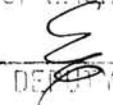


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STATE OF WASHINGTON

No. 44477-1-II

BY  \_\_\_\_\_  
DEPUTY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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J.C.,  
Appellant,

v.

S.C.,  
Respondent.

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REPLY BRIEF OF APPELLANT J.C.

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ORIGINAL

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## **I. NATURE OF PROCEEDING**

J.C filed the Appellant's opening brief. Respondent has filed her brief. This brief is in Reply to Respondent's brief.

## **II. FACTS.**

The appellant, J.C., previously set forth his statement of the case, and by reference incorporates that Statement of Facts in this Reply brief.

## **III. ARGUMENT**

**3.1 Respondent has incorrectly defined the issues raised by J.C. in her responsive brief.** The issues that have been raised by J.C. are quite simple. The sole ultimate issue in this appeal, is whether or not ER 412 and RCW 7.90.080 prohibit the introduction of the testimony of J.C. and S.C. in the initial evidentiary hearing before Pro Tem Commissioner Martin Meyer.

On December 19, 2012, a full Sexual Assault Protection Order (SAPO) evidentiary hearing was held before Pro Tem Commissioner Martin Meyer. Only S.C. and J.C. testified. These two juveniles were the only participants on the day of the incident in question, November 8, 2012. The ultimate issue before the Commissioner was whether or not there was a consensual or non-consensual touching of J.C.'s penis by S.C.

J.C. and S.C. had discussed each other's intimate sexual experiences with two other persons, K. and A., respectively, on the school bus throughout the fall of 2012. (ERP at 104). Neither K. nor A. gave any testimony as third parties about their sexual relations with J.C. and S.C. at the evidentiary hearing. Third party testimony by either K. or A. would have clearly been inadmissible, had they been called as witnesses.

As the Commissioner correctly observed:

“COURT: I think it is directly relevant here to these proceedings both as a matter of what exactly happened and number two just establishing some credibility with the witness. I understand that under the statute that sexual activity is not generally admissible for the respondent but it's part and parcel of what gave rise to this whole proceeding so I don't think I can ignore it in this context.” (ERP at 23).

This was the obvious and correct ruling under the specific facts of this case. To exclude the conversations between S.C. and J.C. would be nothing short of a fraud upon the court. The first analysis is whether or not the evidence is relevant to what happened on November 8, 2012. (See ER 401, 402, 403). The conversations were about sexual experiences with other people. The subject matter was initiated between S.C. and J.C. One obvious inference that can be drawn from these conversations, was that each witness was comfortable sharing their past sexual intimate experiences with one another. This clearly sets a foundation for each person to assume that sexual contact might occur between S.C. and J.C. A

fact finder would literally be hamstrung from making a decision on the ultimate issue of consent, without this testimony.

No third party or other extrinsic evidence was offered in the evidentiary hearing regarding past sexual conduct by S.C. or J.C. with third parties. The testimony is obviously the key evidence that had to be heard by the fact finder to decide the issue of consensual/non-consensual behavior between S.C. and J.C. J.C. asked S.C. to have sex with him and she declined. No sexual contact occurred between the two witnesses, after J.C. accepted her declination. (ERP at 143). The SAPO statute does not apply. The SAPO statute allows evidence of past sexual conduct between the parties if the evidence is either constitutionally required to be admitted, or if the probative value of the evidence outweighs the danger of unfair prejudice to a party. RCW 7.90.080(10(b)); RCW 7.90.080(2). In the instant case, there was no previous sexual contact between the parties, which is an additional reason these provisions of the SAPO statute do not apply.

If the Superior Court decision was correct, the evidentiary hearing would be reduced to (1) allowing each witness to identify themselves, (2) allowing the witnesses to testify they were together at J.C.'s grandpa's house on November 8, 2012, and (3) allowing S.C. to testify that J.C. forced her to touch his penis, and (4) allowing J.C. to testify that S.C. was

not forced to touch his penis, and that S.C. did not touch his penis. This is a completely absurd result, belies any notion of fairness or justice, and the Court of Appeals should have no trouble overruling the Superior Court Judge's decision.

