

69738-2

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No. 69738-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

JULIE WARE,

Appellant,

v.

JESSE NELSON,

Respondent.

COURT OF APPEALS
STATE OF WASHINGTON
2013 JUL 29 PM 4:23

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

The Honorable Judge Hollis R. Hill

BRIEF OF RESPONDENT

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INTRODUCTION

Jesse Nelson and Julie Ware began dating as teenagers. They had an on-again, off-again relationship from 1989 to 1994. When they dated, their relationship was public, and they behaved like an affectionate couple in front of their friends. In 1994 Ware obtained a court order prohibiting Nelson from contacting her. In 2002, approximately three years after Nelson married his wife Angie, Ware contacted Nelson and their relationship resumed. As before, their relationship was sexually intimate. They saw each other about a half a dozen times in 2002. In 2011 their relationship resumed and lasted about one year. Most of their contact in 2011-12 was over the telephone.

Nelson was placed under arrest based on Ware's allegation that sometime during the evening of October 13, 2012, Nelson sneaked into her apartment and digitally penetrated her. However, several witnesses confirmed that on October 13 Nelson had spent the afternoon and early evening with friends, concluding a day of hunting. He spent the rest of that evening with his wife and two young children, and then retired with his wife to bed.

Nelson was not charged with a crime. Ware brought a petition for a sexual assault protection order (SAPO), alleging not only the incident on October 13, but also a history of sexual assaults perpetrated by Nelson stemming back to their first date in 1989.

After a day-long hearing in which the superior court judge heard testimony from eight people and reviewed the declarations of four other individuals, Ware's petition for a SAPO was denied. The trial court found that Ware failed to prove that Nelson sexually assaulted her on October 13, as he had an alibi for that entire evening. The court further found that there was insufficient credible evidence to prove that Nelson committed any of the other sexual assaults alleged by Ware.

Ware falsely testified that Nelson raped her on October 13. This fabrication casts doubt on all of her other claims regarding the nature of her relationship with Nelson. There is substantial evidence that the trial court was correct in denying Ware's petition for a sexual assault protection order .

PROCEDURAL HISTORY

On October 26, 2012, Jesse Nelson was arrested based on Julie Ware's allegation that Nelson had sexually assaulted her on October 12 or 13, 2012. CP 53-54. Nelson was never charged with a crime. RP 38.¹ On October 29, 2012, in King County Superior Court, Ware filed a Petition for a Sexual Assault Protection Order (SAPO), naming Jesse Nelson as the Respondent. CP 1-10. Included in the petition was a three-

¹ At the time of the full hearing on November 26, 2012, no criminal charges had been filed against Nelson. RP 38. As of the time of this writing (July 25, 2013), no criminal charges have been filed against Nelson.

and-a-half-page, single-spaced, typed narrative in which Ware described her history with Nelson. CP 4-7. On that day a court commissioner issued a temporary SAPO and notice of hearing, directing Nelson to appear at a hearing scheduled for November 9, 2012. CP 11-13.

The parties appeared through their respective attorneys for the November 9 hearing. The court continued the hearing to November 26, 2012. CP 37. Prior to the November 26 hearing, witnesses for Ware submitted sworn declarations that included allegations regarding the conduct of Nelson and his witnesses when the parties appeared on November 9. CP 41-42; CP 54-56; CP 60-62.

On November 26 the matter was assigned to Judge Hollis Hill of the King County Superior Court. The trial court reviewed the sworn declarations of a number of witnesses as well as Ware's petition with its detailed narrative. After hearing almost a full day of testimony from seven of those witnesses (including lengthy testimony by Ware), the trial court entered an order denying Ware's request for an order of protection and dismissing Ware's petition. CP 78-80.

STATEMENT OF THE CASE

A. History of relationship between Nelson and Ware leading up to October 13, 2012.

The appellant Julie Ware and the respondent Jesse Nelson met in 1989, when Ware was 14 years old and Nelson was 17. CP 4. Ware

testified that she went out on a double-date with Nelson that year, along with Nelson's friend Matt Tisler and another girl. CP 4; RP 8. All four teenagers went in Nelson's VW Rabbit. RP 49.

Ware testified that that on that date, Nelson got her away and raped her in his car. RP 9-10; CP 4. In her petition, Ware did not mention being threatened by Nelson at that point, but in court she testified that Nelson threatened to kill her and her family if she said anything. RP 10. She testified that she believed Nelson had the ability to kill because "he had guns in the car" when he committed the sexual assault. RP 10. Ware described "three or four" guns "on the sides of the car." RP 10-11. These were handguns. RP 49. The guns were not hidden; Ware testified that the guns could be seen by anybody sitting in the car. RP 50.

Ware testified that this was the only time she went on a date with Nelson. RP 52-53.

In contrast, Nelson's friend Matt Tisler testified that he recalled double-dating with Nelson and Ware at least three times. RP 135-36. Tisler described Nelson and Ware dating in 1989, and that they dated "for a couple of years." RP 135. He knew they were a couple because "they would hold hands and hug and kiss each other." RP 136. Tisler testified that during this period Nelson did not possess a handgun, and that Nelson did not carry handguns in his car. RP 137.

