

No. 73607-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In Re:
 LEANNE HARRIS,
 Respondent,
 v.
 JASON HARRIS,
 Appellant.

CORRECCTED BRIEF OF RESPONDENT

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I. INTRODUCTION

The matter comes before the court on an appeal from a Domestic Violence Order for Protection which was entered on April 14, 2015, by Commissioner Melinda Johnson-Taylor. The matter was originally filed and a Temporary Order for Protection was first issued on October 15, 2014. After a hearing on November 19, 2014, at which the court allowed both parties to testify, the court asked Ms. Harris's counsel to provide the police records relating to the issue at hand. Once those records were available to the court, and after full opportunity for respondent to respond in writing to those records, the final Order for Protection was issued on April 14, 2015. The trial court committed no error in entering the Order for Protection, and this Court should find that no error occurred. This Court should also award attorney's fees to respondent.

II. RESPONSE TO APPELLANT'S ISSUES ON APPEAL

1. The trial court did not err by striking evidence of taped conversations between the parties offered by appellant when that evidence had been illegally obtained and was not self-authenticating.

2. The trial court did not err by excluding testimony in the form of declarations by children under the age of eighteen.

3. The trial court did not err by excluding additional testimony by Mr. Harris at the April 2015 hearing regarding sexual

promiscuity or alleged acts of respondent, such as bigamy and her immigration status, because such testimony is barred under ER 412, and thereby barred under ER 1101.

4. The court did not err when it limited testimony at the April 2015 hearing when both parties testified at the hearing in November 2014.

5. This Court should find this appeal to be frivolous and order appellant to pay respondent's attorney's fees.

6. If this Court does not find the appeal frivolous, appellant should be ordered to pay respondent's reasonable attorney's fees as per RCW 26.50.060 (1)(g).

III. STATEMENT OF THE CASE

The parties met through a Christian dating website on August 10, 2014, and met in person for the first time on August 13, 2014. CP 62-63; CP 136-137. Jason¹ first proposed to Leanne in late August, 2014, and she said "yes" to him at the end of September, 2014. CP 137-138. They were married on October 1, 2014, in front of a judge at the Bellevue District Court. CP 64; CP 138. Prior to the marriage, Leanne told Jason that her work visa had expired, that she was in the country illegally, and that, because she could not work, she had no money. (CP 36; CP 63; CP 146).

¹ For ease of narrative I will refer to appellant as "Jason" and respondent as "Leanne". No disrespect is intended to either party.

Leanne also told Jason that she was practicing celibacy. The parties agreed they would be married in a civil ceremony, but that they would not have sex until they were married in a church in New Zealand (where Leanne's parents lived) because of their religious beliefs. CP 138; CP 205; CP 214; CP 263-264. Immediately after the marriage Jason became increasingly belligerent, suspicious, and controlling of Leanne. On October 5, 2014, Jason raped Leanne. CP 5; CP 139-140; CP 263-268. On October 11, 2014, Jason moved out of the home he shared with Leanne. CP 69.

Leanne filed a Petition for Order for Protection on October 15, 2014, alleging the rape and Jason's intimidating behaviors after they were married as a basis for relief. CP 1-7.

Jason responded to the Petition by filing a Declaration in which he claimed he knew Leanne's visa had expired prior to the marriage, but "[a]fter performing some online research *the day following our marriage* I learned expired visa's translate to mean illegal immigrant status...." CP 63 (emphasis added). However, he told police on Thursday, November 13, 2014, "*he did not realize (before the marriage)* that Leanne was on an expired work visa and that [she] was completely broke and had no way to make a living...." CP 265 (emphasis added). Jason also claimed Leanne only married him to stay in the country (CP 63), but rather than trying to

nurture the marriage, "[a]s soon as we moved in together...[Leanne] began to be extremely verbally abusive towards myself and my children, and physically towards me on one occasion." CP 64. According to Jason, despite this bad behavior on her part, suddenly Leanne came on to Jason and wanted sex five days after the marriage. CP 64. This, despite the testimony by pastor Kerry Smith that both Jason and Leanne had talked to her that very day about their keeping their vow of celibacy. CP 214. These are just some of the inconsistencies in Jason's statements throughout the proceeding and police investigation about what happened between the time the parties met and when the rape occurred on October 5, 2014.

