

69738-2

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No. 69738-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JULIE WARE,

Appellant,

v.

JESSE NELSON,

Respondent.

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

The Honorable Judge HOLLIS R. HILL Presiding

REPLY BRIEF OF APPELLANT

Emily Cordo
WSBA # 37077
Attorney for Appellant Julie Ware
Sexual Violence Law Center
2024 3rd Ave
Seattle, WA 98121
206.436.8611

A handwritten signature in black ink is written over a vertical stamp. The stamp contains the text "FILED" at the top, "JUL 13 2024" in the middle, and "CLERK OF COURT" at the bottom. The signature is a large, stylized loop.

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I. INTRODUCTION

Sexual Assault Protection Order (SAPO) cases are not merely special proceedings; they are unique, even among protection orders, because of the statutory limitations on the judge's use of discretion. Statutes should not be construed in ways that make all substantial parts of it, but in order to prevent judges from disregarding all these limits on their discretion this Court must be willing to provide meaningful review of SAPO denials. In this case, the Findings of Fact/Conclusions of Law were replete with errors—such as misstatements of the record, inconsistencies between the oral ruling and the Findings, reliance on prohibited factors, etc.—but Nelson argues that they are unreviewable because they include the word ‘credibility.’ This position, if adopted by this Court, will create a loophole that swallows the statute. It should be rejected in favor of the position that the SAPO statute requires meaningful review of SAPO denials, even when the findings purport to rely on credibility.

II. ARGUMENT

A. DENIAL OF WARE'S PROTECTION ORDER VIOLATED STATUTORY RESTRICTIONS ON THE JUDGE'S DISCRETION AND AUTHORITY.

1. Judges have significantly restricted discretion in SAPO cases.

Nelson's brief cites the Division II case Hecker v. Continas to suggest that decisions in SAPO cases should be reviewed for an abuse of

discretion. 110 Wn.App. 865, 869, 43 P.3d 50 (2002); Respondent’s Brief at 21. Hecker applied an abuse of discretion standard based on the premise that granting or denying a DVPO is discretionary. Id. Although the Court did not elaborate, and its only citation was to a 1971 case about medical records, it appears the court was relying on the Domestic Violence Protection Order Act’s use of the term “may.” Hecker, 110 Wn.App. at 869; RCW 26.50.060(2).

Ware does not endorse Hecker’s premise that judges have unfettered discretion to deny DVPOs¹, but even if deference to the judge’s discretion is required for DVPOs, it is absolutely inapplicable to SAPOs. A judge would not be entitled to equivalent discretion and deference in a SAPO case, because the Sexual Assault Protection Order Act uses “shall,” not “may.” Compare RCW 26.50.070(1) (“Where an application under this section [for a DVPO] alleges that irreparable injury could result ... the court may grant an ex parte temporary order....”) and RCW 26.50.060(1) (“Upon notice and after a hearing, the court may provide relief as follows....”) with RCW 7.90.110(1) (“An ex parte temporary sexual assault protection order shall issue if the petitioner satisfies the

¹ There are exceptions to the general rule that “may” is only permissive, so Ware does not take the position that judges have the discretion to deny DVPOs even if the petitioners establish the required elements by a preponderance of the evidence. *See, e.g., Nate Leasing Co., Inc. v. Wiggins*, 114 Wn.2d 508, 522 n2, 789 P.2d 89 (1990) (noting that the use of “may” in the Ship Mortgage Act could refer to the choice of remedies under the Act, not discretion to simply not proceed under the Act).

requirements of this subsection by a preponderance of the evidence”) and RCW 7.90.090(1) (“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).²

In addition to limiting judges’ discretion by using “shall,” the Sexual Assault Protection Order Act provides that if the petitioner proves qualifying nonconsensual sexual penetration or conduct, the Judge is specifically prohibited from denying relief based on factors including:

- One or both parties were minors. RCW 7.90.090(1)(b)
- One or both parties were voluntarily intoxicated. RCW 7.90.090(4).
- The petitioner did not file a police report. RCW 7.90.090(1)(b).
- The assault did not cause physical injury. RCW 7.90.090(1)(b).
- The petitioner engaged in limited consensual sexual contact with the respondent RCW 7.90.090(4).
- The petitioner has a sexual history or reputation. RCW 7.90.080.

