

FILED
September 17, 2015
Court of Appeals
Division I
State of Washington

No. 73416-4-I

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

REBECCA NELSON,

Appellant,

v.

JAMES DUVALL,

Respondent.

APPELLANT'S OPENING BRIEF

ANDERSON & YORK, PC
Evangeline Stratton, WSBA # 43038
150 Nickerson St., Suite 311
Seattle, WA 98109
(206) 466-1896

LIVENGOOD ALSKOG PLLC
Kevin B. Hansen, WSBA # 28349
121 Third Avenue
P.O. Box 908
Kirkland, WA 98083
(425) 822-9281

K&L GATES LLP
Erica R. Franklin, WSBA # 43477
Alanna E. Peterson, WSBA # 46502
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

*Attorneys for Appellant
Rebecca Nelson*

TABLE OF CONTENTS

INTRODUCTION 1

ASSIGNMENTS OF ERROR 2

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

STATEMENT OF THE CASE..... 3

ARGUMENT 10

 A. Standard of review10

 B. RCW 7.90.090 prohibits the court from denying Ms. Nelson’s petition on the basis of her voluntary intoxication.....11

 C. Ms. Nelson’s intoxication rendered her incapable of consent as a matter of law.13

 1. Mental incapacity precludes consent.14

 2. Ms. Nelson presented sufficient evidence to establish that she was incapable of consent.18

 3. The trial court erred in penalizing Ms. Nelson for her impaired memory.20

 D. The court erred in excluding hearsay evidence in a proceeding that is exempt from the Evidence Rules.24

 1. The trial court’s interpretation of ER 1101 is contrary to courts’ longstanding understanding of this rule.....24

 2. The trial court’s procedural rulings are contrary to the purpose of ER 1101 and the Sexual Assault Protection Order Act.26

 E. The court’s substantive and procedural decisions raise due process concerns.28

CONCLUSION..... 29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Dependency of A.L.W.</i> , 108 Wn. App. 664, 32 P.3d 297 (2001)	25
<i>Gourley v. Gourley</i> , 158 Wn.2d 460, 145 P.3d 1185 (2006)	28
<i>Heinsma v. City of Vancouver</i> , 144 Wn.2d 556, 29 P.3d 709 (2001)	15
<i>In re Knight</i> , 178 Wn. App. 929, 317 P.3d 1068 (2014)	11
<i>People v. Perkins</i> , 27 A.D.3d 890, 810 N.Y.S.2d 596 (N.Y. App. Div. 2006)	17
<i>State v. Al-Hamdani</i> , 109 Wn. App. 599, 36 P.3d 1103 (2001)	17
<i>State v. Anderson</i> , 88 Wn. App. 541, 945 P.2d 1147 (1997)	25
<i>State v. Cate</i> , 683 A.2d 1010 (Vt. 1996)	17
<i>State v. Ferguson</i> , 100 Wn.2d 131, 667 P.2d 68 (1983)	20
<i>State v. Jones</i> , No. 101311, 2015 WL 2250459 (Ohio App. May 14, 2015)	17
<i>State v. Ortega Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994)	15, 16
<i>State v. S.S.</i> , 67 Wn. App. 800, 840 P.2d 891 (1992)	26

<i>State v. Sanders</i> , 697 N.W.2d 657 (Neb. 2005).....	17
<i>State v. Summers</i> , 70 Wn. App. 424, 853 P.2d 953 (1993).....	16
<i>Tiger Oil Corp. v. Dep't of Licensing</i> , 88 Wn. App. 925, 946 P.2d 1235 (1997).....	10
<i>Waste Mgmt. of Seattle, Inc. v. Wash. Utils. & Transp.</i> <i>Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	11
<i>In re Welfare of Brown</i> , 29 Wn. App. 744, 631 P.2d 1 (1981).....	25
Statutes	
RCW 7.90	25
RCW 7.90.005	27, 28
RCW 7.90.010	17, 23
RCW 7.90.010(1).....	14, 15
RCW 7.90.050	27
RCW 7.90.055	27
RCW 7.90.090	<i>passim</i>
RCW 7.90.090(4).....	11, 12
RCW 7.90.120	27, 28
RCW 9.44.050(1)(b).....	17
RCW 9A 44.....	14
RCW 9A.44.010(4).....	15, 16, 20
RCW 9A.44.010(7).....	15

RCW 9A.44.050(1)(b)15, 22

Rules

ER 41225

ER 1101 *passim*

ER 1101(c)24, 25, 26, 27

ER 1101(c)(3)26

ER 1101(c)(4)26

Other Authorities

Annalise H. Scobey, PUTTING BEER GOGGLES ON THE JURY:
RAPE, INTOXICATION, AND THE REASONABLE MAN IN
COMMONWEALTH V. MOUNTRAY, 48 New Eng. L. Rev.
203, 205 (2013-2014).....23

Robin Charlow, BAD ACTS IN SEARCH OF A MENS REA:
ANATOMY OF A RAPE, 71 Fordham L. Rev. 263, 299
(2002).....23

Teresa P. Scalzo, Am. Prosecutors Research Ins.,
Prosecuting Alcohol Facilitated Sexual Assault 1
(2007), *available at*
http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf23

INTRODUCTION

**“Alcohol’s not good, especially when you’re a good-looking lady running around on the campus.”
--Pro Tempore Judge Richard Bathum (RP 90:4-5)**

This appeal involves a challenge to a trial court ruling that grants perpetrators of sexual assault a free pass against incapacitated victims. The more vulnerable the victim, the less protection the trial court would offer.

