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Division I  
State of Washington

73416-4

No. 73416-4-I

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

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REBECCA NELSON,

Appellant,

v.

JAMES DUVALL,

Respondent.

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APPELLANT'S REPLY BRIEF

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## I INTRODUCTION

In his brief (“Brief of Respondent”), Mr. Duvall argues that the record supports a finding that on January 10, 2015, Ms. Nelson had the capacity to consent to sexual intercourse. But in denying Ms. Nelson’s petition for a Sexual Assault Protection Order (“SAPO”), the trial court made no such finding. To the contrary, the trial court began and ended its analysis with Ms. Nelson’s lack of memory of the events at issue, treating this as a basis to adopt Mr. Duvall’s account of the disputed events. In so doing, the court neglected to consider whether Ms. Nelson had the mental capacity to consent—even though her blackout called her capacity into serious question.

This Court should reject Mr. Duvall’s invitation to ignore the serious flaws in the trial court’s ruling in favor of a *post-hoc* rationalization. Instead, this Court should reverse the trial court’s decision in light of the trial court’s legal errors and remand the case for a determination as to whether Ms. Nelson had the mental capacity to consent to intercourse.

## II ARGUMENT

### A. The Trial Court Failed to Inquire as to Ms. Nelson’s Capacity to Consent.

Mr. Duvall engages in a detailed *post-hoc* analysis of the evidence before the trial court—relying on evidence the trial court never read, never considered, and never cited—to argue that substantial evidence supported a finding the trial court never made—namely, that Ms. Nelson had the

capacity to consent to intercourse. Instead of making such a determination, the trial court simply adopted Mr. Duvall's account of the disputed facts, citing Ms. Nelson's lack of memory without inquiring into the legal significance of her blackout. This Court cannot, and certainly should not, defer to a finding that the trial court never made.

As Mr. Duvall has to concede, the trial court found consent solely on the basis of Ms. Nelson's lack of memory. *E.g.*, Br. of Resp't at 15 ("The Court noted that Nelson had admitted that the sex could have occurred with her consent, and that she simply couldn't remember what had happened. RP 52. But Duvall remembered and said that she did consent."). Mr. Duvall quotes a portion of the trial court's ruling that underscores the absence of any finding on incapacity:

**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 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 (emphasis added); *see* Br. of Resp't at 24. By noting that "the only testimony that the Court really has that goes to [consent] is from the defendant in this case," the trial court unequivocally indicated that it failed to consider Ms. Nelson's capacity and instead, ruled on the basis of Ms. Nelson's inability to rebut Mr. Duvall's testimony with a narrative of her own.

Undeterred by the stated basis for the trial court's ruling, Mr. Duvall suggests that the record supports a finding of capacity. *E.g.*, Br. of Resp't at 22-23 (suggesting that Ms. Nelson's insistence on stumbling home on her own indicated that she was not very intoxicated); *id.* at 30 ("[T]here is overwhelming evidence that whatever the precise level of her intoxication was at the time sexual intercourse began, shortly before that moment Nelson was fully capable of running, walking, writing and sending Snapchat messages..."). In so doing, Mr. Duvall draws not only from his own testimony but also from the declarations affixed to Ms. Nelson's petition, other hearsay evidence, and Ms. Nelson's testimony as to the events that took place before she had intercourse with Mr. Duvall. *See* Br. of Resp't at 21-23, 30-31. But the trial court likely did not read the declarations,<sup>1</sup> and even if it did, it certainly did not cite to them in describing the basis for its ruling. RP 87:16-90:9. Moreover, it is unlikely

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<sup>1</sup> Ms. Nelson's analysis of this issue is more persuasive than Mr. Duvall's, as the trial court stated that it would need *more than* fifteen to twenty minutes to read the materials Ms. Nelson had provided, and the recess lasted only fifteen minutes, part of which was devoted to a conversation between the trial judge and the parties' counsel. Br. of App't at 7.

that the trial court even *considered* these declarations, as its ruling makes clear that it did not feel compelled to consider any evidence outside of Mr. Duvall's account of the disputed events and Ms. Nelson's lack thereof. RP 87:24-88:15. Similarly, the trial court explicitly stated that it would not consider hearsay evidence. RP 31:15-21. Finally, while the trial court considered Ms. Nelson's testimony insofar as she stated that she had no memory of intercourse with Mr. Duvall, its ruling makes clear that it did not consider the portions of her testimony that went to capacity. RP 88:12-13 ("[T]he only testimony that the Court really has that goes to [consent] is from the defendant in this case"). In sum, Mr. Duvall invites this Court to rely on evidence the trial court likely never read, almost certainly never considered, and clearly never credited—all to uphold a finding that the trial court never made. This Court should decline Mr. Duvall's invitation.

