 to the sexual assault in October 2012, Ware describes every single one of her numerous contacts with Nelson as being the product of stalking, harassment, threats,

or physical force by Nelson. While a court in a SAPO proceeding cannot learn all the particulars of a relationship that spans 23 years, the court must weigh the evidence available and determine its credibility. This Courts [sic] allows that some aspects of Ware's version of her contacts with Nelson may be true. However, the Court finds that Ware's depiction of her relationship with Nelson does lack credibility.

This finding does not identify any permissible basis for questioning the credibility of Ware's corroborated accounts of Nelson's stalking, harassment and threats, from 1989-1991, 1993-1995, and in 2002, nor her testimony about specific instances of sexual assault in 1998, 1991, 1993, and multiple sexual assaults in 2002. The Judge's finding that Ware was not fully credible, because she concluded that some aspects of the relationship were consensual, is prohibited by the SAPO statute.

Assignment of Error 4: Substantial evidence does not support the trial court's Finding of Fact #21: "*The testimony of Nelson's wife Angela was more credible than Ware's testimony because it establishes that there was more to the relationship between Ware and Nelson over the years than was shared by Ware.*" – The court stated no specific basis for finding Angela Nelson more credible than Ware other than circular logic.

Assignment of Error 5: Substantial evidence does not support the trial court's Finding of Fact #10 – "*There is insufficient credible evidence to support Ware's allegation that in 2002, on multiple occasions, Nelson forced his way into Ware's apartment and forced Ware to have sex with*

him.” Ware’s specific testimony regarding the 2002 rapes met the statutory requirement, and her testimony went completely uncontested except for self-serving hearsay statements that she consented, admitted through Nelson’s wife. The Judge provided no explanation for why Angela Nelson’s hearsay testimony was more credible than the testimony of Ware, Stewart, and Ware’s ex-boyfriend Bill McQuiston.

Assignment of Error 6: The Findings of Fact do not support the trial court’s Conclusion of Law 5 – *“Petitioner did not establish by a preponderance of the evidence that other contacts between Ware and Nelson met the definition of nonconsensual sexual conduct or nonconsensual sexual penetration, as required by RCW 7.90.030(1)(a).”* – Ware’s specific uncontested testimony regarding the 1989, 1991, 1993, and 2002 rapes fit the definition of nonconsensual sexual penetration. There are no findings of fact in the record about these rapes sufficient to explain the Judge’s rejection of Ware and Ware’s witnesses’ testimony.

Assignment of Error 7: Substantial evidence does not support the trial court’s Finding of Fact #12 – *“In 1999 Ware called Nelson’s mother Suzan Nelson and Nelson’s wife Angela. Posing as someone from the high-school-reunion planning committee, Ware was able to obtain Nelson’s phone number. She called him at work.”* – Nelson’s wife admitted that her only basis for testifying about this issue was hearsay

from Nelson, yet in contravention of the Judge's own explanation as to how she would weigh the evidence, the Judge gave this hearsay testimony greater weight than Ware's testimony, without any stated reason for finding Ware's testimony less credible.

Assignment of Error 8: The Trial Judge erred in regard to the following findings and conclusions (all of which relate to the Judge's conclusion that Ware failed to prove the October 2012 sexual assault), because the court failed to enter any findings regarding the challenges to the credibility of Nelson's witnesses, and deemed insubstantial impeachment on collateral issues (specific to the 2012 assault) sufficient to rebut all of Ware's evidence regarding the uncontested rapes in 1989, 1991, 1993, and 2002:

- Finding of Fact #18: *"With regard to Ware's allegation that on October 13 Nelson snuck into Ware's apartment and sexually assaulted her, Ware wrote in her narrative that "by this time it was getting dark." Ware claimed during cross-examination, however, that in her mind that statement meant that the assault occurred sometime after dark. Ware could not describe what time of night the alleged assault occurred. Ware's inability to recall approximately what time she was sexually assaulted on October 13 undermines her credibility."*
- Finding of Fact #20: *"Ware did not include in the three-and-a-half page narrative attached to her petition that on the night she was assaulted she told anyone about the assault. Nowhere in her narrative did she state that she ever told Trevor or Gayle about the alleged assault. She did not provide declarations from Trevor or Gayle, nor did she call them to testify. These were the two people who were in a position to confirm the timing and the nature of the events of October 13 as described*

by Ware. Ware's failure to bring before the Court the testimony of Trevor or Gayle undermines the credibility of Ware's testimony that on the night she was assaulted she told Trevor, and that he in turn told his mother, about the assault."

- Finding of Fact #2: *"Weighing all the evidence presented to the Court, the Court finds that there were enough inconsistencies in Ware's testimony and enough things missing from the evidence provided by Ware to cause the Court to question Ware's credibility regarding the events of October 13, 2012."*
- Finding of Fact #16: *"Nelson presented testimony at hearing that constituted a credible alibi for October 13, 2012."*
- Conclusion of Law 5: *"Because Nelson was in the company of either his hunting companions or his wife and children during the evening of October 13, 2012, Nelson had an alibi for the time period in which Ware claims she was sexually assaulted by Nelson. The preponderance of the evidence shows that Nelson could not have committed the sexual assault alleged by Ware to have occurred on October 13, 2012."*

III. STATEMENT OF THE CASE

Appellant Julie Ware filed this appeal after the denial of her Petition for a Sexual Assault Protection Order, after an extended hearing on November 26, 2012¹. Through her Petition, supporting declarations, and testimony in court, Julie Ware provided a great deal of evidence to establish a pattern of stalking, harassment, and more than a dozen instances of sexual abuse by Jesse Nelson beginning in 1989, and

¹ Ware had not expected to present any witness testimony other than her own, because both parties had filed many declarations, and normally SAPO hearings are limited to roughly a half-hour on the Anti-Harassment Protection Order docket. RP 6. However, most of Ware's witnesses who wrote declarations were present in the courtroom. RP 6. Nelson called them as witnesses so they could be cross examined, in addition to his own witnesses. *Id.*

occurring most recently on October 13, 2012. RP 7-10. However, the Trial Judge ultimately denied the Petition. RP 192.

A. EVIDENCE REGARDING SEPTEMBER 1989 RAPE

Julie Ware testified that in 1989, when she was 14, she met Jesse Nelson on a camping trip, and they went on a double-date (in September 1989) to the county fair, with Nelson's friend Matthew Tisler and a friend of Ware. CP 4; RP 8-9, 49. Ware testified that Nelson eventually persuaded her to leave the fair with him in his car, and that after they parked they engaged in consensual kissing outside his car. CP 4; RP 9. However, when she refused Nelson's instruction to remove her clothing, she testified that he pulled her pants down, pushed her down in the car, and raped her vaginally. CP 4; RP 10. She testified that Nelson threatened that if she told anyone "he would kill my family, and he would kill me." CP 4; RP 10. There were several guns in Nelson's car; they frightened her, but he did specifically not use them to threaten her. RP 11, 50-51.