The SAPO statute and ER 412 never come into play within the evidence offered in this case by both parties. Even though the rape shield statute was not addressed in the evidentiary hearing, Judge Hirsch ruled it was violated. The rape shield statute does not apply for the same reasons as ER 412 and RCW 7.90.080 do not apply.

Respondent's reliance on *State v. Hudlow*, 99 Wn. 2d 1, 659 P.2d 514 (1983) is misplaced. This case involved interpreting the "Rape Shield Statute." The proffered testimony in *Hudlow* had to do with the victims' previous sexual intercourse and oral sex with numerous sailors and other past roommates. The history of prior sexual conduct with other persons, not the defendants, is obviously far different than the testimony between S.C. and J.C. The proffered testimony in *Hudlow*, which the Supreme Court ruled inadmissible, was extrinsic evidence about third parties and understandably highly prejudicial, when the balancing test of ER 403 was utilized.

The excluded evidence in *Hudlow*, if admitted, would have turned the evidentiary portion of the trial into a debate of whether or not the two

female victims were “whores.” (See *Hudlow, Id.* at 5.) This clearly would amount to “prejudice” which could have misled the jury from consideration of the case on the testimony between the parties. The excluded evidence was not conversations between the alleged victims and the defendants in *Hudlow*. This is clearly distinguishable from this case on appeal. This is analogous to the situation previously discussed, regarding calling A.F. as a third party witness to testify about sex with S.C., which was not done, and would have been clearly inadmissible under ER 412 or the SAPO statute.

**Unfair prejudice.** Respondent argued, and Judge Hirsch ruled, that there was unfair prejudice to S. C. by allowing the testimony at issue. Both the Judge and Respondent misunderstand what the concept of unfair prejudice encompasses. All evidence is “prejudicial” to the extent it harms the testifying party. To constitute “unfair prejudice”, it must be irrelevant or collateral to the issues before the fact-finder:

“Rule 403 authorizes the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” Nearly all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another. This is not the sense in which the term “prejudice” is used in Rule 403. Nothing in Rule 403 authorizes the exclusion of evidence merely because it is “too probative.” (Emphasis added).

*5 Wash. Prac., Evidence Law and Practice §403.3 The balancing process – Unfair Prejudice*

In exercising the Court's discretion, the *Hudlow* court stated the following:

“These considerations—the integrity of the truthfinding process and defendant's right to a fair trial—should be the factors considered by the trial court in exercising its discretion to admit or exclude the evidence.”

*State v. Hudlow, supra.*, at 14.

As was previously stated, to exclude the conversations between S.C. and J.C. leading up to and subsequent to the activities at J.C.'s grandpa's house would be nothing less than a fraud upon the Court to determine the ultimate facts. What is clearly relevant is what happened, and what was discussed between the parties on November 8, 2012. (See ER 401, 402, 403.) The Superior Court's decision simply concluded that all the relevant evidence should be excluded or disregarded, and the total evidence for the fact finder be limited to just a very few statements by the two litigants, about non-consensual or consensual conduct. None of the evidence excluded by the Superior Court was provided by anyone but S.C. and J.C. None of the excluded evidence was extrinsic, or provided by third persons who were not litigant parties.

If A.F. had appeared as a witness, to establish his sexual relationship with S.C. for the purpose of establishing sexual predisposition of S.C., this would clearly be excludable under ER 412 or RCW 7.90.080,

the SAPO statute. S.C., as the alleged victim, is not afforded the opportunity under the rules of evidence to testify as to what occurred between her and J.C. on November 8, 2012, and then say, none of this is relevant and should be excluded. This result would be absurd and would be a fraud upon the court. The Superior Court was wrong as a matter of law.

**Use of RCW 7.90.080.** The same reasoning that is set forth above regarding ER 412 is applicable to the SAPO statute. The SAPO statute allows evidence of past sexual conduct between the parties if the evidence is either constitutionally required to be admitted, or if the probative value of the evidence outweighs the danger of unfair prejudice to a party. RCW 7.90.080(1)(b); RCW 7.90.080(2). In this case, there was no previous sexual contact between the parties, which is another reason this provision of the SAPO statute does not apply.