² If the may/shall distinction in these statutes does reflect the level of discretion, the DVPO statute is the outlier. The new stalking protection order statute would make *ex parte* relief discretionary (“Where it appears ... that the respondent has engaged in stalking conduct and that irreparable injury could result if an order is not issued immediately without prior notice, the court may grant an ex parte temporary order for protection....”), but the judge not the final order (“If the court finds by a preponderance of the evidence that the petitioner has been a victim of stalking conduct by the respondent, the court shall issue a stalking protection order”. Engrossed Substitute House Bill 1383, Sec. 10, 12, 63rd Leg., Reg. Sess., Wn. 2013 (emphasis added). Likewise, Anti-Harassment Protection Orders use the permissive “may” in the ex parte standard, and “shall” in regard to final orders. RCW 10.14.080(1), (3).

Like the use of “shall,” these restrictions distinguish SAPOs not only from other civil and criminal cases, but even from the other protection orders.

In addition to emphasizing the clear legislative intent that SAPO judges should not have unfettered discretion, and demonstrating that their decisions must be reviewable (so that those provisions do not become unenforceable and superfluous), these restrictions on judge’s discretion to deny relief serve another function. Their adoption demonstrates the legislature’s expectation that unless judges’ discretion was limited, rape myths would lead judges many to deny relief to eligible petitioners.

In advocating for a deferential standard of review and broad discretion for the judge, Nelson made a very telling comment. He argued that specific findings should not be required, and credibility findings should never be reviewed, because judges “may properly rely on their gut reactions....” Respondent’s Brief at 28. Credibility may include some intangibles, but the premise that a judge may deny a SAPO based on unspecified “gut” feelings, notwithstanding the evidence or restrictions, is absolutely antithetical to the Sexual Assault Protection Order Act.

2. Undisputed evidence of nonconsensual sexual conduct or penetration triggers the judge’s nondiscretionary duty to grant relief.

If a petitioner proves by a preponderance nonconsensual sexual penetration or nonconsensual sexual contact (as defined by the statute), the

judge shall grant relief. RCW 7.90.090(1). Of course, the preponderance of the evidence “merely means the greater weight of the evidence.” State v. Harris, 74 Wn. 60, 64, 132 P. 735 (1913). Accordingly, if the petitioner’s sworn statement (or other evidence) is sufficient to satisfy every element of the statutory definition, and no evidence is presented to dispute it, the petitioner is entitled to relief. If there is nothing to weigh against the petitioner’s evidence, it is not possible for the petitioner’s evidence to have less weight (compared to no evidence at all).

This is analogous to a default. After entering a default, a judge may only deny relief based on lack of jurisdiction or failure to state a claim upon which relief can be granted. See, e.g., Kaye v. Lowe's HIW, Inc., 158 Wn.App. 320, 242 P.3d 27 (2010). A judge is not entitled to dispute the plaintiff’s evidence or assert other defenses on the absent defendant’s behalf. Id. at 330. Likewise, if a respondent appears in a SAPO case but chooses to remain silent, rather than providing any testimony or evidence, the judge has no authority to assert objections to the evidence or other defenses on the respondent’s behalf *sua sponte*.

When considering the significance of a respondent’s strategic decision to remain silent, it is important to keep in mind the fact that this is a civil proceeding. In contrast to a criminal case, “the trier of facts in a civil case is entitled to draw an inference from [a party’s] refusal to so

testify.” Diaz v. Wn. State Migrant Council, 165 Wn.App. 59, 265 P.3d 956 (2011) (emphasis added); King v. Olympic Pipe Line Co., 104 Wn.App. 338, 355-56, 16 P.3d 45 (2000); Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976). Nelson made the strategic decision to exercise his right to withhold extremely relevant evidence (his testimony), and to avoid being cross-examined. RP 148-159. The Judge was not entitled to protect him from the downside of his own strategic decision by inferring that he disputed the pre-2012 assaults. The Judge may not have been required to infer his guilt, but she certainly had no authority to infer his innocence, raise defenses on his behalf, assume that if he had testified he would have disputed Ware’s evidence regarding the pre-2012 rapes, or assume that his denial would have been persuasive and credible enough to outweigh Ware’s evidence.

In the absence of evidence disputing the petitioner’s claim, a jurisdictional problem, or a failure to state a claim upon which relief may be granted, a judge is no longer acting as an arbiter of contested facts, and is limited to applying the law to the petitioner’s undisputed evidence. Heller v. McClure & Sons, Inc., 92 Wn.App. 333, 337, 963 P.2d 923 (1998). Heller merely clarifies that even in a non-default, when a defendant does not dispute the plaintiff’s assertion of the facts, the judge

merely applies the law to the uncontested evidence, so *de novo* review is as appropriate like it would be in a default. 92 Wn.App. at 337.