Ware's mother, Donna Stewart, corroborated that Ware and Nelson went on a date to the fair. CP 49. She testified that after the date to the fair Ware seemed upset, and over several months her personality and mood changed dramatically. *Id.* Stewart got Ware into counseling, but her downward emotional spiral culminated in a suicide attempt. *Id.* Ware had become so withdrawn that Stewart and Ware's pediatrician admitted Ware

for two weeks of inpatient mental health treatment at Fairfax Hospital. CP 49-50. Stewart acknowledged that Ware had received counseling or mental health treatment related to the 1989 rape (and subsequent abuse by Nelson) ever since 1989. CP 50; RP 115.

Nelson asserted his 5th Amendment privilege and did not testify. RP 157-58. He did not personally dispute or present any other evidence to contest Ware's testimony that Nelson raped her after their double-date at the fair in 1989.

B. EVIDENCE REGARDING 1989-1990 STALKING AND 1990 ANTI-HARASSMENT PROTECTION ORDER

While Ware received treatment at Fairfax, Stewart searched her bedroom at home and found letters from Nelson hidden everywhere. CP 49-50. Ware testified that between the 1989 rape and 1991, Nelson sent her 50-100 letters. RP 11. According to Stewart, the letters described "a relationship that never existed," and Nelson also wrote:

about taking her away, talking about how he hated his life, hated school and wanted to kill one of his teachers. How he knew that I (Julie's mother) was standing in the way of them being together and how he offered to kill her sister Jenny and I so that we wouldn't be a burden to her.... He was telling her not to tell anyone that he was calling her, to hide the letters, that they were going to be together and that they were going to have a 'real family together.' He played on the fact that Julie was from a broken home.

CP 50. Ware confirmed that the reason she tried to hide the letters and Nelson's ongoing harassment from her family was that "I was scared that

if my parents found out about it – they were threatening to my mom. He threatened to kill my mom... if I didn't do what he asked....” CP 4; RP 54.

Based on the letters and Ware's eventual disclosure of the rape after the fair, Stewart took Ware to the Sheriff's Department. CP 50; RP 53, 107. Stewart was “so frightened of what the letters contained” that she let the Sheriff keep them as evidence, but stalking was not taken seriously in those days, so nothing much happened. CP 50; RP 53-54. After the Sheriff's Department failed to take action, Stewart sought civil protection from Nelson based on the letters. CP 50; RP 14. Nelson appeared in court, and Ware was granted a one-year Order for Protection from Civil Harassment (a copy of which was included with the 2013 SAPO Petition). CP 8; RP 37.

Nelson asserted his 5th Amendment privilege, and failed to present any evidence or testimony (even hearsay) from any person disputing Ware and Stewart's testimony regarding Nelson's repeated threats to kill Ware's family, including the letters. He did not dispute that those letters were the basis for Stewart's first police report and for her Order for Protection from Civil Harassment in 1990.

Nelson presented two witnesses to testify about the events from 1989 to 1991. First, Nelson's friend Matthew Tisler testified that Nelson and Ware “dated for a couple years.” RP 135-48. Tisler “assume[d]” the

dates probably happened around the spring of 1990. RP 144-45. However, Tisler's memories of that period were sparse. He said that he remembered a double-date at a bowling alley, and an unspecified number of unidentified movies. RP 136-37. Tisler did not testify about any specific interactions between Ware and Nelson, merely saying, "They would hold hands and hug and kiss each other and, I mean, I guess about anything you would expect from people being that age." RP 136. Tisler was completely unable to recall the double-date at the fair that both Ware and Stewart testified about. RP 135-36.

Second, Nelson's wife testified that when she bailed him out of jail for the 2012 sexual assault of Ware, he told her that he had been having "affairs" with Ware and that they dated initially as teenagers. RP 180-82.

The Trial Judge did not make any findings as to why Tisler's vague and intermittent recollections and Nelson's self-serving statements to his wife were more persuasive than Ware's testimony, corroborated by Stewart, regarding the nonconsensual nature of their relationship.

C. EVIDENCE REGARDING 1990-91 HARASSMENT AND 1991 RAPE

The March 1990 Order for Protection from Civil Harassment made little difference; Ware testified that Nelson continued to harass and threaten her by phone and in letters, which alternated between declaring

his love and threatening that if she did not drop the restraining order he would kill her family or take her away. CP 4. At some point Nelson enlisted in the Navy, but resumed calling Ware when home on leave. *Id.*

Ware testified she did not see Nelson again in person until about a year later, at the airport. RP 14. Tisler admitted having no basis for believing there was any contact between Ware and Nelson during that period. RP 140. Ware testified that Nelson called her before one of his return trips home (in 1990 or 1991), demanded she meet him at the airport, and repeated his typical threats. RP 14-15, 55. On direct examination Tisler testified that he did not remember noticing any of what happened between Nelson and Ware at the airport, just that they seemed “cordial.” RP 139-40. However, on cross examination he changed his mind, and testified, “You know, if I remember correctly, she came up and kind of gave him a hug, and they kind of went over and talked.” RP 146.

Nelson presented no evidence or witness testimony (even hearsay) disputing that he called Ware, told her to be at the airport, and threatened her. The Trial Judge did not make any findings of fact regarding Tisler’s credibility, either generally or in comparison to Ware.

In late 1990, Ware moved into her father and stepmother’s home, because they worked in an in-home office, so they thought she would be safer there. CP 4, 50. However, Nelson continued to harass her and

threaten her family. *Id.* Stewart testified that the ongoing harassment took a major toll on Ware's education and emotional well-being. CP 50.

Ware's father and stepmother's home had the home-business on the first floor and the family's home on the two levels above that. CP 4. Nelson next raped Ware on a Friday in mid-1991 (she remembers it happened while her father's employee Stan was working on remodeling the office space on the ground floor). CP 4. That particular Friday, Ware's father and stepmother were away on a trip to Reno. CP 4. While she was alone upstairs, Nelson "snuck in the house portion and threatened me. He took me to the upstairs bathroom and raped me." CP 4.

Nelson did not personally dispute, nor did he present any other evidence to contest, Ware's description of the harassing letters and calls from 1990-91 or the 1991 rape.

D. EVIDENCE REGARDING 1993 RAPE AND 1993-95 HARASSMENT

Ware testified that after Nelson had been in the military for a while, she began hearing less and less from him, and eventually she began dating Eric Broderson. CP 4. Then in May or June 1993, once again, "Jesse found me and started stalking me." CP 4. Ware testified that one day, without warning, Nelson showed up at her apartment, "forced himself into

the apartment, and he forced himself to have sex with me,” threatening that if she told anyone he would kill her. RP 16-17.

Ware described being terrified by Nelson, “He does not raise his voice at all. He has power. And I would cry, and he would hold me. He would twist my arm and say listen, Bitch, I will kill you if you don’t listen to me. He has power.... I did believe him. I believed him every time.” RP 17. Stewart testified that around this time she noticed Ware becoming physically sick and sad, and seeing her counselor more often. CP 50.

Ware moved back in with her mother, and got a job at a print shop, but it did not help. CP 4-5; RP 18-20. Ware testified:

[H]e would just show up at our house unwanted and without warning. In front of my mom and sister he would tell me ‘get in my car’. My mom would have to step in and tell him ‘NO’ and it would turn into a shouting match with my mom telling him to get off our property.

CP 4-5. Stewart corroborated Ware’s description, saying that Nelson:

would stop by the house and demand that she ‘get in the car’. Julie would stand there like a deer in the headlights and couldn’t say a word. She would look at me like ‘mom what am I supposed to do?’ She had this look of pure fright. I would have to step in and tell him to leave and that Julie wasn’t going anywhere with him.