In his response declaration dated November 15, 2014, Jason included what he claimed were five transcripts of conversations he had with Leanne between the October 5th rape and October 19, 2014. CP 77-116. The original tapes of the conversations were not provided to the court. Only one of the transcripts, dated October 19, 2014, had any indication within the transcribed conversation that Leanne knew the conversation was being recorded. CP 114. Jason claimed Leanne knew that he was taping the conversation because he had told her he was taping their conversations, and because his phone was visible during the conversation. He also claimed he told her he was recording the conversations before he started the recording. RP 11-13. The court

allowed the transcript from October 19, 2014. However, the court did not consider the other transcripts because there was no indication within the transcribed conversation that Leanne knew the private conversation was being recorded. RP 14.

Jason submitted declarations from his children, Keeley Harris (fifteen years old at time of declaration) and Kieren Harris (seventeen years as of the hearing date). The commissioner noted the court's long-standing rule to not consider declarations from children in circumstances involving their parents. RP 4-5. However, it is unclear from the report of proceedings whether or not this testimony was actually excluded.

At the conclusion of the hearing on November 19, 2014, the commissioner asked counsel to provide copies of the police records. Once those records were produced, the court held another hearing on April 14, 2015. At the hearing, and in a declaration filed just prior to the hearing (CP 497-504), Jason attempted to bring up a number of allegations against Leanne, including claims she had committed bigamy; had lied about her celibacy; and that she had committed a number of "illegal" acts. The court did not allow additional testimony at that hearing.

After review of the police record and additional argument of counsel, the court found Leanne's testimony had been consistent throughout the process, including her statements to the police, and that

Jason's statements had been inconsistent. Based on this evidence, the commissioner found domestic violence had occurred and issued the Order for Protection protecting Leanne (CP 544-549); an Order to Surrender Weapons (CP 550-551); and a Judgment for Attorney's Fees (CP 543).

On April 23, 2015, Jason's attorney filed a Motion for Reconsideration. CP 559-583. That motion was denied. CP 597-598. This appeal was filed on June 17, 2015, but Leanne did not know it had been filed until this court issued a perfection letter on July 24, 2015, and copied Leanne's attorney. Leanne still has not been served with a Notice of Appeal.

V. ARGUMENT

A. **The standard of review for a trial court's interpretation of the rules of evidence is "*de novo*", and the decision to include or exclude evidence is reviewed for "abuse of discretion."**

Jason argues that the commissioner improperly refused to consider transcripts of purported conversations he had with Leanne; and improperly refused to allow Jason to testify at the April 15, 2015, hearing. Interpretation of a court rule is a question of law, subject to *de novo* review. *Nevers v. Fireside, Inc.*, 133 Wash.2d 804, 809, 947 P.2d 721 (1997). In determining the meaning of a court rule, the court should apply the same principles used to determine the meaning of a statute. *City of Bellevue v. Hellenthal*, 144 Wash.2d 425, 431, 28 P.3d 744 (2001).

Foremost, the court should consider the plain language of the rule and construe the rule in accord with the intent of the drafting body. *See id.* If the rule's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wash.2d 359, 367, 89 P.3d 217 (2004); *Gourley v. Gourley*, 158 Wn.2d 460, 466, 145 P.3d 1185 (Wash. 2006).

Once the issue of interpretation is resolved, "the trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *State v. DeVincentis*, 150 Wash.2d 11, 17, 74 P.3d 119 (2003). An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. *State v. Dixon*, 159 Wash.2d 65, 75-76, 147 P.3d 991 (2006). A decision rests on untenable grounds if it " ' rests on facts unsupported in the record or was reached by applying the wrong legal standard.' " *Id.* at 76, 147 P.3d 991 (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003)). A decision is manifestly unreasonable if it adopts a view that no reasonable person would take. *Id.*

B. ER 1101 is a permissive evidence rule and does not require the commissioner to consider evidence that is inadmissible in other proceedings.

ER 1101(c) states:

- (c) **When the Rules Need Not Be Applied.** The rules (other than with respect to privileges, the rape shield statute and ER 412) need not be applied in the following situations....:

(4) *Applications for Protection Orders.* Protection order proceedings under RCW...26.50....

ER 1101(c)(4). The plain language "need not be applied" makes the rule a permissive rule. The commissioner had the full authority to consider or not consider evidence as it is presented in a protection order hearing. Here she properly excluded evidence that was wildly improper under the rules of evidence and the standards of the court.

1. It was within the discretion of the Court to exclude the purported transcripts of private conversations between Leanne and Jason.

In this case, the purported transcripts of conversations between Jason and Leanne are illegal under Washington Law. Washington's Privacy Act, chapter 9.73 RCW, prohibits recording of any "[p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation." RCW 9.73.030(1)(b). The statute requires any consent to be part of the recording. RCW 9.73.030(3).