**B. This Court Is in no Position to Engage in a *Post-Hoc* Rationalization of the Trial Court's Ruling.**

The *post-hoc* analysis that Mr. Duvall tasks this Court to undertake falls well outside the purview of an appellate court. It is well established that factual determinations—particularly those that rely upon the credibility of live witnesses—are squarely within the province of the trial court. *Bartel v. Zuckriegel*, 112 Wn. App. 55, 62, 47 P.3d 581 (2002). While Mr. Duvall is correct that this Court reviews a trial court's factual findings for substantial error, this Court is ill-positioned to embark on a detailed factual inquiry of its own. *Old Windmill Ranch v. Smotherman*, 69 Wn.2d 383, 390, 418 P.2d 720 (1966). Accordingly, where as here, the

trial court failed to make a required factual finding altogether, the appropriate remedy is a remand. *E.g., Fed. Signal Corp. v. Safety Factors, Inc.*, 125 Wn. 2d 413, 423, 886 P.2d 172 (1994).

**C. In Urging this Court to Affirm the Trial Court’s Finding of Consent, Mr. Duvall Ignores the Serious Legal Errors Inherent in that Finding.**

In inviting this Court to affirm the trial court’s ruling on grounds the trial court never considered, Mr. Duvall overlooks the serious legal errors underlying the trial court’s ruling. In fact, by failing to look beyond the parties’ explicit accounts of the disputed events to consider the threshold issue of capacity, Mr. Duvall makes the same mistakes the trial court did.

For example, Mr. Duvall argues that the trial court correctly inferred consent from “unrebutted testimony from Duvall that when he asked her if she wanted to have sex, she explicitly consented.” Br. of Resp’t at 3. But if Ms. Nelson was too intoxicated to consent as a matter of law, then any verbal approval she may or may not have given to Mr. Duvall would be irrelevant. Similarly, Mr. Duvall makes much of the fact that Ms. Nelson “admitted that she cannot remember whether she consented or not.” *Id.* at 23 (“And most significantly of all, when asked if she was able to testify that she did *not* consent to sex, Nelson admitted that she could *not* say that; she agreed that it was “true” that ***she could not say that she did not give her consent.***”) (quoting RP 37). But in this context, an inability to recall whether she gave consent does not negate a

petitioner's allegation that she lacked the mental capacity to consent. To the contrary, and as detailed below, her memory loss calls her lucidity at the time of intercourse into serious question.

By the same token, Mr. Duvall misses the point in accusing Ms. Nelson of requiring the trial court to "disbelieve Duvall's testimony." Br. of Resp't at 30. The reliability of Mr. Duvall's testimony is not the issue; the question, rather, is whether the words and actions he described as indicative of consent had any legal significance given Ms. Nelson's compromised mental state. And while this Court is bound by the trial court's credibility determinations, the trial court's deference to Mr. Duvall was more than a mere credibility determination; it was an error of law subject to *de novo* review. See *In re Knight*, 178 Wn. App. 929, 937, 317 P.3d 1068 (2014).<sup>2</sup>

**D. The Trial Court Committed Reversible Error in Failing to Consider Ms. Nelson's Capacity to Consent.**

Regardless of whether the record might have supported a hypothetical finding of capacity, the trial court's failure to make such a finding requires reversal. In light of the undisputed evidence of Ms. Nelson's blackout, the trial court's failure to examine her capacity to

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<sup>2</sup> Similarly, Mr. Duvall faults Ms. Nelson for failing to assign error to the court's "factual finding" of consent, Br. of Resp't at 19, and in so doing, he ignores the legal errors underlying the trial court's finding of consent, to which Ms. Nelson did assign error. Br. of App't at 2.

consent reflects a fundamental misunderstanding of consent within the context of Sexual Assault Protection Order (“SAPO”) proceedings.

Mr. Duvall grossly mischaracterizes Ms. Nelson’s position on lack of memory and nonconsent. Nowhere in Ms. Nelson’s opening brief does she propose an “automatic formula that equates a subsequent lack of memory with a previous lack of agreement,” *see* Br. of Resp’t at 28, or even “a presumption of nonconsensual sex flowing from an inability to recall what happened,” *see id.* at 3. But nor should a petitioner’s inability to recall having intercourse create a presumption of consent whenever the respondent claims it was consensual—and by the trial court’s logic, it does exactly that. Upon noting that Ms. Nelson had no memory of the events at issue, the trial court adopted Mr. Duvall’s account and ended its analysis, sending a dangerous message to would-be assailants whose victims are too incapacitated to testify against them.