CP 51. In June 1994, Ware obtained a Domestic Violence Protection Order against Nelson². CP 5.

² Ware no longer had a copy of the order, but filed a printout of the old DV court file’s list of contents with her Petition. CP 5, 9.

Nelson's friend Tisler testified that he accompanied Nelson to court for the DVPO hearing. RP 140-41. Tisler testified that Nelson did not contest the DVPO:

Well, when they went through the steps behind it, basically it was like there was not going to be any legal action taken if I remember correctly, and so [Nelson is] like, oh, well, I'm done with this, so just let them put a restraining order on me, and I'm out of here.... You know, he wasn't there to really fight it. I mean it was just like he was at that time done with having a relationship.

RP 141. However, the court records state that the order was contested. CP 9. Although the Trial Judge entered findings consistent with Tisler's testimony that there was a consensual relationship between Ware and Nelson during this time period, the Judge made no findings regarding the effect this contradiction with the court record had on Tisler's credibility.

Even after Ware obtained the DVPO, Nelson would not leave her alone; Stewart and Ware testified that Nelson would park his car just outside the range of the DVPO, and when they called the police, law enforcement did nothing to help. CP 5, 51; RP 58-61. One officer advised her to move. CP 5.

One morning (later in 1994), Ware showed up around 3:00 AM for her shift at the print shop, but when she got out of her car at the office:

Jesse pulled up in his car and held the gun out and said "get in the fucking car." I was horrified, he was saying all the same stuff about "killing my family", if I didn't do what he wanted. He said

“it was pay-back time”. “How I destroyed his life and how dare I do that to him.”

CP 5; RP 18. Ware described Nelson driving her into an isolated uninhabited area, telling her to get out of his car, and then leaving her there, in the dark, terrified. *Id.* She described that he eventually came back for her, hit her face, and threatened that she should tell no one. CP 5. He told her “this was a lesson.” RP 19. Nelson did not dispute this testimony.

Ware and Broderson moved in together at a new apartment, but Nelson found them, and began harassing both of them. CP 5, 45-46. Ware testified that on one occasion, Broderson and a friend were at a bar: “and I got a phone call from Jesse saying, gee, wouldn’t their heads look great blown up.” RP 20. She interpreted this as a threat to kill them. RP 21. The next time Nelson showed up at Ware’s apartment she fought back, but he pushed her down a flight of stairs outside her apartment, and she ended up in a walking cast. CP 5; RP 21. Nelson did not dispute this testimony.

Broderson’s declaration stated that Ware eventually told Broderson about the stalking and rapes, and the threat to shoot him. CP 46. Broderson was so frightened he bought a gun for “protection for her and myself” from Nelson. CP 5, 46. Broderson testified that he saw Nelson stalking them, sitting in a vehicle near their apartment. CP 46. When they could not take it any longer, Broderson asked his employer to transfer him to

Oregon. CP 47. Ware, Broderson, and Stewart all testified that Broderson and Ware “moved in the middle of the night to Oregon, and basically we didn’t tell any of our friends or anything where we moved to.... Because we didn’t want that – Jesse to find out where we were at.” CP 5, 47, 51; RP 22. Broderson testified that they did not leave forwarding contact information with the phone company or postal service, because they were so fearful that Nelson would find a way to locate Ware in Oregon. CP 47.

Nelson did not present any witness testimony or other evidence to dispute the rape at Ware’s apartment in 1993 or to contest her corroborated allegations of ongoing harassment, stalking, protection order violations, and the kidnapping in the 1993-94 period. Likewise, he did not present any evidence contesting the testimony of Ware, Stewart, and Broderson that he frightened Ware and Broderson so much that they moved to Oregon secretly to escape his stalking.

E. EVIDENCE REGARDING 2002 RAPES

Although she was living in Oregon from 1994 to 1998, without contact from Nelson, Ware continued to have severe nightmares and fear of Nelson. CP 51. Her health deteriorated, and by 1998 enough time had passed without contact with Nelson that Ware moved back in with her mother in Washington. CP 6. She continued to have no contact with

Nelson between then and 2001, and her health gradually improved, so in 2001 Ware moved into her own apartment. CP 6.

Around 1999, Jesse and Angela Nelson married. RP 159. Angela Nelson testified that also around 1999, a woman called her (and Nelson's mother), asked to speak with Nelson and for his work number, and said she was part of a reunion committee. RP 169. Nelson's wife testified that when she asked Nelson about the call he said it was from Ware, and claimed he and Ware dated years before he and Angela were married. RP 170. Nelson did not produce any phone records or other evidence that the woman who called was Ware, other than his wife's hearsay statements, and she admitted she only knew what Nelson told her. RP 177-78. The Judge did not enter any findings to explain why this hearsay testimony was more credible than Ware's statement that the parties had no contact during that period of time.

In the summer of 2002, Nelson showed up unexpectedly at Ware's front door, and: "When I opened the door he said 'I'm so glad I found you', 'All I have done is think about you', 'I have to fuck you' and 'if you tell anyone I'm going to kill you.'" CP 6. Nelson began showing up at Ware's apartment and would force his way in. CP 6. He resumed the sort of threats and promises that they would be together that he had used in his letters, along with expressing that now that Ware was no longer involved

with Broderson, he regretted marrying his wife. CP 6. On approximately ten occasions, Nelson used violent force and threats to have sex with Ware. CP 6; RP 24. He continued to threaten her and her mother and sister. RP 23. Stewart noticed Ware returning to the angry, withdrawn, secretive, and physically ill state she had seen in the past when Nelson had been stalking her, and Ware finally admitted to Stewart that Nelson was back and had been physically, sexually, and emotionally abusing her. CP 51.

During this period of time, Ware was dating a man named Bill McQuiston. CP 58. Ware told McQuiston about Nelson's history of stalking her, as she "trembled and cried." CP 58; RP 124. McQuiston's declaration stated that Ware called McQuiston immediately after one occasion when Nelson went to her apartment; Nelson left when she threatened to call the police. CP 58. A few days later, Nelson showed up at Ware's apartment again, and McQuiston found him there. CP 58. McQuiston told him to leave Ware alone, "to forget she ever existed," or McQuiston would tell Nelson's wife, and to "get the hell out of the apartment." CP 58-59; RP 24-25, 70-71. Angela Nelson testified that when she bailed Nelson out of jail and he claimed to have had repeated affairs with Ware, and he admitted this incident with McQuinton. RP 180. Nevertheless, Ware did not trust Nelson to stay away, so Ware, Stewart,

and McQuiston all testified that they helped Ware move secretly, once again, in the middle of the night. CP 6, 52, 59; RP 25.

Nelson did not present any evidence to contest the stalking and approximately ten sexual assaults in 2002, other than his wife's testimony that after she bailed him out of jail in 2012 he told her that his "affairs" with Ware included seeing her a half-dozen times in 2002. RP 180-82. The Judge's findings do not explain why this hearsay testimony was more persuasive than the combined testimony of Ware, Stewart, and McQuiston.