Evidence obtained in violation of the act is inadmissible for any purpose in any civil or criminal trial with certain exceptions not applicable here. RCW 9.73.050; *State v. Roden*, 179 Wn.2d 893, 899, 321 P.3d 1183 (2014). There are four prongs to consider when analyzing alleged violations of the privacy act. There must have been (1) a private communication which was (2) recorded by use of (3) a device designed to record and/or transmit (4) without the consent of all parties to the private

communication. *State v. Christensen*, 153 Wn.2d 186, 192, 102 P.3d 789 (2004) (citing RCW 9.73.030).

In this case, there is no question that the conversation between newlyweds about a sexual act would be considered private by any reasonable person. The recording of it without any indication within the recording that Jason informed Leanne that the conversation was being recorded renders the communication illegal under Washington's Privacy Act, and, therefore, inadmissible.

Besides being illegally obtained, the original recordings were not made available to the court or to Leanne's attorney. The "conversations" were transcribed by someone who did not know Leanne and could not have known if it was Leanne's voice on the recording. In addition, there was no way to tell from the transcript whether the recording had been modified from the original. "To prove the content of a...recording..., the original...recording...is required." ER 1002. A duplicate, such as a transcript, is only admissible if there is no question raised as to the authenticity of the recording. ER 1003. Leanne did raise the issue of authenticity in her Objection to Evidence. CP 211-212.

Finally, the context and timing of the conversations - very shortly after the parties were married, and after the husband had said he was leaving the marriage - makes any statement made by either party about the sex act suspect because the conversation was about the survival of the marriage, not about whether or not the husband had raped his wife.

Given all of these reasons why the evidence was inappropriate, it was within the commissioner's discretion to exclude it.

2. It was within the commissioner's discretion to exclude declarations from children under the age of eighteen.

Jason submitted declarations from his children, Kieren and Keeley Harris, both of whom are under the age of eighteen years. The children did not testify about domestic violence, but about events that occurred several days after the rape. CP 42-47 and CP 55-61. It is unclear from the hearing transcript whether or not the commissioner considered the declarations, though she did point out that the court had a "longstanding rule" against considering such declarations. RP 4. Local rules state that declarations of minors are "disfavored" in King County. KCLFLR 6(e)(2). Excluding the irrelevant testimony of minors was appropriate and within the commissioner's discretion.

- C. **The evidence appellant offered in Jason's Declaration dated April 6, 2015, and which he wanted to testify about at the April 2015 hearing, was inadmissible under ER 412 and, therefore, was also inadmissible under ER 1101.**

Eight days before the hearing set for April 14, 2015, Jason filed a declaration in which he made myriad new claims about Leanne. He claimed she had not been celibate before their marriage, that she had myriad relationships with other men, and that she continued to have relationships with other men after their marriage. CP 499; CP 501. He

claimed Leanne had committed bigamy by marrying two other men, and that she had never divorced either of them. CP 501. He did not provide a copy of this declaration to Leanne until the day of the hearing and she was unable to object to it until the hearing itself.

This evidence was presented solely to show Leanne's other marital and sexual behavior and/or sexual promiscuity. This type of evidence is strictly forbidden under ER 412.

"The following evidence is not admissible in any civil proceeding involving alleged sexual misconduct...:

- 1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.
- 2) Evidence offered to prove any alleged victim's sexual predisposition."

ER 412(b). While there are exceptions to the rule, there is a specific procedure to determine whether the evidence is admissible which Jason did not follow. ER 412 (c) and (d). Evidence inadmissible under ER 412 remains inadmissible under ER 1101. ER 1101(c) ("The rules (other than with respect to...ER 412) need not be applied in the following situations..."). The commissioner correctly found such evidence was inadmissible and properly excluded the declaration and Jason's testimony on these issues at the April hearing.

D. The court allowed testimony at the November 2014 hearing and was not required to allow additional testimony at the April 2015 hearing.

Appellant has asked this Court to find the commissioner erred when she did not allow additional testimony at the April 14, 2015,

hearing. The commissioner did allow both parties to testify at the November 17, 2014. The commissioner had received and considered a declaration from Jason that addressed the issues he complains he was not allowed to testify to at the April hearing.