Ware wrote that her mother sensed “something” had happened and forbade Ware from talking with Nelson. CP 4. Ware wrote that Nelson then began sending her letters, describing them in her petition as numbering in the hundreds and during testimony as “probably a total of 50 to 100.” CP 4; RP 11. Donna Stewart, Ware’s mother, wrote in a sworn declaration that in the couple of months after she forbade her daughter having contact with Nelson, “her personality changed. She became more secretive, more emotional and I tried [to] attribute that to becoming a teenager.” CP 49. Eventually, Ware’s mother decided to have Ware evaluated. *Id.* During Ware’s absence, Ware’s parents went into her bedroom and found Nelson’s letters to Ware. *Id.* Ware had hidden them in “books, drawers and boxes.” Ware’s mother wrote that in these letters Nelson was “talking about a relationship that never existed.” *Id.* Ware’s mother wrote that she took the letters to local law enforcement and left them there. CP 50. Ware and her mother describe law enforcement as taking no action with regard to the letters. CP 50; RP 12. In March 1990 she obtained a one-year anti-harassment order against Nelson on behalf of her daughter. CP 8.

Ware went to live with her father and stepmother because Ware’s mother wanted Ware to “put some distance between her and Jesse.” CP 50. Ware’s mother describes her daughter as “always seem[ing] confused, defensive and again very secretive when visiting me.” *Id.*

When Ware was 17 years old, Nelson had enlisted in the service. CP 50. Matt Tisler testified that sometime either during Nelson's military leave or after he was out of the Navy, he was visiting Nelson at the home Nelson was renting. RP 138. Ware suddenly showed up out front. *Id.* Tisler testified, "I just figured they worked things out . . . maybe were going to try to start up another relationship or something." *Id.*

Angela Nelson, Nelson's wife, recounted what Nelson had told her about his relationship with Ware. Angela testified that Nelson and Ware had dated as teenagers and that when Nelson got out of the military Nelson and Ware "tried to have a relationship again." RP 182. Angela testified that Nelson told her that the second period of time he tried to date Ware "it wasn't pleasant, that it was the same. She always wanted to hide everything from her mother. He wasn't interested in dealing with that part of it." RP 183. Angela testified that Ware had written hundreds of letters to Nelson, and that Nelson's father told her that he had recently gotten rid of those letters. *Id.*

Tisler wrote in his declaration that when Nelson returned from boot camp, he was present when Ware met Nelson at the airport. CP 72. Tisler was there with a group of friends to meet Nelson coming off the plane. *Id.* As they made their way toward baggage claim, Ware appeared. *Id.* Tisler testified at the hearing that Nelson appeared surprised by Ware's appearance. RP 139. Tisler testified that Ware gave Nelson a hug and the

two of them talked briefly with each other. RP 140. This appears to have been sometime around 1992, based on the chronology set out in Ware's petition. CP 4.

In her petition, Ware made no reference to this meeting. When asked about it during the hearing, she testified that she went to the airport because Nelson had called her and threatened to hurt her if she did not come to the airport to meet him. RP 14-15.

Nelson's mother Suzan Nelson provided a sworn declaration in which she described being contacted in 1999 by a woman who said she was on the planning committee for Nelson's high school reunion and was trying to reach Nelson. CP 73. Suzan Nelson gave the woman Nelson's home phone number. *Id.* Angela Nelson wrote in her declaration that she received a call from a woman posing as a member of the high-school reunion committee. CP 69. Ware and Nelson did not attend the same high school. RP 147. Angela gave the woman Nelson's phone number at work. CP 69; RP 169. Later that day, Nelson told his wife that the caller was actually Julie Ware, and that they used to date. CP 69; RP 170.

Based on Ware's allegation that Nelson had sexually assaulted her on October 13, 2012, Nelson was arrested. RP 171. When Angela Nelson bailed him out of jail, Nelson divulged to his wife that he had been having an affair with Ware. *Id.* Angela described Nelson's relationship with Ware as "consensual." RP 170. Angela testified that Nelson told her that

he and Ware had had an affair in 2002. RP 180. Angela and Jesse Nelson had known each other since 1997, and they were married in 1999. RP 183. Angela testified that Nelson told her that during 2002 he saw Ware “half a dozen times.” RP 180. He told her that Ware initiated the affair when Ware called him at work. RP 180-81. He told Angela that Ware invited him to her apartment, and there Nelson encountered Ware’s then-boyfriend Bill McQuiston. RP 180. McQuiston told Nelson to leave, and Nelson complied. *Id.* McQuiston’s declaration dated November 15, 2012, and his testimony in court is consistent with Nelson’s description of this encounter. CP 58-60; RP 123-24. McQuiston testified that after he ordered Nelson out of the apartment, Ware followed Nelson to the door. RP 124. He said he did not accompany Ware to the doorway as she walked Nelson out. *Id.*

When Ware testified about McQuiston ordering Nelson out of her apartment, she said that Nelson “could have” threatened her on his way out the door. RP 72. She said she did not see Nelson to the door. *Id.* She said that she was in a different room, and that Nelson “could have said something to me in the other room as he’s walking out the door.” *Id.*

Angela testified that Nelson told her that his next contact with Ware was when they resumed their affair in 2011. RP 181. Nelson told his wife that the affair had lasted for about a year. RP 178. He told his wife that

much of his contact with Ware in that last year was by telephone, and that he and Ware engaged in phone sex. *Id.*

Ware produced a copy of one page of a phone bill, showing calls made and received from the evening of August 11 to the evening of August 15, 2012. CP 66. In the column of data in the phone bill labeled “Place Called”, some of the calls show up as “blocked.” CP 66. Ware initially testified that the calls that appear on the bill as “blocked” were when Nelson called her. RP 77. Although she couldn’t be sure that every blocked call in that four-day period was from Nelson, she testified that the only other calls she received from a blocked number were from her doctor’s office, and her doctor called her no more than once every month or two. RP 100. On August 13 she received a call from a blocked number that lasted one minute followed a minute later by a call from a blocked number that lasted 62 minutes. CP 66. Ware testified that the 62-minute phone call was from Nelson. RP 77.