E. EVIDENCE REGARDING OCTOBER 2012 RAPE

According to Ware, from her move in 2002 to the summer of 2012, she had no contact with Nelson. CP 6; RP 25, 72-73. Then in mid-2012, she started getting calls from Nelson, at a number she had posted on Facebook. CP 6; RP 26. He called her repeatedly, threatening her and demanding phone sex, to the point that it "made me sick." CP 6; RP 26.

Angela Nelson testified that later (when she bailed him out), Nelson told her he and Ware had frequent phone contact. RP 178-79. Angela Nelson corroborated Ware's testimony that Nelson only called Ware, not vice versa, agreeing that was what Nelson told her and that, and that she had no personal knowledge that Ware had ever called the house. RP 179-80. Ware provided some of her phone records documenting roughly a dozen calls from a blocked number, most or all of which were

from Nelson (and most of which she did not answer) just from a roughly four-day period in August 2012. CP 65-66; RP 27, 76-91.

Angela Nelson testified that although she believed her husband's claim that he and Ware had been having an affair for a year around 2011-12, she had never seen letters from Ware to Nelson or any evidence (like appointment calendars or any receipts) to prove there was any consensual relationship between Nelson and Ware. RP 185-86. The only basis for her testimony was what her husband told her after being bailed out of jail. *Id.*

Ware testified that the night of October 13, 2012 she was helping her downstairs neighbor to apply online for a cell phone. CP 6-7; RP 27-29. She was running up and down the outside stairs between their two apartments, to print documents in her own apartment and then bring them down for the neighbor and her son to review; because she was going back and forth, she left her apartment unlocked. *Id.* It had gotten dark, but the lights were off in her apartment, and when she walked in Nelson was there waiting. *Id.* He grabbed her left arm and pushed her against the wall face-first, then stood behind her, restraining her hands above her head. *Id.*

Ware testified, "He was calling me a bitch. Why did you fuck with my family, you bitch. And he puts his hands in my panties with his fingers, and he put them inside me. And it hurt so bad." RP 29. While he had his fingers in her vagina he was violent, but it only lasted a few seconds, then

he called her a bitch one last time and walked out of her apartment. CP 6-7; RP 29. The whole incident lasted no more than 4-5 minutes. CP 7.

Ware testified that after he left she bled from her vagina briefly. CP 7. She testified that she spoke with her neighbor and her son later that night and admitted what had happened, but that she refused to call the police because they had done so little to help her in the past. RP 30. She had a sleepless night, and the next morning spoke by phone with her friend Rhonda Mattax, who filed a declaration. CP 38-39; RP 31.

Mattax stated that from the beginning of their conversation, “I knew something was very wrong. I could hardly hear her. Her first words were inaudible – it was like she was whimpering.” CP 39. Ware disclosed to Mattax that Nelson (who Mattax knew had been stalking Ware) had snuck into her apartment, digitally penetrated her, and threatened her. *Id.* Mattax described Ware’s tone that morning as “shell-shocked.” “struggling to hold herself together” and crying repeatedly. *Id.* She corroborated that Ware did not want to report it to the police because they never helped and Nelson “always eventually came back.” *Id.* Ware was too scared to leave her apartment, so Maddax took groceries to her. *Id.*

Stewart confirmed that Ware was withdrawn in the days after October 13, but said Ware did not disclose the assault to her until around October 24-25. CP 53. At that point, with the assistance of her mother,

Ware tried to report the assault, although the detective did not show up to take her report until a day later. RP 31-32. Ware was extremely fearful that filing a police report would make Nelson retaliate violently. CP 53-54.

Angela Nelson testified that on October 13, after around 7:00 to 7:30 PM, she was at home with Nelson, and that they went to bed around 9:00 PM. RP 167-68. She also testified that later, after Nelson was arrested for the rape and she bailed him out, he claimed he and Ware had actually been having an affair. RP 170-71. She said Nelson cried a lot, and told her, “I’m sorry. I’m sorry. We’ll make it work. I’ll do whatever it takes to make it work.” RP 187. In her oral ruling, and in the Findings of Fact and Conclusions of Law, the Judge failed to make any findings regarding the obvious credibility issues with this testimony. When Ware objected on hearsay grounds the Judge repeated her earlier instruction: “All right. Hearsay is permissible in a hearing such as this, but the Court will take into consideration the hearsay nature of the testimony in the weight that it gives to the testimony. RP 171.

Initially, in providing an alibi for Nelson for the dates October 12 and 13, 2012³ Angela Nelson and three other witnesses (Gordon Cory, Todd Butler, and David Collins) submitted declarations providing an inaccurate alibi for October 12. RP 160, 175. They later withdrew their

³ When drafting the Petition, Ware could not remember if it was the 12th or 13th. CP 7.

declarations and submitted new ones, because the events they said were Nelson's alibi for October 12 actually occurred on October 5. RP 160-63, 175-76. The Judge made no reference in her oral ruling or findings to any impact this might have had on their credibility.

In her oral ruling, the Judge gave few reasons for not finding that Ware had proved the October 12, 2012 assault by a preponderance. RP 192-93. She wished Ware had presented testimony from her downstairs neighbor and her son. RP 193-94. In regard to credibility, the Judge stated: "I did find the wife's [testimony] more credible because I understand that there was more to the relationship between [Ware and Nelson] over the years than was shared by Ms. Ware." RP 194. The Judge hastened to add:

I'm not saying that things didn't happen as she [Ware] – as she suggested at some point in time, but there were too many inconsistencies and things left out that caused me to question the credibility of the events that occurred on October 13th. And the absence of the testimony of the two neighbors, who were in a position to really bring forth evidence to support the credibility of the events that were alleged, wasn't before the court. So that's what I can say.

RP 194-95. The Judge made no reference to the declaration of Rhonda Mattax, to whom Ware disclosed only a few hours later. CP 39.

IV. ARGUMENT

A. THE STANDARD OF REVIEW IS *DE NOVO* WHEN APPLYING THE LAW TO UNCONTESTED FACTS.

In this case, Appellant Julie Ware challenges the Trial Judge's Findings of Fact and Conclusions of Law, and the denial of her Sexual Assault Protection Order, following a SAPO hearing that was handled like a bench trial. On appeal, conclusions of law are reviewed *de novo* to determine if the findings support the conclusions. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Findings of fact may be subject to different standards of review, depending on whether the facts are contested or uncontested. The substantial evidence standard of review applies when, and because, the trial judge has resolved conflicting evidence in favor of one side. *E.g., Id.* at 879-80; *accord Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000) (“When a trial court evaluates conflicting evidence and resolves factual disputes, appellate review requires determining whether substantial evidence supports the ruling.”)

In contrast, when party appeals a ruling that grants or denies relief based on the application of the law to undisputed facts, the standard should be *de novo*. *Heller v. McClure & Sons, Inc.*, 92 Wn.App. 333, 337, 963 P.2d 923 (1998). In *Heller*, Division I stated:

The question presented here requires us to apply our prevailing wage statute to undisputed facts. In doing so, we review *de novo* the trial court's application of the statute to these facts. If a statute is ambiguous, we apply the tools of statutory construction. Our aim is to give effect to the intent and purpose of the Legislature.