The faulty premise of the Superior Court Judge was based on the erroneous assumption that sexual contact between both parties with *other persons*, brought the SAPO statute into play. The SAPO statute does not apply to testimony of the two litigant parties as to one another.

Judge Pro Tem Meyer stated the situation accurately when he made the following ruling:

“COURT: I think it’s directly relevant here to these proceedings both as a matter of what exactly happened and number two just establishing some credibility with the witness. I understand under the statute that sexual activity is not generally admissible for the respondent but it’s part and parcel of what gave rise to this entire proceeding so I don’t think I can ignore it in this context.”

(ERP at 23.)

The decision of the reviewing Superior Court Judge is wrong as a matter of law, and should be reversed.

**4.2 The Trial Judge’s exclusion of all testimony of both parties about sexual relations with third parties was “arbitrary and capricious.”**

In addition to being wrong on the evidence rules and the SAPO statute concerning relevant evidence, the ruling of the trial Judge was “arbitrary and capricious.” The Court abuses its discretion if the decision is manifestly unreasonable or is made on untenable grounds. *State v. Ray*, 167 Wn. 2d 644, 222 P.3d 86 (2010). The trial court must exercise its discretion in conformity with the law. *State v. Grayson*, 154 Wn. 2d 333, 336-7, 111 P.3d 1183 (2005).

For the foregoing reasons, that the Court clearly applied the evidence rules contrary to the law, its decision was an “abuse of discretion.”

**4.3 The reviewing Superior Court Judge erred by ignoring the credibility finding of Pro Tem Judge Meyer.**

Pro Tem Judge Meyer made a specific Finding of Fact regarding the credibility of the testimony of S.C. and J.C. (RP at 187). Pro Tem Judge Meyer was able to observe the two witnesses first hand giving live testimony under oath. The Superior Court Judge's review is confined to the record on appeal. *In Re Marriage of R.E., supra*, 183 P.3d 339, 144 Wn. App. 393, at 406 (2008).

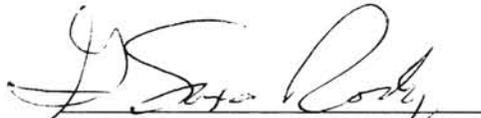
Judge Hirsch did not have the ability to determine credibility of the witnesses on a record appeal. The credibility of witnesses is usually within the sole province of the fact finder, whether it be a jury or judge. *Bale v. Allison*, 294 P.3d 789 (2013), \_\_\_\_ Wn. App. \_\_\_\_.

In this case, the Superior Court just ignored this aspect of the proceeding it was reviewing. Even in a "de novo" review on the record, there is no legal authority allowing the reviewing court to simply ignore this part of the evidentiary hearing process. This case clearly had to turn on the fact finder's observations of the credibility of S.C. and J.C. The failure of the trial Judge to exercise any discretion on this issue, is an "abuse of discretion". A court's failure to exercise its discretion is an abuse of discretion. *Hook v. Lincoln County Noxious Weed Control Board*, 166 Wn. App. 145, 269, P.3d 1056 (2012).

**V. CONCLUSION**

In conclusion, the Superior Court reviewing judge erred as a matter of law when she excluded all evidence regarding the conversations between the litigant parties. The decision of the Superior Court reviewing judge was arbitrary and capricious and should be reversed, and the Order of Pro-Tem Commissioner Meyer reinstated.

Respectfully submitted this 19th day of June, 2013.

  
G. Saxon Rodgers, WSB#5798  
Attorney for Appellant J.C.

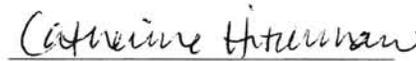
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery, as noted below, of a true and correct copy of the foregoing document to:

Amy Perlman  
Madison Law Firm, PLLC  
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Olympia, WA 98502  
Attorney for Respondent S.C.

*via email and ABC-LMI*

DATED at Olympia, Washington, this 19th day of June, 2013.

  
Catherine Hitchman