Ware wrote in her petition that in September 2012 Nelson showed up at her front door. CP 6. She wrote that she threatened to call the police if she ever saw him again. *Id.* She wrote that she then started seeing him sitting in parked cars, watching her. *Id.* Then she describes Nelson sexually assaulting her the evening of October 13, 2012. CP 6-7.

B. Nelson's version of events of October 13, 2012.

Angela Nelson provided evidence that the day of October 13 began early, with her husband Jesse Nelson waking up about 5:00 a.m. to go hunting. RP 164; CP 69. Nelson and his friend Heiko Garber left to get situated in their blind well before first light. RP 164. Angela's father Gerry McClellan joined Nelson and Garber at the hunting site. CP 16; RP 166; At noon Nelson and Garber returned to Nelson's home to eat lunch and doze on the couch. RP 165. At around 3:30 or 4:00 p.m., Nelson and Garber left to go out for the evening hunt. *Id.* Shortly after that, Angela and the Nelson's two young children drove to the home of Angela's parents, where Angela's mother Marge McClellan would be taking care of Angela's elderly grandmother, who had fallen. *Id.* Angela made dinner for her mother and grandmother. RP 166. At around 6:30 or 7:00 p.m. Angela's father returned to the McClellan house from hunting. RP 166; CP 16. At about that same time Nelson called Angela on her cell phone, having arrived home and wondering where she was. RP 166; CP 70. Angela and the children returned home around 7:00 or 7:30 p.m. RP 167; CP 70. The drive between the McClellan home and the Nelson home takes approximately 10 minutes. RP 166.

Heiko Garber testified that on October 13 he hunted with Nelson in the morning and in the evening. RP 127. Gerry McClellan joined them at

the hunting site. CP 19. They hunted until “it was right towards the end of where we could be out there.” RP 128. *Id.* Garber confirmed that, for the time period that included October 13, state rules allowed hunting only until 7:00 p.m. RP 127; CP 33. Garber testified that after hunting he and Nelson returned to Nelson’s home, where he packed up his things and said goodbye to Angela. RP 128.

On October 13 in the Seattle area the sun sets at 6:24 p.m. CP 36.

Angela testified that she and her husband and their kids stayed at home the rest of that evening. RP 166-67. Angela testified that they went to bed early, around 9:00 p.m., in part because Nelson was going hunting early the next morning. RP 167. Angela and her husband sleep in the same bed. RP 168. Angela testified that as the mother of two young children, she is a light sleeper. *Id.* She testified that her husband did not get up and leave for any period of time after they went to bed. *Id.* She testified that because of the rural setting in which they live, “you don’t miss a car in our driveway.” *Id.* The driveway leading from the Nelson home is a gravel hill. *Id.*

Garber testified that around 6:00 a.m. the following morning (October 14) he returned to Nelson’s home so that they could go hunting again. CP 19; RP 129.

In October 2013 Ware lived in Auburn, Washington. CP 1. The Nelson home is outside Eatonville, Washington. RP 174. Average travel time from the Nelson home to Auburn is an hour. *Id.*

C. Ware's version of events of October 13, 2012.

Ware testified that on the evening of October 13 she was helping her neighbor Gail Harrison shop online for a new cell phone. RP 27. Ware brought her laptop computer to help Gail, who is disabled. RP 44. Ware lives on the second floor of a two-story building; Gail lives with her son Trevor downstairs from Ware. RP 41. Trevor is a grown man in his 30s. RP 40. . RP 41. Ware testified she was "running up and down stairs" helping Gail. *Id.* This was an exterior flight of stairs. RP 41-42. Ware's building faces a parking lot. RP 92. The parking lot opens onto a street. *Id.* The building is not secure; Ware testified that anyone could walk up to her apartment. *Id.*

Ware was dressed in a long T-shirt, panties, a robe, and slippers. RP 27; RP 46-47. As she was going back and forth between her apartment and the downstairs apartment, Ware left her door unlocked. RP 27. Ware testified that she was using the printer and copier in her apartment to print things for Gail. RP 27. Ware said that she left the lights off in her apartment. RP 28.

Ware wrote in her petition that when Nelson assaulted her in her apartment that evening, “by this time it was getting dark.” CP 6.

However, on cross examination, Ware testified that when Nelson assaulted her “it was later on in the evening . . . after it was dark.” RP 48. When asked how long it had been dark when Nelson assaulted her, Ware replied “I have no idea.” RP 47. Ware was unable to provide a time for when the assault occurred. RP 48.

Ware did not provide an explanation as to how Nelson found out where she was living.

Ware wrote in her narrative that as Nelson was assaulting her “he was saying ‘look bitch, stop having the police look for me’, you know better than to fuck with me’.” CP 7. On direct, Ware testified that Nelson said “Why did you fuck with my family, you bitch.” RP 29. She said that the assault lasted five seconds, and that when Nelson was done “he just said you bitch.” *Id.* Rhonda Mattax wrote in her sworn declaration that when she spoke to Ware the following morning, Ware told her that while he was assaulting her Nelson said “‘This is mine, and don’t you forget it. I’ll be watching.’ and left.” CP 39.