The petitioner in this case, Rebecca Nelson (“Ms. Nelson”), was sexually assaulted while debilitatingly intoxicated—so intoxicated that she was unable to form a lasting memory of the assault. Her attacker admits that he had sexual intercourse with her. Thus, the only disputed issue before the trial court presiding over the Sexual Assault Protection Order proceeding was whether Ms. Nelson’s severe intoxication rendered her incapable of consenting to that act as a matter of law.

The trial court denied the Sexual Assault Protection Order petition on account of Ms. Nelson’s inability to recall the details of the attack, holding that evidence of her mental incapacity was insufficient proof of non-consent and amounted to nothing in comparison with the attacker’s claim of consent. In so holding, the trial court effectively required Ms. Nelson to provide a firsthand account of her attack—an unprecedented requirement that reflects a fundamental misunderstanding of the meaning

of consent. Contrary to the governing statute, the trial court also cited Ms. Nelson's voluntary intoxication as a basis for denying the petition, castigating her for drinking while being a "good-looking lady" on a college campus. Adding further insult to injury, the trial court's procedural rulings ran afoul of statutes and court rules designed to allow sexual assault survivors meaningful access to the courts. The court's substantive and procedural errors undermine the integrity of the proceeding and require that the trial court's judgment be reversed.

ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Ms. Nelson's petition on the basis of evidence that she was voluntarily intoxicated. *See* RP 89:22-90:8.
2. The trial court erred in holding that evidence of Ms. Nelson's mental incapacity was insufficient to establish non-consent. *See* RP 87:24-88:15.
3. The trial court erred in applying the Evidence Rules in a Sexual Assault Protection Order proceeding. *See* RP 7:21-23; 8:21-9:2; 10:1-8; 12:12; 31:20-21; 75:22-25.
4. The trial court erred in excluding the police report and other contemporaneous evidence of the incident. RP 8:21-9:2; 10:1-8; 12:12; 30:23-31:21.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the court violate RCW 7.90.090 in denying Ms. Nelson's petition on the basis of evidence that she was voluntarily intoxicated? (Assignment of Error 1).
2. Did the court misinterpret RCW 7.90.090 in holding that evidence of mental incapacity is insufficient to establish that sexual intercourse was nonconsensual? (Assignment of Error 2).
3. Did the court misapply the governing statute and Evidence Rules in strictly applying the hearsay rule to a Sexual Assault Protection Order proceeding? (Assignment of Error 3).
4. Did the trial court err in excluding the police report and other contemporaneous evidence of the incident? (Assignment of Error 4).
5. Did the court's substantive and procedural decisions violate Ms. Nelson's procedural due process rights? (Assignments of Error 1, 2, and 3).

STATEMENT OF THE CASE

At the time of the events at issue, Ms. Nelson and Respondent James Duvall ("Mr. Duvall"), both students at the University of Washington, resided in the same dormitory. RP 15:7-8; RP 15:18-19; RP 65:24-66:5. They were casually acquainted with one another. RP 16:3-6.

On the evening of January 9, 2015, Ms. Nelson went to a series of parties with friends. RP 17:19-21, 19:4-7, 24:18-23. Throughout the evening, she drank from a water bottle filled with vodka. RP 18:7-10, 19:10-14. The water bottle contained almost 500 mL of vodka when she began drinking from it, and she consumed more than half of its contents throughout the course of the evening. CP 7-8. She also had approximately three shots of alcohol in addition to a mixed drink containing alcohol. RP 18:14-18:22.

Her tolerance for alcohol is low, and she became heavily intoxicated. RP 26:8-12. Indeed, according to her boyfriend, Ryan Hanchett, the “Snapchats” Ms. Nelson sent throughout the evening were alarmingly incoherent. CP 36-37; *see also* CP 17-18 (describing the Snapchat application).

On account of her intoxication, Ms. Nelson only vaguely remembered leaving a second party and heading to a third, then going to a friend’s dormitory and eventually making her way back to her own dormitory. RP 24:18-21; RP 25:8-23. She had no recollection of the ten- or fifteen-minute trip from her friend’s dormitory to her own, but suspected that she stumbled and fell on the way home, as she sustained a painful knee injury and tore a sizeable hole in her jeans. RP 25:24-26:7.

The next thing Ms. Nelson remembered was waking up the next morning with her pajamas on inside out. She felt pain in her vagina and found blood on her sheets. Her knee was swollen and sore, and she felt “disoriented” and “helpless.” RP 28:3-9; RP 29:2-3. She had no memory of having had intercourse with Mr. Duvall, beyond a vague recollection of physical pain and Mr. Duvall’s attempt to dispose of a condom. RP 27:21-23. Mr. Duvall concedes that he had intercourse with Ms. Nelson. RP 72:16-17.

Extremely distraught, Ms. Nelson acted immediately to tell her boyfriend and parents what had happened. RP 29:12-23. With her parents’ assistance, she alerted the University of Washington Police, and a number of police officers came to her dormitory, took a statement and collected evidence. RP 30:18-33:12. She then checked into Harborview Medical Center, where she submitted to an invasive sexual assault exam. RP 33:15-25; *see also* CP 12.