The issue of due process and the adequacy of a 26.50 Domestic Violence hearing was addressed in *Gourley v. Gourley*, 158 Wn.2d 460, 467-70, 145 P.3d 1185 (2006). In that case, the respondent claimed his due process rights had been violated because he was not allowed to cross-examine the petitioner. The Washington Supreme Court said:

"...RCW 26.50.070(1) explains that where appropriate, the court can grant an ex parte temporary order for protection, "pending a full hearing." "A full hearing, as provided in this chapter, shall be set for not later than fourteen days from the issuance of the temporary order" RCW 26.50.070(4).

However, no section of chapter 26.50 RCW explicitly sets forth the form the hearing must take or defines what is meant by "full hearing." When the term is used, it is juxtaposed against the "ex parte" hearing necessary for a temporary protection order. RCW 26.50.020, .070(1), (4). Therefore, nothing in the statutory scheme explicitly requires a trial judge to allow the respondent in a domestic violence protection order proceeding to cross-examine a minor who has accused him of sexual abuse.

Here, the commissioner did not abuse his discretion when he determined that cross-examination was unnecessary. The commissioner had ample evidence with which to make his determination, including Mr. Gourley's admission that he rubbed aloe vera on N.'s naked body. Thus, the need to cross-examine N. was obviated because Mr. Gourley himself confirmed N.'s declaration. Mr. Gourley's due process rights were not violated.

Id.

As in *Gourley*, the commissioner had voluminous declarations and police reports, she had allowed the parties to testify in the previous hearing, and she had made it clear the purpose of the April 2015 hearing was to review the police records and determine whether or not domestic violence had occurred and, if so, to enter a permanent Order for Protection. The evidence Jason wanted to testify to was inadmissible under ER 412. It was well within the court's discretion to exclude the testimony and deny Jason's request to allow testimony at the second hearing.

E. This appeal is frivolous and this Court should require appellant to pay respondent's attorney's fees and costs for having to respond to it.

RAP 18.9 allows the court to require a party to pay "terms or compensatory damages to any other party" if it finds a party "files a frivolous appeal or fails to comply with [the Rules of Appellate Procedure]." RAP 18.9(a). "A frivolous appeal is one which, when all doubts are resolved in favor of the appellant, it so devoid of merit that there is no chance of reversal." *Fidelity Mort. Corp. v. Seattle Times Co.*, 131 Wn.App. 462, 473, 128 P.3d 621, (Div. 1 2005). Appellant failed to serve respondent with the Notice of Appeal. Appellant's brief was unclear as to which issues he was appealing, and he failed to raise any issue on appeal about evidentiary rulings made by the commissioner that had any chance of reversal. This Court should require appellant to pay attorney's

fees and costs incurred by respondent in responding to this frivolous appeal.

F. If this Court does not find the appeal to be frivolous, it should order appellant to pay respondent's attorney's fees and costs pursuant to RCW 26.50.060 (1)(g).

In a domestic violence action under RCW 26.50, the court can "[r]equire the respondent to...reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees...." RCW 26.50.060(1)(g). The commissioner determined it was appropriate to award attorney's fees to Leanne in the lower court. CP 543. This appeal has been an expensive ordeal for her, and, given her inability to support herself due to her immigration status, this Court should also award reasonable attorney's fees. Leanne has filed an affidavit of financial need pursuant to RAP 18.1(c).

V. CONCLUSION

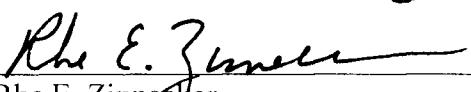
For the reasons stated above, this Court must:

- 1) Deny appellant's request for a reversal of the commissioner's April 14, 2015, decision to enter the Order for Protection, to enter a judgment for attorney's fees against appellant, and to enter an Order to Surrender Weapons.
- 2) Find appellant's appeal to be frivolous and order him to pay respondent's reasonable attorney's fees and costs pursuant to RAP 18.9(a).

3) If there is no finding of a frivolous appeal, then this Court should order reasonable attorney's fees and costs pursuant to RCW 26.50.060(1)(g).

DATED this 4th day of March, 2016.

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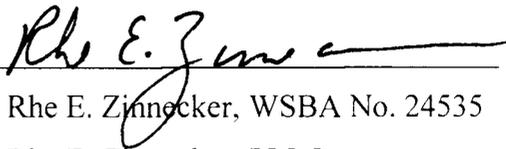
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CERTIFICATE OF MAILING

The undersigned now certifies that the foregoing CORRECTED BRIEF OF RESPONDENT and a copy of the FINANCIAL DECLARATION OF LEANNE HARRIS (to conform with what was filed with the court) was served on the following:

Stephen Pidgeon
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by first class mail, postage prepaid, this 4th day of March, 2016.

By 

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