During her testimony Ware volunteered for the first time that within minutes of Nelson assaulting her she told Trevor about the assault. RP 30. She also testified that after she told Trevor and while Trevor was with her in her apartment, Trevor called his mother Gail and described what Ware

had told him. *Id.* Ware failed to mention these details in the three-and-a-half-page narrative included in her petition.

When her attorney asked Ware why she didn't call the police that night, Ware replied "Because every time I've ever called the police before with Jesse, nothing has ever happened, nothing." RP 30. This is similar to what she told Rhonda Mattax, who wrote that Ware said "she didn't want to call the police because she had done that in the past and felt it never helped." CP 39.

When her attorney asked Ware why she had waited more than a week to tell her mother of the assault, Ware replied "Jesse told me the night of the assault that he would kill my mother and me if I told anyone." RP 103. When her attorney asked why she had told Trevor and then the next day her friend Rhonda about the assault, Ware replied "They are exempt from that." *Id.* She said she was referring to Gail, Gail's son Trevor, and Ware's friend Rhonda. RP 104.

In her narrative Ware wrote that Nelson had repeatedly told her that he would hurt her or her family if she told anyone about what he was doing to her. The following are examples:

- In the section of the narrative labeled "Later 1990," Ware wrote that Nelson told her "if you tell anyone I'll kill your mom and sister, because I know where they live." CP 4.

- In the section labeled “Mid/Late 1994” Ware wrote that after grabbing Ware as she got off work and driving her to a remote location, Nelson “smacked me across my face and said ‘you better not tell anyone bitch.’” CP 5.
- In the section labeled “2002” Ware wrote that Nelson showed up at her front door and said, among other things, “if you tell anyone I’m going to kill you.” CP 6.
- In the section labeled “Approximately late June/early July 2012” Ware wrote that Nelson called her cell phone several times and “made threats about killing my family, unless I cooperated and he told me what he wanted was sex.” CP 6.

Notwithstanding these threats, Ware told the following people that Nelson had committed offenses against her:

- She told her mother Donna Stewart that after she moved in with her father and stepmother, Nelson “started harassing her even there.” CP 50. After Ware had gotten together with her husband Erik Broderson, she told her mother that she was wearing a walking cast because Nelson had pushed her down the stairs as she was trying to get away from him. CP 50. She told her mother that Nelson was constantly calling her and coming by the apartment and that he threatened to kill Ware’s mother, Ware’s sister, and Broderson if Ware told anyone. CP 51. She told her

mother that Nelson had grabbed her as she was getting off work and taken her at gunpoint. CP 51. She told her mother in “2001/2002” that Nelson “had found her and was physically (sexually) and emotionally abusing her.” *Id.* In approximately August 2012 Ware told her mother that Nelson had found her. CP 52. One day Ware called her mother and told her that Nelson was sitting in a car outside her apartment. *Id.* Ware’s mother wrote she advised Ware to file a police report, and that Ware did so. CP 52-53.

- Ware told her then-husband Erik Broderson that Nelson had raped her numerous times, that he had thrown her down the stairs, and that he was stalking her and Broderson. CP 46.
- Ware told her then-boyfriend Bill McQuiston that Nelson had been stalking her. CP 58; RP 124.
- On the morning of October 14, 2012, Ware told her friend Rhonda Mattax that the night before she had been sexually assaulted by Nelson. CP 39.
- Ware testified that within a half hour of being sexually assaulted by Nelson, she provided the details of this assault to her neighbor Trevor, and that she witnessed Trevor telling his mother Gail about the assault. RP 44; RP 30.

It was pointed out to Ware during cross examination that she had written in her narrative that Nelson had repeatedly told her he would hurt her or her family if she told anyone. *Id.* Ware testified that it was okay for her to tell her neighbors or her best friend, but not her mother, because “my mother’s who I’m concerned about.” *Id.*

D. Allegations made with regard to November 9, 2012, court appearance.

Ware’s mother Donna Stewart filed her sworn declaration after the parties appeared for the originally-scheduled hearing on November 9. CP 48-57. In her declaration and during her testimony Ware’s mother alleged that she and Ware and the rest of their party waited a short way down a hall near a fourth-floor courtroom for Ware’s attorney to finish up some paperwork. CP 55; RP 111. While they were waiting, Nelson and his group exited the courtroom and stood near the courtroom area. CP 55. Nelson suddenly broke away from his group, walked toward Ware and her group, and around the rotunda area. He was looking at Ware the whole time. *Id.* He continued to walk back and forth around the rotunda area, all the while trying to make eye contact with Ware. *Id.* He passed very close to Ware’s friend Bill McQuiston and Ware’s stepfather Gary Stewart. *Id.*

Ware’s mother alleged that Nelson’s group made their way to the elevator, and she heard Angela Nelson yell at Nelson “‘Get in the God Damn Elevator’.” CP 55. She testified that she was “positive” that the

woman used profanity and that the woman used the name “Jesse.” RP 112. Ware and her party went down to the second floor to the Clerk’s Office for entry of the court order. CP 55. Ware went into the Clerk’s Office with her attorney while Ware’s party waited in the hallway in front of the Clerk’s Office. CP 55-56. Ware’s mother saw Nelson standing with his party down the hall on the second floor. CP 56. Ware’s mother described Nelson again walking toward them, again trying to make eye contact with Ware while Ware was inside the Clerk’s Office. CP 56; RP 112-13.