In the aftermath of the assault, Ms. Nelson panicked when she encountered Mr. Duvall on campus. RP 43:21-25 (“And I thought I was going to pass out. And I like couldn’t breathe. And I just looked at my phone so that I wouldn’t have to look at him (witness crying) because I was really scared.”). Because Ms. Nelson and Mr. Duvall continued to share a dormitory, Ms. Nelson lived in chronic fear of encountering him

again. RP 44:9-13 (“So every time that I would come back to my dorm room, I would freak out and I would just look at my phone and like every single person – I would see people from far away and I would be like ‘Oh my God, it’s James.’”).

On March 18, 2015, Ms. Nelson filed a Petition for Sexual Assault Protection Order (“Petition”) in King County Superior Court, Cause No. 15-2-06453-3SEA. CP 1-5. She received a Temporary Sexual Assault Protection Order and Notice of Hearing (“Temporary Order”). CP 27-29.

On March 31, 2015, the parties appeared before Pro Tempore Judge Richard Bathum for the return hearing. The court opened the hearing by questioning whether it was necessary to read the pleadings the parties had filed.

THE COURT: Okay. Thank you.
There’s a lot of paperwork here. Do the parties think I need to read that?

MS. STRATTON: Your honor, are you talking about the Petitioner’s petition and the additional declarations?

THE COURT: I’m talking about a very thick petition and declarations.

RP 4:10-4:17. At the request of Ms. Nelson’s counsel, the court reluctantly agreed to read the pleadings, but it warned the parties that it was not prepared to give them much weight.

THE COURT: All right. From a judge's perspective, generally when I start reading these things you start finding hearsay right away. You don't know who the people are that are mentioned or what they're talking about. And so I'll go ahead and read this, but I don't know how much weight it's going to give you.

RP 8:21-9:2.

Although the court agreed to read the pleadings, it is unclear whether the court actually did so prior to making its ruling. The court indicated that it would need more than fifteen or twenty minutes to read through these materials, and yet it called only one fifteen-minute recess throughout the course of the proceeding, part of which was devoted to a conversation between the court and counsel. RP 8:6-15; RP 41:3-6. Indeed, the court did not give any indication that it had read the pleadings.

In any event, the court next announced that it would treat the Sexual Assault Protection Order proceeding as a "full trial." RP 12:12. When Ms. Nelson's counsel explained that proceeding on the basis of written submissions and oral argument was standard practice in Sexual Assault Protection Order proceedings, RP 7:4-6, the court responded, "I've never done anything just with paper. There's always been testimony." RP 7:21-23.

The court also insisted on applying the Evidence Rules to the proceeding, citing its concerns for the respondent, Mr. Duvall.

THE COURT: Okay. Well, the last couple ones of these I had people got expelled as a result of what happened here . . . So that's why I think that, when we get down to how serious things are, people need to testify and be subject to cross-examination.

RP10:1-8; *see, e.g.*, RP 31:20-21 (excluding police report as inadmissible hearsay); RP 75:22-25 (excluding written affidavits attached to petition and response).

The court heard testimony from Ms. Nelson; Ms. Nelson's father, Gregory Nelson; and Mr. Duvall. Ms. Nelson testified to the substantial amount of alcohol she had consumed throughout the evening of January 9, 2015. She also described her debilitating level of intoxication, which rendered much of the evening and early morning a blur. RP 16:7-27:18. In particular, she reported that she did not know how Mr. Duvall got into her dorm room or recall having intercourse with Mr. Duvall, beyond faintly recalling feeling physical pain and hearing him attempt to dispose of a condom. RP 27:21-23; CP 10. Ms. Nelson's father described her behavior following the assault. RP 56:19-59:4. Mr. Duvall admitted that he had intercourse with Ms. Nelson but claimed that he asked for consent and Ms. Nelson provided it.¹ RP 72:16-17; 72:3-4. He also testified that

¹ Ms. Nelson attempted to introduce the police report, but the court ruled that it was inadmissible hearsay. RP 30:23-31:21.

Ms. Nelson “did appear drunk, but it did not appear that she was blacked out or had no recollection of what was happening.” RP 70:25-71:2.

After Ms. Nelson had presented her case, the court expressed its doubts as to the sufficiency of the evidence.

THE COURT: What evidence do you have that shows that she did not consent?

MS. STRATTON: Her level of intoxication alone, your Honor.

THE COURT: Okay. That’s it? That’s the only thing?

RP 63:12-17. Accordingly, the court ultimately ruled in favor of Mr. Duvall, citing Ms. Nelson’s inability to recall the events at issue.

The difficulty in this case is that your client [Ms. Nelson] does not remember. Your client does not help us with a lot of what exactly happened in the room.

It could have been consent or it maybe wasn’t consent. It’s very, very difficult from the testimony that she gave to create any kind of picture as to what happened in this case.

On the other hand, the defendant does give us some testimony in connection with this case. There is agreement that both had been drinking. There is, I think, agreement that she drank too much.

But the issue here is whether or not this was in effect consensual or not consensual. And because the only testimony that the Court really has that goes to that is from the defendant in this case, the Court finds that there was consent, at least at one point in time.

RP 87:24-88:15.

The court did not adjourn the hearing after announcing its ruling. Instead, Judge Bathum went on to share his views on the dangers of alcohol and to chastise Ms. Nelson for drinking while being a “good-looking lady.”