Id. This is analogous to the principle that when an appellant fails to designate error in a trial court's factual findings, the appellate courts treat the unchallenged factual findings as verities on appeal, and apply the law *de novo*. *Grundy v. Brack Family Trust*, 151 Wn.App. 557, 567, 213 P.3d 619 (2009) (“Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is ... *de novo*”) Likewise, when legal conclusions are mis-identified as findings of fact, they are reviewed *de novo*. *Id.*

Ware believes that the trial court improperly assessed the weight and credibility of the supposed inconsistencies (such as whether it was “dark” or “getting dark” during the assault), and the alibi evidence presented by Nelson’s wife. However, given the substantial evidence standard, she understands the fruitlessness of requesting review of that part of the Trial Judge’s decision, which held that Nelson’s wife’s alibi prevented Ware from meeting the preponderance of the evidence standard in regard to the 2012 rape.

Therefore, this appeal focuses instead on the Trial Judge’s errors in applying the Sexual Assault Protection Order Statute to the undisputed evidence in this case regarding Nelson’s sexual assaults of Ware in 1989, 1991, 1993, and 2002. Although this appeal may appear to be centered on

factual findings and credibility determinations (because of the way the Findings of Fact and Conclusions of Law were worded), Ware's specific issues on appeal are primarily subject to *de novo* review.

B. APPELLATE REVIEW OF CREDIBILITY-RELATED FINDINGS IS APPROPRIATE AND SOMETIMES NECESSARY IN A BENCH TRIAL.

Notwithstanding the 'substantial evidence' standard, countless cases state that the appellate courts will not review credibility determinations. *E.g.*, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Despite the pervasiveness and decisiveness of this principle, it cannot be universally true. In Sexual Assault Protection Order cases in particular, this absolutist position is untenable.

(1) Credibility Determinations are Reviewable for Sufficiency and Accuracy.

In a bench trial, such as a SAPO hearing, the judge is required to make written findings: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law." CR 52(a)(1) (emphasis added). A judge's failure to comply with court rules requiring entry of factual findings after a bench trial is reversible error. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). There is no exception that absolves a

judge of her CR 52 obligation of specificity when she is entering findings related to credibility. In fact, credibility determinations should require a greater degree of specificity than other factual findings, for two reasons.

First, credibility determinations are often based on subjective, nonverbal factors that cannot be gleaned from the record on review. For example, the bases for making credibility determinations include “demeanor, bias, opportunity, capacity to observe and narrate the event, character, prior inconsistent statements, contradiction, corroboration, and plausibility.” *In re Detention of Stout*, 159 Wn.2d 357, 382, 150 P.3d 86 (2007). The subjective and potentially nonverbal basis for a credibility finding in a bench trial is a reason that specificity should be required, not a reason that credibility determinations should be unreviewable.

For example, consider a hypothetical bench trial in which the plaintiff is attempting to establish that he has a physical disability that makes him unable to sit in a chair for more than an hour. If the only evidence in the case is the in-person testimony of two equally qualified doctors, one who concluded that the plaintiff was disabled and one who concluded he was malingering, and the judge merely states that he found one doctor more credible than the other, the absence of specificity in the factual findings means the parties (and appellate court) have no way to ascertain the actual basis for the ruling, and whether it was legitimate (*e.g.*,

one doctor was more thorough) or illegitimate (*e.g.*, one doctor was male and the other was female).

Second, a credibility determination without a specific factual basis may be characterized as a finding of fact, but in actuality the statement “I find the witness not credible” is nothing more than a conclusion. It may or may not have an adequate basis, but without an explicitly stated basis it is meaningless. The purpose of requiring specific factual findings is to create a sufficient record for review. *State v. Head*, 136 Wn.2d at 624. The record is inadequate when a judge makes no findings at all, but it is just as inadequate when the judge makes conclusory findings unsupported by specific facts. A one-sentence ruling stating “I deny relief because the Petitioner is not credible” is functionally no more specific than the one-sentence ruling stating “I deny relief.”

Sometimes the specific basis may make the finding unreviewable (if it is based on evidence not in the record, such as witness demeanor), but other times, as argued *infra*, specific findings may in fact require appellate review. Therefore, appellate courts should review credibility determinations to ensure that they are supported by specific factual findings, as required by CR 52.

(2) Outrageous or Patently Erroneous Credibility Determinations Must be Reviewable.

In addition to reviewing credibility findings for sufficiency and specificity under CR 52, there are certain types of substantive credibility findings so outrageous that it is difficult to believe they could be deemed unreviewable and irreversible on appeal. For example, if a judge entered any of the following findings as the substantive basis for denying a SAPO, it is inconceivable that they would be unreviewable:

- I find the Petitioner not credible, because most women who ‘cry rape’ are lying, and the Petitioner is a woman, so more likely than not the Petitioner is lying.
- I find the Petitioner not credible, because she can’t speak English.
- I find the Petitioner not credible, because she is fat and unattractive, so I don’t believe anyone would want to have sex with her, but if they did she would obviously consent and be grateful.
- I find the Petitioner not credible, because she testified that the encounter resulting in the rape began at 9:00 PM, but surveillance camera footage proves the Respondent didn’t arrive until 9:01 PM.

Although credibility determinations this extreme are certainly not the norm, they demonstrate the danger of the absolutist position regarding review. It would shock the conscience for this Court to disclaim responsibility for reviewing findings like these.

These hypothetical findings further demonstrate why findings regarding credibility must be specific, particularly when credibility concerns are the sole basis for the denial of relief. If a SAPO judge is permitted to deny relief based on a credibility determination that is conclusory or not supported by specific factual findings (the bare

statement: “I find the petitioner not credible.”) the judge could easily disguise the fact that the denial of relief was based entirely on the judge’s disdain for the petitioner’s race, gender or appearance, for example.

Moreover, if credibility determinations are never reviewable, the appellate courts have created an enormous loophole. A judge can easily transform an outrageous but reviewable finding into an unreviewable finding merely by adding the word “credibility.” For example, this Court would surely review and reverse a plainly race-based trial court ruling (*e.g.*, “I deny relief because the petitioner is African American.”). That ruling should not become immune from review if the trial judge simply adds the word “credibility” (“I deny relief because I find that the petitioner is not credible, because the Petitioner is African American.”).

In this case, for example, Ware disclosed a substantial history of mental health treatment that became necessary after the trauma of the 1989 rape, and Stewart revealed that Ware was still receiving treatment at the time of the hearing. The Findings of Fact and Conclusions of Law did not include any clear explanation of why Ware’s undisputed testimony about the 1989 rape (or the others) was not credible, or if any generally applicable characteristic (*e.g.*, speaking style, demeanor, or motivation to lie) made her less credible. Consequently, the Trial Judge made it impossible to determine if Ware’s membership in a protected class

(persons with disabilities) may have influenced the Judge's credibility determination and resulted in the denial of relief. In contrast, if the Judge had entered a finding that, "The Petitioner's speech was halting and had a flat affect, which I found unpersuasive, so I do not believe the 1989 rape occurred even though it was undisputed," Ware could have filed a Motion for Reconsideration and provided evidence that those characteristics are a side effect of her medication, not evidence of dishonesty.