Ware’s stepfather Gary Stewart filed a declaration alleging that he saw Nelson exit the courtroom on the fourth floor, and that he saw Nelson walk “within an arms reach” of him and Ware’s friend McQuiston. CP 41. Stewart alleged that on the second floor he saw Nelson walking away from the group he was with and come near him and McQuiston and then almost collide with Ware’s mother. CP 42.

McQuiston filed two declarations, the second one after the November 9 court appearance. In that declaration he wrote that after Ware said “That’s him,” he watched Nelson walk within a couple of feet of him and five to six feet from Ware. R 60-61. McQuiston wrote that he watched a small group of people that had just come out of the courtroom walk toward the elevator. CP 61. He wrote that Nelson continued to walk around the rotunda. *Id.* He wrote that Nelson got on the elevator after the

woman in the red jacket snapped at Nelson to get on the elevator. *Id.* McQuiston wrote that when Ware's party got to the second floor, he saw Nelson and his group standing in the hallway, staring at Ware's party. McQuiston described Nelson walking away from Nelson's group toward Ware's group two times, the second time coming within inches of Ware's mother. *Id.*

Ware testified regarding the events alleged to have occurred at the courthouse on November 9. She said that while she was sitting down outside the fourth-floor courtroom, she told McQuiston that she saw Nelson. RP 4. She said that Nelson was coming right toward them. *Id.* She said that Nelson and McQuiston came face to face. RP 95. She said that she saw Nelson's face. *Id.*

Ware testified that after she watched Nelson and his party head toward the elevator on the fourth floor, she heard Nelson's wife say "get in the God damn elevator, Jesse." RP 96.

Ware's mother Donna Stewart, her stepfather Gary Stewart, and her friend Bill McQuiston were each asked to identify Nelson in court on November 26. Donna Stewart testified that she was "absolutely" positive that the man sitting in the front row of the courtroom was Jesse Nelson. RP 110. Gary Stewart was "positive" that the man sitting in the front row was Jesse Nelson. RP 121. McQuiston said that he believed that the man sitting in the courtroom was Jesse Nelson. RP 123.

The man sitting in the front row of the courtroom who was identified by the three witnesses as Jesse Nelson was Nelson's friend Heiko Garber. RP 126. Jesse Nelson did not enter the courtroom until after those three witnesses had testified. RP158.

Garber testified that on November 9 Nelson stayed on the second floor and was not with their party in the fourth-floor courtroom. RP 130. Garber testified that he did walk around while they were on the fourth floor. *Id.* He also said that he walked around the second floor to find another way of leaving that floor without their party having to walk near Ware's party. RP 131.

Matthew Tisler's testimony as to the events of November 9 was consistent with Garber's testimony. RP 142-44; 146-47.

Angela Nelson testified that her husband was not on the fourth floor of the courthouse at all on November 9. RP 172. She testified that Nelson's attorney had advised Nelson to stay on the second floor so that the parties would not cross paths. *Id.* She testified that it was possible that after she got on the elevator on the fourth floor she called to Garber to get his attention. *Id.* Angela was asked whether she said "get on the God damn elevator." RP 173. She testified, "I would probably never say that, but I would certainly never say it in a courthouse." RP 173. She testified that once their party met up with Nelson on the second floor, at no point did Nelson go off on his own. RP 173.

ARGUMENT

A. The Trial Court's Factual Findings Are Reviewed For Substantial Evidence.

Ware argues that this case involves “undisputed” facts, and that therefore the standard of review should be *de novo*. Br. of Appellant at 23-26. As argued below, however, this case comprises almost nothing but disputed facts. For that reason, the appellate court should apply a deferential standard in reviewing the trial court’s decision denying Ware’s petition for a sexual assault protection order.

The standard of review to be applied to a superior court’s decision to grant or deny a protection order is not entirely clear. In one case from Division 2 the court held that the decision to grant a domestic violence protection order is subject to review for abuse of discretion. Hecker v. Cortinas, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). However, no published decision has relied on Hecker for its holding regarding standard of review.

Chapter 7.90 RCW is the Sexual Assault Protection Order Act. The act is silent as to what standard of review is applied when a party appeals the trial court’s decision in a SAPO case.

In Washington, Civil Rule 52 controls the issuance of findings of fact and conclusions of law. Unlike its federal counterpart, CR 52 gives no guidance as to the standard of review to be applied when a party

challenges the findings of the trial court. In contrast, the federal rule provides that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.” Fed. Rule Civ. Proc. 52(a)(6).

The preponderance of Washington case law indicates that, absent specific authority to the contrary, the appropriate standard of review to be applied to a trial court’s findings in a protection order proceeding is the substantial evidence test. See, e.g., Endicott v. Saul, 142 Wn. App. 899, 909, 176 P.3d 560 (2008) (vulnerable adult protection order issued at conclusion of bench trial); In Re Marriage of Stewart, 133 Wn. App. 545, 550, 137 P.3d 25 (2006) (domestic violence protection order). Substantial evidence has been defined as “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The “substantial evidence” standard of review is more deferential to the fact finder than the “clearly erroneous” standard of review. Franklin County Sheriff’s Office v. Sellers, 97 Wn.2d 317, 324 646 P.2d 113 (1982) (noting that when legislature amended Administrative Procedure Act to replace substantial evidence test with clearly erroneous standard of review for factual determinations, intention was to allow for broader and more intensive scrutiny of agency fact finding).