No, I’m not done.

There’s another thing that anytime I get the opportunity to talk to kids about this which is alcohol. And here in the courthouse we see every kind of drug there is. You name it, we see it.

What’s still king? Alcohol is still king.

In Alcoholics Anonymous they say cunning, powerful, baffling. Alcohol’s not good, especially when you’re a good-looking lady running around on the campus.

RP 89:22-90:5.

ARGUMENT

A. Standard of review

The court “shall” grant a petition for a sexual assault protection order “[i]f 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.” RCW 7.90.090. “The use of the word ‘shall’ imposes a mandatory duty.” *Tiger Oil Corp. v. Dep’t of Licensing*, 88 Wn. App. 925, 935, 946 P.2d 1235 (1997) (quoting *Waste Mgmt. of Seattle, Inc. v. Wash. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994)).

Although this Court must “defer to the trier of fact on the persuasiveness of the evidence, witness credibility, and conflicting testimony,” factual determinations must be supported by substantial evidence. *In re Knight*, 178 Wn. App. 929, 936-37, 317 P.3d 1068 (2014). This Court reviews any conclusions of law *de novo*. *Id.* at 937.

B. RCW 7.90.090 prohibits the court from denying Ms. Nelson’s petition on the basis of her voluntary intoxication.

A court may not deny a Sexual Assault Protection Order on grounds that the victim was voluntarily intoxicated. RCW 7.90.090(4) (“Denial of a remedy may not be based, in whole or in part, on evidence that . . . [t]he petitioner was voluntarily intoxicated . . .”). Contrary to this express prohibition, the trial court admitted that Ms. Nelson’s voluntary intoxication was one of the reasons it denied her petition. In addition, the trial court’s decision to deny the petition was based on Ms. Nelson’s voluntary intoxication because it was predicated on her inability to recall the assault.

The trial court explicitly acknowledged that Ms. Nelson’s voluntary intoxication was a “factor” in its denial of a protection order.

THE COURT: No, I’m not done. There’s another thing that any time I get the opportunity to talk to kids about this is alcohol, and here in the courthouse we see every kind of drug there is. You name it, we see it. What’s still king? Alcohol is still king. In Alcoholics Anonymous they say cunning, powerful, baffling. Alcohol’s not good, especially when you’re a good looking lady running around on the

campus. So I'm not blaming anybody for this except to tell you that that's *another factor in this case* that I think was something that is unfortunate.

RP 89:22-90:8 (emphasis added); *see also* RP 88:7-9 (“There is agreement that both had been drinking. There is, I think, agreement that she drank too much.”).

In other words, the trial court denied blaming the victim while it did exactly that, factoring what it viewed as Ms. Nelson's culpability into its decision to deny the protection order Ms. Nelson sought. Thus, in clear contravention of the statutory mandate, the trial court's “denial of a remedy” was “based . . . in part, on evidence that . . . [t]he petitioner was voluntarily intoxicated.” *See* RCW 7.90.090(4).

The court's denial of the petition was also based on Ms. Nelson's voluntary intoxication because it was predicated on her inability to recall the details of the assault. By denying a protection order on grounds that Ms. Nelson was unable to provide a first-hand account of her attack, the court effectively penalized Ms. Nelson for being too intoxicated to form a lasting memory of the assault. *See, e.g.*, RP 88:16-21 (“Waking up the next morning after a night of drinking and maybe not a memory -- I don't know what happened there as to why she didn't testify regarding the specific facts of the case. But the court cannot find in favor of the Petitioner in this case and dismisses the case.”); RP 87:24-89:1 (“The

difficulty in this case is that your client [Ms. Nelson] does not remember. Your client does not help us with a lot of what exactly happened in the room.”). Because Ms. Nelson’s lack of memory was inextricably tied to her intoxication, a denial resting on her faulty memory necessarily rested on her voluntary intoxication, in violation of RCW 7.90.090.

The trial court’s comments amply demonstrate that Ms. Nelson’s voluntary intoxication was a substantial factor in its decision to deny a protection order. Because the trial court ran afoul of the governing statute, its decision cannot stand. *See* RCW 7.90.090.

C. Ms. Nelson’s intoxication rendered her incapable of consent as a matter of law.

The only disputed issue in this case is whether Ms. Nelson consented to sexual intercourse with Mr. Duvall. The trial court’s reasoning in denying the petition reflects a fundamental misunderstanding of the phrase “nonconsensual sexual penetration” as that phrase is used in RCW 7.90.090. Because consent, for these purposes, implies a meaningful understanding of the nature and consequences of sexual intercourse, a party who is too intoxicated to meet this threshold is unable to consent as a matter of law.

Accordingly, the trial court erred as a matter of law by holding that overwhelming evidence of debilitating intoxication was insufficient to establish nonconsensual sexual conduct. Because Ms. Nelson’s severe

intoxication rendered her categorically incapable of consent, whether Mr. Duvall sought consent and whether Ms. Nelson verbally acceded is irrelevant. By the same token, there was no need for Ms. Nelson to provide a firsthand account of the events in question, and the trial court erred in requiring that she do so.

1. Mental incapacity precludes consent.

RCW 7.90.090 requires the court to issue a sexual assault protection order if “the court finds by a preponderance of the evidence that the petitioner has been the victim of . . . nonconsensual sexual penetration by the respondent.” Sexual penetration is “nonconsensual” if there is a “lack of freely given agreement.” RCW 7.90.010(1).