In addition to credibility determinations based on discriminatory factors, it would be outrageous for the appellate court to refuse to review a credibility determination based exclusively on evidence in the record if the determination is plainly erroneous (*i.e.*, not supported by substantial evidence). For example, returning to the hypothetical plaintiff claiming a disability, the judge could enter a finding that: "I find the petitioner not credible, because he testified he can't sit for more than five minutes without severe pain, but he sat for more than an hour straight in the courtroom, and I saw no indication he was in pain." The subjective view of the judge (that the plaintiff was not in pain) cannot be reviewed because the appellate court cannot see the petitioner. However, if the judge misheard the plaintiff's testimony, and the record shows that the plaintiff actually testified he could not sit for more than five hours straight (rather

than five minutes), there is no reason for this Court to refuse to find that the credibility determination is not supported by substantial evidence.

These categories of credibility-related findings —outrageous or discriminatory findings, or erroneous findings based on the record— demonstrate limitations on the general principle that credibility determinations are never reviewable.

(3) Reviewing Credibility Determinations Is Particularly Essential in SAPO Cases.

Requiring specific factual findings to support credibility determinations, and requiring that the basis not be outrageous, may be more crucial in Sexual Assault Protection Order cases than in any other type of case, for three reasons.

First, SAPO hearings are unusual, procedurally. For example, there is extreme and unpredictable variation in how they are run (in this case, for example, the Petitioner did not anticipate that the judge would hold a full-day mini-trial with more than a half-dozen witnesses, rather than the typical abbreviated hearing based primarily on affidavits)⁴. Likewise, the suspension of the rules of evidence means that evidence ordinarily considered unreliable (such as hearsay) is commonly admitted in SAPO

⁴ The fact that the Petitioner had no notice that the hearing would be handled this way makes the Judge's criticism that Ware should have produced even more witnesses (her neighbor and her son) particularly unreasonable, given that Ware had no reason to believe she would have the opportunity to have them testify in person.

hearings, and the weight accorded to that evidence is entirely a matter of the judge's discretion. ER 1101.

More importantly for the issue of credibility determinations, in a SAPO hearing the parties have no right to a jury, but unlike DVPOs they are heard by judges instead of commissioners (at least in King County). KCLCR 40.1(b)(2)(C)(i)-(iii); King County Superior Court Daily Calendar available at www.kingcounty.gov/courts/Clerk/Calendars.aspx (last accessed 5/20/13). That means SAPO cases do not benefit from the multiplicity of perspectives shared in jury deliberations, and they are not reviewable in Superior Court through a Motion for Revision. KCLCR 7(b)(8). Thus, in most SAPO cases, if credibility determinations are immune from appellate review, the sole authority for both how the hearing is conducted and the ultimate fact-finding are placed in the hands of one judge who is completely unaccountable.

Second, unreviewable credibility determinations by an individual judge are uniquely more likely to result in injustice in sexual assault cases than in any other type of bench trial, because the overwhelming prevalence of rape myths causes many truthful rape victims to be viewed as not credible. Judges, like all other people, are susceptible to those myths, consciously or unconsciously:

A number of studies have demonstrated that many commonly held beliefs about sexual assault victims are overwhelmingly refuted by empirical data.... “Despite this evidence, however, the rape mythology persists, and recent studies reveal that rape myths insidiously infect the minds of jurors, judges, and others who deal with rape and its victims.”

State v. Robinson, 146 Wis.2d 315, 431 N.W.2d 165 (1988)(citations omitted); *see also Commonwealth v. King*, 445 Mass. 217, 834 N.E.2d 1175 (2005). This risk is particularly grave in cases where the defense is not a denial that sex occurred, but a claim that it was consensual:

[The] vast majority of people--including law enforcement personnel, judges and potential jurors--remain conflicted about what constitutes 'consensual' sex [and thus victims] continue to encounter the same hurdles that they did thirty years ago.

Seidman, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 472 (2005).

It is shamefully common that rape victims are disparaged, found not credible, and denied relief (in both the civil and criminal context) based on distorted, misogynist views of what constitutes a credible victim. Therefore, in sexual assault cases, treating credibility judgments as sacrosanct allows judges to deny relief to typically disfavored and disbelieved victims (*e.g.*, those who are mentally ill, intoxicated, or prostitutes), merely because the judge has outdated views regarding what constitutes a credible rape victim. If credibility is not reviewable, the most

vulnerable victims will be denied protection based on the whims and prejudices of individual judges, with no possibility of oversight.

Third, refusing to review credibility determinations directly contravenes the SAPO statute. The statute explicitly prohibits judges from denying relief based on many of the common victim-blaming myths that historically led judges and juries to find rape allegations not credible. For example, the statute explicitly prohibits consideration of the victim's past sexual history, alcohol consumption, failure to report the rape to law enforcement, and limited consensual sexual contact with the respondent. RCW 7.90.080, .090.

The statute's inclusion of these provisions demonstrates the legislature's recognition that judges, like all other people, are immersed in the cultural norm of victim blaming and inaccurate but prevalent rape myths. The legislature made it clear that their intention is that judges should not be able to rely on those factors. However, judges have the unfettered ability to rely on the prohibited factors unless they are required to provide a specific factual basis for credibility determinations, and unless the appellate courts are willing to review and reverse findings and conclusions that are based on these impermissible factors.

Among the most important principles of statutory interpretation is: "Statutes must be interpreted and construed so that all the language used is

given effect, with no portion rendered meaningless or superfluous.”

Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303(1996). If all that a judge must do to avoid review of a ruling denying relief based on prohibited factors is to say that those factors made the victim not credible (“I deny relief because the petitioner didn’t make a police report” versus “I deny relief because the petitioner is not credible because she didn’t make a police report”), all of the statute’s prohibitions would become meaningless, superfluous, and unenforceable. Therefore, in SAPO cases in particular, appellate review is essential.

(4) Adequate Limits Could Be Put On Reviewable Credibility

Determinations

It may be simplest to take the absolutist view of this issue—closing the door to review of credibility determinations entirely—but it is possible for the court to draw three narrow exceptions that will not consume the general rule of deference to the trial judge on credibility matters.

First, as argued *supra*, when a judge denies a SAPO based entirely or primarily on a credibility determination, the basis for that determination should be specifically identified in the findings. CR 52(a)(1). The absence of such specificity should be reviewable so that CR 52 is enforceable.

Second, the next section of this brief argues that when a SAPO petitioner presents uncontested evidence that is sufficient under the statute

to require the judge to grant relief, but the judge denies relief based on collateral credibility concerns, the denial of relief should be reviewable.

Finally, the last section of this brief argues that when a statute specifically excludes certain factors as bases for denying relief, and a judge's credibility determination is based on those prohibited factors, the determination should be reviewable.

C. THE TRIAL COURT ERRED BY FINDING THAT COLLATERAL CREDIBILITY QUESTIONS TRUMPED UNDISPUTED EVIDENCE.

1. Ware's Undisputed Testimony Satisfied the Statutory Requirements for a SAPO.

The evidentiary burden on a Petitioner seeking a Sexual Assault Protection Order is explicit and simple:

If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order....

RCW 7.90.090(1)(a). Trial judges lack the discretion to deny a SAPO if the Petitioner meets that standard, because "It is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty. The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent." *The Erection Co. v. Dept. of Labor and Industries of State of Wn*, 121 Wn.2d 513, 519, 852 P.2d 288

(1993)(citations omitted). Therefore, if a trial judge denies relief to a petitioner who meets the standard in RCW 7.90.090(1)(a), the judge has committed an abuse of discretion and should be reversed *de novo*.