Even under the less deferential “clearly erroneous” standard of review, a decision will not be overturned unless the reviewing court, after reviewing the whole record, is left with “the definite and firm conviction that a mistake has been made.” Thornton Creek Legal Defense Fund v. City of Seattle, 113 Wn. App. 34, 57, 52 P.3d 522 (2002). If the trial court’s findings are plausible, the appellate court cannot reverse those findings even though it might have come to a different conclusion if it had been sitting as the trier of fact. Ambassador Hotel Co. v. Wei-Chuan Investment, 189 F.3d 1017, 1024 (9th Cir. 1999). ““Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.”” Krist v. Kolombos Rest. Inc., 688 F.3d 89, 95 (2nd Cir. 2012) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985)). As one appellate court memorably put it, “To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.” Parts and Elec. Motors, Inc. v. Sterling Elec., Inc., 866 F.2d 288, 233 (7th Cir. 1988).

This deference to the trier of fact has an impressive pedigree. The court in Thorndike v. Hesperian Orchards, 54 Wn.2d 570, 575, 343 P.2d 183 (1959), explained that “the constitution does not authorize this court to substitute its findings for that of the trial court.”

Even where the trial court's findings are based on documentary evidence rather than credibility determinations, the appellate court must accept the findings unless clearly erroneous because "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise." Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). See also In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003) (because trial judges routinely hear the type of family law matter at issue, they are better equipped to determine credibility).

This deferential standard of review applies not only to the trial court's findings but also to the inferences drawn from those findings. Zack v. Comm'r of Internal Revenue, 291 F.3d 407, 412 (2002); Overby v. Nat'l Ass'n of Letter Carriers, 595 F.3d 1290, 1294 (D.C. Cir. 1983).

The appellate court need only consider the evidence that is favorable to the respondent. Endicott v. Saul, 142 Wn. App. 899, 909, 176 P.3d 560 (2008). Under the substantial evidence standard, the appellate court inquires whether, considering the evidence in the light most favorable to the prevailing party, a rational trier of fact could have found that the appellant failed to meet the applicable burden of proof. In Re Forfeiture of One 1970 Chevrolet Chevelle, 140 Wn. App. 802, 819 n.4, 167 P.3d 599 (2007) (registered owners of vehicle seized from their drug-dealing

son failed to prove by preponderance of the evidence at forfeiture hearing that they were “innocent owners”).

It is not necessary for the trial court to make findings asserting the negative of each issue raised. Carr v. Yokohama Specie Bank, Ltd., of San Francisco, 200 F.2d 251, 255 (9th Cir. 1952). “The trier of the facts, where the evidence is conflicting, may believe entirely the testimony of one party and disbelieve the testimony of the other party.” Bland v. Mentor, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). If there is substantial evidence to support the findings of the trial court,

it must be assumed that conflicting testimony was rejected and that documents or parts thereof depending on the veracity of the witnesses giving such conflicting testimony were found to be unreliable, even if the trial judge does not make an endless series of detailed statements to the effect that he does not credit the testimony or part of the testimony of each witness.

Ruby v. American Airlines, Inc., 329 F.2d 11, 14 (2nd Cir. 1964).

As noted in Ruby, findings of fact need not be detailed. See also Zack v. Comm’r of Internal Revenue, 291 F.3d 407, 412 (2002). Nor is the trial court required to directly address in its factual findings each issue that is raised by a party. Id. The trial court is not required to give an explicit reason why it chose to believe the testimony of one witness over another. Huff v. City of Burbank, 632 F.3d 539, 543 (9th Cir. 2011), rev’d on other grounds, Ryburn v. Huff, ___ U.S. ___, 132 S. Ct. 987, 181 L. Ed. 2d 966 (2012).

Ware argues that because the trial court applied the law to “undisputed” facts, the standard of review should be *de novo*, citing Heller v. McClure & Sons, Inc., 92 Wn. App. 333, 337, 963 P.2d 923 (1998). Br. of Appellant at 24. Ware’s citation to Heller indicates to what degree Ware confuses the concept of *undisputed* facts with *agreed* facts. In Heller, the evidence on which the factual findings were based was not disputed. What the Heller court had before it could be thought of as “agreed facts.”

Heller is more properly viewed as a case involving statutory construction. The issue on review in Heller was whether the a mechanic’s work on equipment owned by his employer and used at several public works sites fell within the phrase “upon all public works.” *Id.* at 338. Because that phrase was undefined in the prevailing wage statute, the appellate court had to construe the Legislature’s intent. *Id.* There was no dispute that the mechanic’s work was required or that the sites where the work was performed were public works. *Id.* at 340-341. In reviewing the trial court’s application of the prevailing wage statute to those undisputed facts, the appellate court was required to apply the *de novo* standard of review. *Id.* at 337. Notably, the proceedings in Heller did not involve witness credibility.

In contrast, the proceedings on Ware’s petition for a SAPO were driven almost entirely by witness credibility. The predominant issue

underlying the SAPO proceedings was whether the encounters between Nelson and Ware were the product of a consensual sexual relationship, as Angela Nelson and Matt Tisler testified, or strictly a series of unwanted advances that culminated in repeated acts of rape, as Ware claimed. There was little, if any, evidence that the parties could have agreed on. Because of the contradictory testimony and the essential aspect of witness credibility, review of the factual findings in this case are subject to the more deferential standard of substantial evidence.

B. The Trial Court’s Factual Findings Are Owed Even More Deference When The Case Turns On The Credibility Of Witnesses.

When the credibility of witnesses is at issue, the appellate court must pay even greater deference to the trial court’s findings of fact. United States v. Cruz-Mendez, 467 F.3d 1260, 1265 (10th Cir. 2006). “Credibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.” Endicott v. Saul, 142 Wn. App. 899, 909, 176 P.3d 560 (2008) (quoting Morse v. Antonellis, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)). This is because “only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener’s understanding of and belief in what is said.” Madden v. Chattanooga City Wide Service Dept., 549 F.3d 666, 674 (6th Cir. 2008) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 575, 105 S. Ct.