Although the Legislature and the courts have not elaborated on the meaning of “consent” or “freely given agreement” in the Sexual Assault Protection Order context, the Legislature’s treatment of these terms in other code provisions is instructive. Notably, in Chapter 9A.44 RCW (dealing with sexual offenses) the term “consent” is also defined with reference to a “freely given agreement,” suggesting that the Legislature intended to give the term the same meaning in both chapters. *See* RCW 9A.44.010(7) (“‘Consent’ means that at the time of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.”); RCW

7.90.010(1) (“‘Nonconsensual’ means a lack of freely given agreement”); *see also Heinsma v. City of Vancouver*, 144 Wn.2d 556, 564, 29 P.3d 709 (2001) (“When considering an undefined statutory term, the court will . . . provide such meaning to the term as is in harmony with other statutory provisions.”).

Under RCW 9A.44.050(1)(b), a person is incapable of “consent” if she is “mentally incapacitated.” “Mental incapacity” is “that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse.” RCW 9A.44.010(4). In *State v. Ortega Martinez*, the Washington Supreme Court instructed courts to interpret the word “understand” expansively to require a “meaningful,” not merely “superficial,” understanding of the nature and consequences of sexual intercourse. 124 Wn.2d 702, 711-12, 881 P.2d 231 (1994). The “nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it may under some circumstances result in a disruption in one’s established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death.” *Id.* at 712. It is “important for a trier-of-fact to bear [these elements] in mind when it is evaluating whether a person had a condition which prevented him or her

from having a meaningful understanding of the nature of consequences of the act of sexual intercourse.” *Id.*

Notably, “[e]vidence which establishes a rape victim’s inability to understand the nature and consequences of sexual intercourse is not the kind of technical evidence which requires medical testimony to decipher . . . [A] witness’ comprehension of the basic consequences of his or her actions can be proved or disproved from his or her testimony and testimony as to behavior.” *State v. Summers*, 70 Wn. App. 424, 429-30, 853 P.2d 953 (1993).²

Mental incapacity can be caused by the “influence of a substance,” such as alcohol or drugs. RCW 9A.44.010(4). Thus, for purposes of a criminal conviction—and by extension, the issuance of a Sexual Assault Protection Order—“mental incapacity” resulting from alcohol consumption renders a victim incapable of consenting to intercourse as a matter of law. *See* RCW 9.44.050(1)(b); RCW 7.90.010.

Because mental incapacity may impair a victim’s memory, evidence of mental incapacity is often circumstantial. Indeed, courts have upheld second-degree rape convictions—which, unlike Sexual Assault

² While Mr. Duvall’s counsel invoked this case to argue that expert testimony was necessary to establish Ms. Nelson’s non-consent, RP 38:4-39:20, this case stands for the proposition that “the statute does *not* require expert testimony to prove mental incapacity” in every case. 70 Wn. App. at 428 (emphasis added).

Protection Order petitions, require proof beyond a reasonable doubt and carry the potential for incarceration—where a victim offered only circumstantial evidence of intoxication to demonstrate mental incapacity. *See, e.g., State v. Al-Hamdani*, 109 Wn. App. 599, 36 P.3d 1103 (2001); *State v. Sanders*, 697 N.W.2d 657 (Neb. 2005); *State v. Jones*, No. 101311, 2015 WL 2250459 at *8-9 (Ohio App. May 14, 2015); *State v. Cate*, 683 A.2d 1010 (Vt. 1996). In *Al-Hamdani*, the defendant alleged that the act was consensual, but the victim testified that “she awoke to find [the defendant] lying on top of her . . . [and] was unaware that they had sexual intercourse until she was examined at the hospital.” 109 Wn. App. at 602. “She also testified that when she woke to find [the defendant] on top of her ‘the whole thing was dream-like to me.’” *Id.* at 609.

Considering her testimony that she had at least 10 drinks that evening and was “stumbling, vomiting, and passing in and out of consciousness,” the Court held that there was sufficient evidence that “she was debilitatingly intoxicated at the time of sexual intercourse.” *Id.*; *see also People v. Perkins*, 27 A.D.3d 890, 892, 810 N.Y.S.2d 596 (N.Y. App. Div. 2006) (“victim’s testimony that she blacked out and ‘was so drunk she didn’t know what was going on,’ is sufficient to establish . . . [she was] physically unable to communicate unwillingness to the act”). *A fortiori*, in the context of a Sexual Assault Protection Order petition, where the

standard of proof is significantly lower, circumstantial evidence of mental incapacity is amply sufficient to establish non-consent. *See* RCW 7.90.090 (requiring petitioner to prove non-consent “by a preponderance of the evidence”).

2. Ms. Nelson presented sufficient evidence to establish that she was incapable of consent.

Here, it is undisputed that Mr. Duvall engaged in “sexual penetration.” *See* RCW 7.90.090; RP 72:16-17. The only disputed issue is whether the intercourse was “nonconsensual.” *See* RCW 7.90.090. Because the evidence before the trial court amply demonstrated that Ms. Nelson was “mentally incapacitated” as a result of alcohol consumption, Ms. Nelson established by a preponderance of the evidence that she was “a victim of . . . nonconsensual sexual penetration” by Mr. Duvall. RCW 7.90.090. Accordingly, the court was required to grant Ms. Nelson’s petition. *See id.* (“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”) (emphasis added).