In this case, Ware presented detailed, undisputed testimony about multiple sexual assaults by Nelson that indisputably met the definition of nonconsensual sexual penetration (as well as extensive circumstantial evidence and witnesses who corroborated Nelson’s stalking and threats of violence, and Ware’s dramatic and visible emotional reactions each time she was assaulted or stalked after a period of no contact). RCW 7.90.010 (defining sexual penetration as “any contact [or “intrusion”], however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person....”). Neither Nelson, nor any other witnesses, disputed the qualifying sexual assaults in 1989, 1991, 1993, and 2002. If not for the Trial Judge’s finding that Ware was not entirely credible, this undisputed evidence would have mandated that Ware be awarded a SAPO. RCW 7.90.090(1)(a).

2. The Trial Court Relied on Circular Logic, Not Actual Credibility Concerns About Ware’s Testimony About the Undisputed Rapes.

When credibility determinations are based on observable but unrecorded factors (such as demeanor), it logically follows that the appellate court is not in a position to review them (unless they are

explicitly based on clearly impermissible and irrelevant factors such as the witness's race or disability or sexual history). In fact, appellate courts' rationale for not reviewing credibility determinations is focused on these generalized factors, because unlike the trial judge, the appellate court does not have the opportunity to observe, "expression[s] of [the witness's] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication." *Stout*, 159 Wn.2d at 383.

The credibility determinations that resulted in the denial of relief in this case were not generalized issues regarding Ware's demeanor. The Judge did not state or even imply that Ware lacked credibility due to nervousness, body language, implausibility, etc. Likewise, the Judge made no finding that Ware had any motive to file the case based on false allegations (and no evidence of that theory was presented). This Court is just as well positioned to evaluate Ware's credibility as the trial court, because the Trial Judge's credibility determinations were based on contested testimony in the record about specific collateral issues: hearsay testimony that Ware had some consensual contact with Nelson, and evidence regarding the 2012 rape.

When the Trial Judge questioned Ware's credibility, she did so based on (1) Ware not bringing in even more witnesses, (2) Ware not

remembering if it was “dark” or “getting dark,” and (3) for each and every issue for which Nelson presented evidence conflicting with Ware’s testimony, the Judge resolved the dispute against Ware without explaining why Nelson’s witness was more credible than Ware.

The Judge’s resolution of factual disputes based on credibility determinations relied on circular logic. The Judge stated a conclusion (that she endorsed the other witness’s factual claim), then said that because Ware disputed that factual claim, she was not credible. The Judge did not explain how and why she concluded that Ware’s testimony was inaccurate and the other witness’s testimony was accurate in the first place. For example, the Judge found that Ware and Nelson went on several double dates based on Tisler’s testimony, even though Tisler’s testimony was vague, inconsistent, and conflicted with the court record, whereas Ware’s position was supported by her own testimony and Stewart’s and her previous two protection orders. The Judge apparently found Tisler more credible, but provided no explanation as to why. Then the resolution of that factual dispute as a credibility matter was transformed into an explanation for finding Ware generally not fully credible.

In sum, the Judge made no findings that Ware’s credibility was questionable generally (e.g., due to her tone or body language), and the only reasons she specified for finding Ware not credible (about anything

other than the 2012 rape) was conflicting testimony over certain limited factual matters (which the Judge resolved against Ware, for unspecified reasons). In light of this, it was erroneous for the Judge to disregard the uncontested evidence establishing sexual assaults in 1989, 1991, 1993, and 2002, which required entry of a final order.

3. Impeachment on Collateral Issues is Insufficient to Rebut Undisputed Evidence.

Impeachment regarding collateral issues is not sufficient to overcome uncontested evidence of qualifying, undisputed sexual assaults, because “Impeachment of a witness does not establish the opposite of his testimony as fact.” *Laguna v. Washington State Dept. of Transp.*, 146 Wn.App. 260, 267, 192 P.3d 374 (2008). It was erroneous for the Trial Judge to find that Ware’s undisputed testimony about the sexual assaults in 1989, 1991, 1993, and 2002 failed to meet the preponderance of the evidence standard based on collateral, circular credibility determinations.

In essence, the Judge accepted the alibi Nelson’s wife provided for him for the 2012 assault (without any findings regarding any of her credibility problems, such as her motivation to lie to protect her husband and children). The Judge decided that due to the alibi, Ware’s failure to bring in even more witnesses, and the difference between “dark” and “getting dark,” Ware failed to prove the 2012 assault by a preponderance.

While this part of the decision was presumably in the judge's discretion, and not reviewable, the real problem arose when the Judge concluded that Ware's failure to satisfy her burden of proof regarding the 2012 rape meant she could find Ware not credible in general, which led her to rule that Ware did not prove any of the other assaults (even though they were undisputed).

Circular credibility determinations based on collateral issues are insufficient to overcome uncontested evidence that independently supports the requested relief. For example, in *Amend v. Bell*, the trial court in an automotive personal injury case granted summary judgment in favor of the driver's employer because it found that the driver was not acting within the scope of his employment. 89 Wn.2d 124, 570 P.2d 138 (1977). The court found that "Excluding the issue of impeachment" the "uncontradicted evidence" was that the driver was not acting in the scope of his employment. *Id.* at 128. The plaintiff argued that it was enough to impeach the driver's credibility regarding his speed and intoxication. *Id.* at 129. The Washington Supreme Court found that impeachment insufficient to create a genuine issue of material fact, because, "[T]he opposing party may not merely recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Id.*

In this case, by failing to contest Ware's evidence regarding the sexual assaults in 1989, 1991, 1993, and 2002, instead only contesting the 2012 assault, Nelson failed to create a factual dispute or a generalizable credibility problem that could preclude Ware from proving the earlier assaults by a preponderance. To analogize to *Bell*, Ware should have been able to win summary judgment in regard to the sexual assaults in 1989 through 2002, even if Nelson's evidence was sufficient to win a contested hearing over the 2012 assault.

D. THE TRIAL COURT ERRED BY DENYING RELIEF BASED ON ALLEGATIONS THAT THE PARTIES HAD SOME CONSENSUAL SEXUAL CONTACT

1. The Trial Judge Denied Relief Based on a Prohibited Factor.

There are many factors listed in this brief that a trial judge may consider in evaluating credibility. *Stout*, 159 Wn.2d 382. However, in a SAPO case, there are specific factors that judges are prohibited from relying upon, or even considering. If *de novo* review reveals that a judge denied relief based on those prohibited factors, the judge committed reversible error.

In recognition of prevalent victim blaming and rape myths, the legislature mandated that SAPO judges disregard several factors that do not disprove nonconsensual sexual conduct or penetration (*e.g.*, failure to make a police report) and are likely to result in the unjust denial of relief

due to their effect on perceptions of the victim's credibility. In essence, these factors are deemed by statute more prejudicial than probative, notwithstanding the relaxation of the rules of evidence. ER 1101.

For example, if a petitioner proves by a preponderance that she was the victim of nonconsensual sexual conduct or penetration by the respondent, "Denial of a remedy may not be based, in whole or in part, on evidence that: (c) The petitioner engaged in limited consensual sexual touching." RCW 7.90.090(4) (emphasis added). Therefore, even when a judge's findings are characterized as related to credibility, the judge commits an error of law by denying relief in whole or in part based on a limited consensual sexual relationship between the parties.