1504, 84 L. Ed. 2d 518 (1985)). Credibility issues are best resolved in the “crucible of the courtroom,” where witness testimony is subject cross-examination, and the trier of fact can give due weight to the testimony based on observations of demeanor and related factors. In Re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

Ware argues that the trial court’s factual findings related to credibility are flawed because they are insufficiently detailed. Br. of Appellant at 27. Ware states, “The subjective and potentially nonverbal basis for a credibility finding in a bench trial is a reason that specificity should be required . . .” *Id.* However, the subjectivity of the factfinder’s credibility determination is the reason that specificity is not possible. When jurors decide the credibility of a witness, they may properly rely on their gut reactions and on nonverbal cues. There is nothing wrong with judges making credibility determinations as jurors do. Because these things often cannot be described in words, they are not reviewable on appeal.

Ware further argues that the reason specificity should be required for factual findings is to create a sufficient record for review. Br. of Appellant at 28. Ware cites State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998), to support her argument that a credibility determination requires a specific factual basis. However, the court in Head made no such rule regarding specificity. The decision in Head (to remand for further

proceedings) was the result of the trial court, sitting as the trier of fact in an eight-count felony trial, failing to enter any findings of fact or conclusions of law whatsoever. The issue of credibility was not addressed in the Head decision.

Ware's evidence that she was repeatedly sexually assaulted by Nelson for over 23 years rests on her credibility. The trial court found that Ware's testimony as to the alleged October 13 rape and the nature of her relationship with Nelson was not credible. This court may reasonably infer that the trial court's conclusion of law that Ware failed to prove any non-consensual sexual contact is the result of the court's credibility determination.

C. The Lack Of Direct Rebuttal of Ware's Testimony That She Was Previously Sexually Assaulted Does Not Compel The Fact Finder To Accept Those Allegations As True.

Ware argues that evidence of "multiple sexual assaults by Nelson" is "undisputed." Br. of Appellant at 38. However, testimony that is not directly rebutted is not assumed for that reason to be true. Leaving aside the issue of impeachment, there are a number of factors that a trial court applies in making factual determinations:

The court need not accept even uncontradicted and unimpeached testimony if it is from an interested party or is inherently improbable. Credibility evaluations involve more than a witness's demeanor and comprehends an overall evaluation of the testimony in the light of its rationality or

internal consistency and the manner in which it hangs together with other evidence in the case.

9C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2586 (3d ed. 2008).

Although uncontradicted testimony must generally be followed, the exception is when what has been presented is “testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or with testimony which is inherently improbable.” Grace Bros. v. Comm’r of the Internal Revenue, 173 F.2d 170, 174 (9th Cir. 1949).

Ware stands impeached on the issue of whether Nelson sexually assaulted her on October 13, 2012. The trial court found that Nelson had a credible alibi for October 13. CP 90 (Finding of Fact 17). The trial court specifically found Ware not credible as to the events of October 13. CP 91 (Finding of Fact 22). Ware’s testimony regarding the nature of her relationship with Nelson over the years was contradicted by Angela Nelson as well as by Matt Tisler, who provided direct evidence that Nelson and Ware had periodically been in an open and affectionate dating relationship.

Even though Nelson did not provide evidence to specifically contradict Ware’s allegation that he sexually assaulted her in 1989, 1991,

1993, and 2002, the trial court need not accept Ware's testimony in determining whether those offenses actually occurred.

D. The Allegation That Nelson Sexually Assaulted Ware On October 13, 2012, Is Not A Collateral Matter.

Although impeached on the issue of whether she was raped by Nelson on October 13, Ware nevertheless argues that the alleged October 13 sexual assault is a collateral matter. Br. of Appellant at 39. Ware also treats as a collateral matter evidence that she had "some consensual contact" with Nelson. *Id.*

Ware cites Amend v. Bell, 89 Wn.2d 124, 570 P.2d 138 (1977), for the proposition that impeachment of a witness on a "collateral matter" is insufficient to overcome "uncontested" evidence. Br. of Appellant at 41. In Amend, there was impeachment evidence that the defendant driver may have been intoxicated and speeding at the time of the collision. That was held insufficient to contravene evidence that the driver was not acting within the scope of his employment at the time of the collision. *Id.* at 129.

What distinguishes this case is that the issue of whether Nelson sexually assaulted Ware on October 13 is not a "collateral" matter. Nor is it a collateral matter that Ware and Nelson continued to date off and on from 1989 until 1994. Ware's credibility regarding the nature of her relationship with Nelson is at the heart of this case. (In contrast, the defendant driver in Amend who was impeached had no relationship with

the plaintiff whose vehicle he hit.) Here the trial court recognized the gravity of this assertion in the court's factual findings: "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." CP 91 (Finding of Fact 21).

E. The Trial Court's Decision Was Not Based On Evidence That The Parties Had Some Consensual Sexual Contact, But Rather Ware's Lack Of Credibility In Denying That Any Consensual Contact Occurred.

Ware argues that the trial court erred when it based its finding that Ware was not credible on the prohibited factor that Ware had some consensual sexual contact with Nelson after the alleged rape in 1989. Br. of Appellant at 43-45. This argument rests on a misleading construction of the findings of fact.