Over the course of the evening, Ms. Nelson consumed approximately three shots of liquor, a mixed drink containing alcohol, and approximately half of a 500 mL container of vodka. RP 18:14-22; CP 7-8. Her tolerance for alcohol was low, and she became grossly intoxicated.

RP 26:8-12. Indeed, throughout the evening, she sent a series of messages to her boyfriend that he described as “incoherent.” CP 36-37. She does not remember making the ten or fifteen minute trip from her friend’s dormitory to her own dormitory, nor does she have any recollection of injuring her knee and ripping her jeans on the way home. RP 25:24-26:7. She does not recall how Mr. Duvall entered her bedroom. CP 10. She has no memory of having intercourse with Mr. Duvall, beyond a vague recollection of physical pain and Mr. Duvall’s attempt to dispose of a condom. RP 27:21-23. She reported feeling “disoriented” and “helpless” when she woke up with vaginal pain, inside-out clothing, and blood-stained sheets after Mr. Duvall left her room. RP 28:3-9, RP 29:2-3.

Ms. Nelson’s actions in the immediate aftermath of the incident further demonstrate that the intercourse was nonconsensual. She immediately reported the incident to her boyfriend, her parents, and the police, and she voluntarily submitted to a very extensive—and invasive—sexual assault exam at Harborview. RP 29:12-23; RP 33:15-25; *see State v. Ferguson*, 100 Wn.2d 131, 144-45, 667 P.2d 68 (1983) (referencing “hue and cry” doctrine whereby evidence that victim timely complained to someone after the assault is admissible to bolster the victim’s credibility).³

³ Although the Court should have admitted and considered evidence that Ms. Nelson immediately reported the assault here, it is important to

A later chance encounter with Mr. Duvall provoked an intense physiological response, and she panicked whenever she approached their shared dormitory until she learned that Mr. Duvall had been relocated. RP 43:21-25; 44:9-13. She continued to be terrified of what Mr. Duvall might do should he “come back.” RP 47.

In sum, the record is replete with evidence establishing that Ms. Nelson was incapable of “understanding the nature or consequences of the act of sexual intercourse” at the time she had intercourse with Mr. Duvall, and therefore, unable to consent as a matter of law. *See* RCW 9A.44.010(4). Accordingly, even if Ms. Nelson verbally agreed to have intercourse, as Mr. Duvall claimed, any such agreement would be irrelevant. This overwhelming evidence of Ms. Nelson’s “mental incapacity,” coupled with other indicia of non-consent, such as her behavior following the incident, was more than sufficient to establish non-consent by a preponderance of the evidence. *See* RCW 7.90.090.

3. The trial court erred in penalizing Ms. Nelson for her impaired memory.

The trial court flatly dismissed the overwhelming evidence of Ms. Nelson’s debilitating intoxication, concluding that Ms. Nelson had

recognize that sexual assault survivors often face significant barriers to reporting sexual assault, and a survivor’s failure to immediately report an assault does not necessarily undermine her credibility.

produced *no testimony* to counter Mr. Duvall's account of the events in question.

The difficulty in this case is that [Ms. Nelson] does not remember, [Ms. Nelson] does not help us with a lot of what exactly happened in the room. It could have been consent or maybe it wasn't consent. It's very, very difficult from the testimony that she gave to create any kind of picture as to what happened in this case. On the other hand, the defendant does give us some testimony in connection with this case. There is agreement that both had been drinking. There is I think agreement that she drank too much. But the only issue here is whether or not this was in effect consensual or not consensual, and because **the only testimony that the Court really has that goes to that is from the defendant in this case**, the Court finds that there is -- that there was consent, at least at one point in time.

RP 87:24-88:15 (emphasis added).⁴ By declining to consider any of the circumstantial evidence of non-consent that Ms. Nelson had presented and instead, faulting her for her failure to "create [a] picture as to what happened," the trial court effectively required Ms. Nelson to provide direct evidence of non-consent by providing a firsthand account of the events in question.

The trial court's novel requirement that Sexual Assault Protection Order petitioners provide a firsthand account of a sexual assault not only

⁴ See also RP 63:12-17:

THE COURT: What evidence do you have that shows that she did not consent?

MS STRATTON: Her level of intoxication alone, Your Honor.

THE COURT: OK, that's it? That's the only thing?

penalizes incapacitated victims but also grants impunity to the perpetrators who take advantage of them. The message to would-be perpetrators from the trial court's ruling is clear: it is the perpetrator's word against the victim's in a Sexual Assault Protection Order proceeding, and if the victim is unable to recall the circumstances of a sexual assault, the perpetrator's word will carry the day. Indeed, so long as the would-be victim will not remember the attack, it is of no import that she was legally incapable of consenting to intercourse in her compromised mental state. *See* RCW 9A.44.050(1)(b). In other words, the trial court's ruling grants a perpetrator of sexual assault a free pass against an incapacitated victim, allowing him to take advantage of her vulnerability by attacking her and then exploit her impaired memory to evade responsibility.

Penalizing sexual assault victims who cannot recall the details of their attack is also at odds with the express intent of the Legislature. In passing the Sexual Assault Protection Order Act (the "Act"), the Legislature recognized that sexual assaults are often unreported and perpetrators often unpunished. The Act is designed to fill the resulting void by providing relief to rape victims in the absence of criminal prosecution.

Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire

safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim.

RCW 7.90.010. Rather than extend protections to sexual assault victims, the trial court's reading of the Act would preclude an entire class of victims from obtaining a civil remedy. Rape is notoriously difficult to prosecute because this crime so often takes place behind closed doors.⁵ A victim's inability to remember the details of an assault further compounds these difficulties.⁶ By making circumstantial evidence unavailable to a Sexual Assault Protection Order petitioner who has no other means of proving her case, the trial court denies her the relief the Legislature sought to provide.

The standard the trial court announced in this case would deny relief, *ipso facto*, to nearly any sexual assault victim who was

⁵ See, e.g., Robin Charlow, BAD ACTS IN SEARCH OF A MENS REA: ANATOMY OF A RAPE, 71 Fordham L. Rev. 263, 299 (2002) (“[Intercourse] most often takes place in a setting in which there are no witnesses, beyond the two participants, who might confirm or refute allegations of non-consent or the reasonable appearance of consent.”); Annalise H. Scobey, PUTTING BEER GOGGLES ON THE JURY: RAPE, INTOXICATION, AND THE REASONABLE MAN IN COMMONWEALTH V. MOUNTRY, 48 New Eng. L. Rev. 203, 205 (2013-2014).

⁶ See, e.g., Teresa P. Scalzo, Am. Prosecutors Research Ins., Prosecuting Alcohol Facilitated Sexual Assault 1 (2007), *available at* http://www.ndaa.org/pdf/pub_prosecuting_alcohol_facilitated_sexual_assault.pdf.

incapacitated at the time of the assault. Under the trial court’s ruling, such an individual would have no recourse through the Sexual Assault Protection Order statutes, as the very circumstances that gave rise to the assault would preclude her from obtaining relief. The trial court’s dangerous and unfounded interpretation is contrary to law and requires reversal.

D. The court erred in excluding hearsay evidence in a proceeding that is exempt from the Evidence Rules.

The trial court erred as a matter of law in applying the Evidence Rules to this proceeding and, in particular, invoking the hearsay rule to exclude reliable documentary evidence, such as the police report and the declarations Ms. Nelson submitted with her petition. Because ER 1101 exempts Sexual Assault Protection Order proceedings from the requirements contained in the Evidence Rules, the trial court had no basis for applying those rules in this proceeding. *See* ER 1101(c); RP 8:21-9:2; RP 12:12; RP 7:21-23; RP 10:1-8; RP 31:20-21; RP 75:22-25.

1. The trial court’s interpretation of ER 1101 is contrary to courts’ longstanding understanding of this rule.

ER 1101(c) provides that, with some exceptions,⁷ the Evidence Rules “need not be applied” to an enumerated list of special proceedings, including “[p]rotection order proceedings under RCW 7.90”

⁷ Privileges, the rape shield statute, and ER 412 still apply to such proceedings. ER 1101(c).

Washington courts have consistently interpreted “need not” to mean that the evidentiary rules “do not” apply to the listed proceedings. *See, e.g., In re Dependency of A.L.W.*, 108 Wn. App. 664, 673, 32 P.3d 297 (2001) (holding that evidence rules “do not apply” to dependency proceedings); *State v. Anderson*, 88 Wn. App. 541, 543-44, 945 P.2d 1147 (1997) (“[T]he Evidence Rules explicitly *do not apply* in proceedings to grant or revoke probation”) (emphasis added); *In re Welfare of Brown*, 29 Wn. App. 744, 747, 631 P.2d 1 (1981) (“The rules of evidence *do not apply* to a preliminary determination in juvenile court proceedings under RCW Title 13 (ER 1101).”) (emphasis added).

In *A.L.W.*, this Court considered the meaning of ER 1101 in the context of child dependency proceedings. 108 Wn. App. at 672-73. The trial court excluded certain letters as “inadmissible hearsay under the Rules of Evidence, precluding the proof offered by the State.” *Id.* at 673. But this Court held that the trial court erred in excluding evidence on hearsay grounds: “under ER 1101(c)(3), the rules of evidence do not apply to dependency review hearings in juvenile court.” *Id.* Other Washington courts have reached the same conclusion. *See, e.g., State v. S.S.*, 67 Wn. App. 800, 807, 840 P.2d 891 (1992) (“ER 1101(c)(3) specifically exempts juvenile disposition hearings from the rules of evidence, thus allowing the routine use of hearsay evidence at juvenile disposition hearings.”).

Indeed, when it added Sexual Assault Protection Order proceedings to the list of exemptions, the Washington Supreme Court explained that “ER 1101(c) (4) currently provides that the rules of evidence (other than with respect to privileges) *do not apply* in protection order proceedings . . .” *GR 9 Cover Sheet, ER 1101(c)*, Wash. St. Reg. 07-09-018 (April 5, 2007) (emphasis added).

2. The trial court’s procedural rulings are contrary to the purpose of ER 1101 and the Sexual Assault Protection Order Act.

The trial court’s application of the Evidence Rules is not only contrary to the well-settled meaning of ER 1101 but also out of step with the purpose of both the Sexual Assault Protection Order Act and ER 1101. The Legislature created sexual assault protection orders to provide a reliable means for sexual assault victims to secure relief outside of the criminal process, recognizing that “[v]ictims who do not report [sexual assault] still desire safety and protection from future interactions with the offender” and that where a rape is reported but not prosecuted, “the victim should be able to seek a civil remedy requiring that the offender stay away from the victim.” RCW 7.90.005.