Although the Trial Judge did not clearly state a basis for finding Ware generally not credible (regarding the pre-2012 rapes), she did find:

From the alleged rape in 1989 to the sexual assault in October 2012, Ware describes every single one of her numerous contacts with Nelson as being the product of stalking, harassment, threats, or physical force by Nelson. While a court in a SAPO proceeding cannot learn all the particulars of a relationship that spans 23 years, the court must weigh the evidence available and determine its credibility. This Courts [sic] allows that some aspects of Ware's version of her contacts with Nelson may be true. However, the Court finds that Ware's depiction of her relationship with Nelson does lack credibility.

Although the Judge rightly points out that Ware denies ever having consensual contact with Nelson after the first rape (and she presented

witness testimony and other evidence such as the two earlier protection orders to corroborate this position), for the purposes of this issue this Court may assume *in arguendo* that the Judge was right, and there was some consensual contact between Ware and Nelson.

The Judge did not find that the entirety of Ware and Nelson's "relationship" was consensual. The Judge suspected that some of Ware's "numerous contacts" with Nelson were consensual, while acknowledging that "some aspects" of the relationship were the result of "stalking, harassment, threats, or physical force." In other words, Ware's undisputed evidence of sexual assaults in 1989, 1991, 1993, and 2002 was not persuasive beyond a preponderance because the Judge believed Ware consented to some contact with Nelson on some unspecified occasions.

The statute provides that it is a legal error for a judge to deny relief under the SAPO statute based even "in part" on the conclusion that some of the parties' sexual relationship was consensual. RCW 7.90.090(4). It makes no difference that the Judge "recite[d] the incantation, 'Credibility,'" when she made this error. *Amend v. Bell*, 89 Wn.2d at 129. The Judge's denial of relief to Ware was therefore an error reversible on a *de novo* basis, even though it was characterized as a matter of credibility.

2. The Judge Gave Self-Serving Hearsay Regarding Consent More Weight than Corroborated Testimony Subject to Cross-Examination.

In this case, the Trial Judge's reliance on the assertion of some consensual contact between the parties is particularly egregious, because there was virtually no evidence of consensual contact other than Nelson's wife's and friend's hearsay statements about what Nelson told them⁵. Specifically, the Judge relied on testimony that Nelson told his wife that he had a consensual relationship with Ware, even though he did not tell her that until after he had been arrested for raping Ware in 2012. RP 170-71. The Judge failed to make any findings related to how the timing and self-serving nature of that hearsay testimony affected its credibility.

A judge has the discretion to admit hearsay evidence in a protection order case. ER 1101. However, here the Judge emphasized repeatedly that she would give hearsay testimony only limited weight:

I'm sure counsel are both aware that the rules of evidence don't apply, but the Court of course is going to give more weight to testimony that's subject to cross-examination if there are witnesses called then [sic] would be given to declarations.

RP 6, 171. Ware testified in person and was extensively cross-examined, as were her supporting witnesses⁶. Nelson refused to testify, and relied on hearsay testimony to call into question Ware's evidence that they had no

⁵ The only non-hearsay evidence presented at the hearing to support consensual contact was Tisler's vague, inconsistent, and biased testimony regarding a couple of alleged double-dates more than two decades earlier, and seeing her at the airport once a couple of years later. The Judge failed to make any findings related to Tisler's credibility, or provide any reason she found Tisler's testimony more persuasive than the testimony of Ware, the testimony of Stewart, the previous two protection orders, etc.

⁶ All but Mattox and Broderson.

consensual relationship at all. The Judge contravened her own assertion regarding how she would evaluate the evidence by giving hearsay evidence that Nelson said they had a consensual affair more weight than Ware and Stewart's direct testimony about their personal knowledge that it was not consensual. This is significant, because not only was Ware's testimony about the rapes in 1989, 1991, 1993, and 2002 uncontested, but the testimony of Ware's witnesses (Stewart and McQuinton, who were cross-examined, and the declarations of Broderson and Mattax) regarding their personal knowledge of Nelson's consistent violent intimidation of Ware for more than two decades, was also uncontested.

For example, Nelson did not present any witness or other evidence (even hearsay evidence) disputing that he sent 50-100 letters to Ware threatening to kill her family (which Ware and Stewart testified to seeing with their own eyes). He did not present any evidence (even hearsay) that contradicted Ware and Stewart's testimony regarding the two previous protection orders they obtained based on his threats and assaults of Ware. He did not present any evidence (even hearsay) that contradicted Ware, Stewart, Broderson, and McQuiston's testimony that Ware repeatedly moved residences, and even left the Washington, to escape his stalking.

Moreover, even if the court fully accepted the hearsay testimony, it did not actually rebut the specific testimony of Ware and her witnesses.

The hearsay evidence of consent was extremely general, not specific to any particular assaults, threats, instances of stalking, etc. Even if there had been some consensual contact, all of this specific evidence about specific instances of sexual assault and stalking could also be true. For example, Nelson's wife testified that Nelson told her he dated Ware as a kid; she did not testify that Nelson specifically told her had consensual sex with Ware after their date at the fair in 1989.

Admittedly, notwithstanding the Judge's repeated statements that she would treat hearsay testimony as less weighty than testimony subject to cross-examination, there could theoretically be reasons for the Judge to find the hearsay testimony on Nelson's side more persuasive than the direct, corroborated testimony on Ware's side. The problem in this case is that the Judge failed to make any findings to explain why. Therefore, it is impossible for Ware, or this Court, to determine whether the Judge gave the hearsay testimony greater weight based on an outrageous factor (such as Ware's disability), based on an illegal factor (a limited consensual sexual relationship), or based on some legitimate reason for finding the hearsay testimony more credible (such as demeanor). However, by failing to provide specific reasons for her credibility determinations, the Judge failed to satisfy CR 52 and failed to make factual findings sufficient to demonstrate that substantial evidence supported her ruling.

IV. CONCLUSION

Julie Ware presented undisputed testimony that Jesse Nelson sexually penetrated her without her consent in 1989, 1991, 1993, and 2002. She presented testimony corroborated by several witnesses, and court documents, demonstrating that her relationship with Nelson was based on threats, violence, stalking, and harassment. The Judge's findings are insufficient and unsupported, in that they rely on conclusory, collateral, unexplained credibility determinations, notwithstanding undisputed evidence sufficient to require the court to grant relief. Further, the Trial Judge erred by denying Ware relief based on the Judge's conclusion that Ware and Nelson's relationship was in part consensual, which the court is prohibited from using as a basis for denying a SAPO. Therefore, Julie Ware respectfully requests that this court reverse the denial of her Sexual Assault Protection Order against Jesse Nelson.

Dated this 20th day of May, 2013.

Respectfully Submitted,



Emily Cordo, WSBA #37077
Attorney for Julie Ware

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I served one copy of this brief on the Respondent's attorney by email, pursuant to our agreement to accept service by email:

Kristina Selsset
119 Frist Ave South, Suite 320
Seattle, WA 98104
kristina.selsset@comcast.net

Dated this 20th day of May, 2013.



Emily Cordo, WSBA #37077