Ware states that the trial court "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.'" Br. of Appellant at 45. However, this conflates two aspects of Finding of Fact 15: how Ware described her relationship with Nelson, and what the trial court was willing to believe. The trial court never acknowledged and made no finding that any aspect of the relationship was the result of "stalking, harassment, threats, or physical

force.” In Finding of Fact 15 the trial court set out Ware’s depiction of her contacts with Nelson; the court did not make a finding that Ware’s depiction was credible.

In its factual findings the trial court states that “*some* aspects of Ware’s version of her contacts with Nelson *may* be true.” CP 90 (Finding of Fact 15) (emphasis added). This phrase requires a careful reading. First, the court did not find that “some aspects of Ware’s version of her *sexual* contacts with Nelson may be true.” Inferring such a meaning, as Ware does in arguing that the court relied on a prohibited factor, mischaracterizes the court’s finding.

Second, the court did not identify *which* aspects of Ware’s story could have been true. For example, it’s possible that drawing from Ware’s testimony the trial court believed (1) that Nelson did send letters to Ware after she was stopped from seeing him in 1989, (2) that Ware did go to the airport when Nelson returned from boot camp, and (3) that Nelson did call Ware a number of times in August 2012. The trial court could believe these events took place without believing that the context painted by Ware was true.

Ware lacked credibility not because she “engaged in limited consensual sexual touching” with Nelson, but because she insisted that all her contacts with Nelson were non-consensual and the result of threats or physical force.

F. The Trial Court Is Permitted To Rely On Hearsay In Determining Whether Ware Has Met Her Burden Of Proof.

Evidence rules prohibiting hearsay need not be applied in a SAPO proceeding. ER 1101(c)(4).

Ware objects to the trial court basing its findings on hearsay. Br. of Appellant at 46. The same argument, however, can be made with regard to the evidence given by Ware's witnesses. Virtually all of that evidence is based not on their direct observation or experience but rather what Ware said about Nelson to the witness.

For example, there is little or nothing in the declaration of Erik Broderson, Ware's ex-husband, that is not a restatement of what Ware told Broderson. The declaration of Ware's friend Rhonda Mattax, who talked on the phone with Ware the morning after the alleged October 13 sexual assault, contains nothing but hearsay. Neither Broderson nor Mattax were made available for cross-examination. Even the evidence purportedly based on the direct observations of Donna Stewart, Ware's mother, is presented through a prism of what Ware supposedly told (or withheld from) her mother about her contacts with Nelson, which she concocted when she was a 14-year-old girl involved in a forbidden relationship with a 17-year-old boy.

Ware's objection to the trial court's reliance on hearsay ignores the testimony of Nelson's witnesses that was based on personal experience.

Notably, Matt Tisler testified that at several points from 1989 to 1994 he spent time in the company of Nelson and Ware when they were dating. Angela Nelson and Nelson's mother, Suzan Nelson, provided evidence that one day in 1999 they each received a call from a woman posing as a member of the reunion committee, who asked for Nelson's contact information. The fact that later that day Nelson told his wife the caller was actually Ware does not weaken the testimony of Angela or Suzan. Angela Nelson, Heiko Garber, and Gerald McClellan provided evidence that one or all of them was with Nelson the early evening and night of October 13, 2012. None of this testimony is hearsay.

Ware and her witnesses alleged that on November 9, 2012, Nelson approached them while they were in the courthouse, and that when they were on the fourth floor they heard Angela Nelson yell at her husband, "Get in the goddamn elevator, Jesse!" Angela Nelson, whose testimony the trial court deemed more credible, refuted all of the allegations stemming from the November 9 court appearance.

The allegations regarding November 9 may seem a small matter. But the fact that Ware and at least two of her witnesses – including her mother – would seize the opportunity to testify in such a way as to further malign Jesse Nelson points up the credibility problem Ware brings to this case.

CONCLUSION

As the trial court stated, a sexual assault protection order “is a document that has grave consequences for the person it’s issued against.” RP 194. The trial court recognized its obligation to consider carefully the credibility of the witnesses, to give due weight to testimony of those witnesses, and to resolve conflicting evidence in light of the court’s credibility determinations.

The issue of witness credibility was pivotal in the court’s decision to deny Ware’s petition for a SAPO. There is substantial evidence in the record to support the trial court’s finding that Ware’s testimony regarding her relationship with Nelson was not credible. There is substantial evidence that Ware fabricated her allegation that Nelson raped her on October 13, 2012, and there was credible evidence contesting her assertion that she never had a dating relationship with Nelson.

There is substantial evidence to support the inference that Ware was similarly untruthful when she alleged that Nelson sexually assaulted her in 1989, 1991, 1993 and 2002.

It was reasonable for the trial court to resolve the conflicts in testimony by choosing to believe the testimony of Nelson’s witnesses and rejecting the testimony of the other party. There was insufficient credible evidence that Nelson ever engaged in non-consensual sexual contact with

Ware. For that reason, the trial court was correct in denying Ware her petition for a sexual assault protection order.

DATED this 26th day of July, 2013.

Respectfully submitted,

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DECLARATION OF SERVICE

I, Kristina L. Selset, declare under penalty of perjury under the laws of the State of Washington that on July 26, 2013, I served via email a copy of the foregoing Brief of Respondent on attorney for petitioner, pursuant to our mutual agreement to accept service by email, as follows:

Emily Cordo
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Signed in Seattle, Washington, this 26th day of July, 2013.



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