Likewise, the Washington Supreme Court’s decision to amend ER 1101 to include protection order proceedings “reflects the need for easy, quick and effective access to the court system by simplifying how

evidence is presented in protection order hearings, which often involve pro se litigants.” *GR 9 Cover Sheet, ER 1101(c)*, Wash. St. Reg. 07-09-018 (April 5, 2007). The Court explained that “the same need for ‘easy, quick and effective access to the court’ apply [sic] to the issuance of orders under the Sexual Assault Protection Order Act.” *Id.*

Consistent with both the Legislature’s and the high court’s intent, the procedures for obtaining a Sexual Assault Protection Order are highly abbreviated, and Sexual Assault Protection Order proceedings take place on an accelerated timeline. *See, e.g.*, RCW 7.90.120 (providing for full hearing on Sexual Assault Protection Order petition within fourteen days of issuance of *ex parte* protection order); RCW 7.90.050 (relaxing service rules); RCW 7.90.055 (waiving filing fees for Sexual Assault Protection Order petitions).

The trial court’s decision to disregard Ms. Nelson’s written submissions, and instead, conduct a full evidentiary hearing is at odds with this framework. Contrary to legislative intent, a victim of sexual assault who has been unable to hold her attacker accountable through the criminal justice system could face equally insurmountable evidentiary barriers in a Sexual Assault Protection Order proceeding governed by the Evidence Rules. *See* RCW 7.90.005 (providing civil remedy for sexual assault victims where assault was unreported or not prosecuted). And given the

highly accelerated timeframe for Sexual Assault Protection Order petitions, holding petitioners to the same evidentiary standards that apply in more formal proceedings is unrealistic. *See* RCW 7.90.120.

E. The court’s substantive and procedural decisions raise due process concerns.

The Due Process Clause guarantees, at a minimum, an impartial decision-maker and a fair decision-making process. *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006) (“The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.”) (internal quotations and citation omitted). The trial court’s procedural and substantive rulings deprived Ms. Nelson of a meaningful opportunity to be heard. In particular, the court’s departure from its sister courts’ longstanding interpretation of ER 1101 and from well-settled procedural practices denied Ms. Nelson a fair hearing. Furthermore, in requiring Ms. Nelson to provide a firsthand account of the assault, when the very circumstances of her attack precluded her from doing so, the trial court deprived Ms. Nelson of her day in court as a sexual assault survivor who was incapacitated at the time of the assault. Finally, the judge’s expressions of concern for Mr. Duvall alone and his predilection to lecture Ms. Nelson calls his impartiality into serious question. Such errors cast doubt on the integrity of the proceeding and the resulting decision.

CONCLUSION

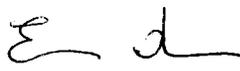
For the foregoing reasons, Ms. Nelson respectfully asks that the Court reverse the denial of her petition for a sexual assault protection order. If a remand is necessary, the Court should provide precise instructions about the proper interpretation of the Sexual Assault Protection Order Act and, at a minimum, give serious consideration to assigning this case to a different judge.

Respectfully submitted this 17th day of September, 2015.

K&L GATES LLP

By 
Erica R. Franklin, WSBA # 43477
Alanna E. Peterson, WSBA # 46502
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
(206) 623-7580

ANDERSON & YORK, PC

By  For
Evangeline Stratton, WSBA # 43038
150 Nickerson St., Suite 311
Seattle, WA 98109
(206) 466-1896

LIVENGOOD ALSKOG PLLC

By E. d For
Kevin B. Hansen, WSBA # 28349

121 Third Avenue
P.O. Box 908
Kirkland, WA 98083
(425) 822-9281

*Attorneys for Appellant
Rebecca Nelson*

PROOF OF SERVICE

Angela O'Connor declares as follows: On September 17, 2015, I caused a true and correct copy of the foregoing document to be served upon the following in the manner indicated:

Attorneys for Respondent:
Timothy McGarry
Attorney at Law
155 108th Ave. NE
Bellevue, WA 98004-5928
WSBA No. 8486
Phone: (206) 290-6764
Fax: (425) 223-5712
Email: mcgarrylaw@msn.com

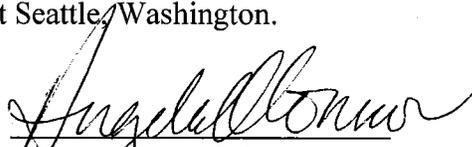
- via U.S. Mail, first-class postage prepaid
- via Hand Delivery
- E-Service
- via Facsimile
- via E-mail w/ hard copy to follow per agreement
- via Overnight Mail

Attorneys for Respondent:
James W. Lobsenz
Carney Badley Spellman, P.S.
701 Fifth Ave., Suite 3600
Seattle, WA 98104-7010
Phone: (206) 622-8020
Fax: (206) 467-8215
Email: lobsenz@carneylaw.com

- via U.S. Mail, first-class postage prepaid
- via Hand Delivery
- E-Service
- via Facsimile
- via E-mail w/ hard copy to follow per agreement
- via Overnight Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated September 17, 2015, at Seattle, Washington.


Angela O'Connor