While a lack of memory is not dispositive in this context, it may be indicative of a lack of capacity, and as such, it warrants an inquiry into the petitioner’s mental capacity as a threshold matter. Contrary to Mr. Duvall’s contentions, having no memory of intercourse due to alcohol consumption bears no resemblance to agreeing to “spend a Saturday afternoon cleaning the attic or washing the dog” and then merely “forget[ting]”—comparisons that trivialize the experiences of sexual assault survivors. *See* Br. of Resp’t at 28. Unlike an ordinary lapse in memory, an alcohol-induced blackout casts doubt on an individual’s ability to enter into a “freely given agreement,” as it evinces a substantial

degree of intoxication. *See* RCW 7.90.010(1) (defining consent with reference to “freely given agreement”); RCW 9A.44.010(4) (“Mental incapacity” may be “produced by . . . the influence of a substance . . .”). As such, an alcohol-induced blackout in this context necessitates a factual inquiry into the petitioner’s capacity to consent.

Here, rather than undertake such an inquiry, the trial court ignored the legal significance of Ms. Nelson’s blackout altogether. To add insult to injury, the court addressed Ms. Nelson’s blackout by adopting Mr. Duvall’s account of the disputed facts—providing *carte blanche* to an assailant by virtue of his victim’s debilitating intoxication. In so doing, the court committed a legal error subject to *de novo* review. *See In re Knight*, 178 Wn. App. at 937.

**E. The Trial Court Also Committed Reversible Error in Denying a SAPO on the Basis of Ms. Nelson’s Intoxication.**

Mr. Duvall’s revisionist approach also fails to address another serious legal error underlying the trial court’s ruling—the trial court’s reliance on Ms. Nelson’s intoxication.

Mr. Duvall cites two reasons for his contention that the trial court did not deny Ms. Nelson’s petition on grounds that she was voluntarily intoxicated, in violation of RCW 7.90.09(4). First, Mr. Duvall makes much of the fact that the trial court’s commentary on the perils of alcohol took place after the trial court had indicated that it would deny Ms. Nelson’s petition. Br. of Resp’t at 24-25. Second, Mr. Duvall argues that the trial court did not deny Ms. Nelson’s petition on account of her

intoxication because it did not explicitly acknowledge that it was doing so. *Id.* at 25 (“[N]owhere in the course of this ruling did the trial judge state that intoxication ‘was one of the reasons it denied her petition’”). Neither of these arguments is persuasive.

First, Mr. Duvall draws a false distinction between the trial court’s “ruling” and its “remarks” on the dangers of alcohol. *See* Br. of Resp’t at 24. The court provided explanatory comments both before and after stating that it was dismissing the case, with no clear demarcation between the ruling and the explanation. RP 87:24-90:9. In fact, after announcing that he was dismissing the case, but prior to lecturing Ms. Nelson on the perils of drinking while being a “good-looking lady,” the trial judge said, “No. I’m not done,” indicating that his commentary on alcohol was of a piece with his ruling. RP 89:22; *see also* RP 90:4-8 (referring to commentary on alcohol as “*another factor* in this case that I think was something that is unfortunate”) (emphasis added).

Moreover, regardless of the timing of the court’s commentary relative to its ruling, the court’s admonition that “[a]lcohol’s not good, especially when you’re a good looking lady running around on the campus” reveals a bias that tainted the entire proceeding. *See* RP 90:4-5. A far cry from a mere “fatherly observation,” *see* Br. of Resp’t at 41, the trial court’s commentary is tantamount to an accusation that Ms. Nelson “asked for it.”

Mr. Duvall draws another false distinction in arguing that the trial court’s ruling was based on consent and not on intoxication. *See* Br. of

Resp't at 25 ("the trial judge gave one reason and one reason only — he found that the sexual intercourse was consensual"). As Mr. Duvall must admit, the trial court's finding of consent was predicated on Ms. Nelson's lack of memory. RP 88 ("[B]ecause the only evidence the Court really has that goes to [consent] is from the defendant in this case, the Court finds that there was consent, at least at one point in time"); *see also* Br. of Resp't at 25 ("He first summarized the testimony that he had heard, noting that Nelson had no memory of what happened, and that Duvall 'on the other hand' did have a memory of the incident.") (citing RP 87-88).

Because the trial court looked no further than Ms. Nelson's alcohol-induced blackout in finding that the intercourse was consensual, Mr. Duvall draws a distinction without a difference in arguing that the trial court's ruling was based on a finding of consent and not on Ms. Nelson's intoxication. Because the trial court effectively denied Ms. Nelson's petition on account of her intoxication, its ruling cannot stand. *See* RCW 7.90.090(4) ("Denial of a remedy may not be based, in whole or in part, on evidence that...the petitioner was voluntarily intoxicated.").

### **III CONCLUSION**

For the foregoing reasons, this Court should reverse the trial court's ruling and remand for a determination of Ms. Nelson's mental capacity to consent to intercourse. Ms. Nelson also asks the Court to provide guidance to the trial court on the proper interpretation of the