Nelson's brief does not allege that the pre-2012 rapes described by Ware, if true, fail to meet the statutory definitions of nonconsensual sexual penetration and conduct. Therefore, Nelson attempts to distinguish Heller by claiming that there is a difference between "undisputed facts" and "agreed facts," and pointing out that he did not affirmatively stipulate to Ware's facts. Respondent's Brief at 26. However, this distinction is neither found in Heller (which never uses the term "agreed facts") nor in other Washington case law (which uses the two terms interchangeably). E.g., Community Care Coalition of Washington v. Reed, 165 Wn.2d 606, 609, 200 P.3d 701 (2009); Union Enterprise, Inc. v. City of Seattle, 77 Wn.2d 190, 192-93, 460 P.2d 285 (1969); McKinnon v. Washington Federal Sav. & Loan Ass'n, 68 Wn.2d 644, 645, 414 P.2d 773 (1966).

3. Judges cannot deny SAPOs based on inferred consent.

Neither the Judge's findings nor Nelson's brief suggest that the 1989, 1991, 1993, and 2002 rapes, as described by Ware, fail to meet some element of the definitions of nonconsensual sexual penetration or conduct. The crucial question, then, is whether or not Nelson disputed each and every of these qualifying sexual assaults.

The fact that Nelson's silence resulted in him conceding Ware's evidence of every rape before 2012 is illustrated by the following questions: (1) Did Nelson personally testify that he did not rape Ware in 1989, 1991, 1993, and/or 2002 as Ware alleged? The answer is no; (2) Did Nelson present any evidence that it was not possible for him to have raped Ware in 1989, 1991, 1993, and/or 2002 as Ware alleged (*e.g.*, an alibi or evidence of impotence)? Again, the answer is no; (3) Did any witnesses testify that they had personal knowledge that Nelson did not or could not have raped Ware in 1989, 1991, 1993, and/or 2002 as Ware alleged? Again, the answer is no; (4) Did any non-party witness even present hearsay testimony that Nelson denied the specific incidences of rape in 1989, 1991, 1993, and/or 2002? Yet again, the answer is no.

Even Angela Nelson (the only source of testimony that Nelson and Ware had any consensual sexual contact,³ in the form of hearsay statements from Nelson) never testified that Nelson told her he denied any of the specific allegations of rape. Nelson's wife testified that Nelson told her that he and Ware had a sexual "affair" and a "consensual relationship," but not that he denied the assaults. RP 170-71.

³ The only other witness who claimed Ware and Nelson dated was Tisler, but Tisler never testified that the parties had a sexual relationship, he just made general claims that they "would hold hands and hug and kiss each other...." RP 136.

Judges are prohibited by the Sexual Assault Protection Order Act from denying a SAPO to an eligible petitioner based on the parties having a consensual sexual relationship. RCW 7.90.090(4) (“Denial of a remedy may not be based, in whole or in part, on evidence that... [t]he petitioner engaged in limited consensual sexual touching.”) (emphasis added). This a very reasonable restriction, because a dating relationship n now way precludes sexual assault: “Seventy-six percent of those who reported rape or physical assault in adulthood indicated that a current or former intimate partner had perpetrated the assault.” John Q. La Fond and Sharon G. Portwood, Preventing Intimate Violence: Have Law and Public Policy Failed?, 69 UMKC L. REV. 3, 4 (2000). Therefore, the Court was unjustified in denying relief based on the pre-2012 rapes due to the alleged existence of consensual contact. RP 170-71. Even if that was not primary basis for denying relief, denying a SAPO based even “in part” on these inferences of consent is prohibited. RCW 7.90.090(4). In fact, the only specific inferences the Judge was clearly entitled to make in this case was to infer that if Nelson could deny those assaults without perjuring himself he would have, rather than remaining silent. Kaye, 158 Wn.App. 320; Diaz, 165 Wn.App. 59; Olympic Pipe Line, 104 Wn.App. at 355-56.

Nelson argues that the judge was entitled to use the evidence that he and Ware dated, and his wife’s hearsay testimony that at some points in

he and Ware had consensual sex, as impeachment evidence sufficient to disprove all of the rapes. Respondent's brief at 30-33. He argues that not only was the judge right to consider it as impeachment evidence, it was appropriate for the judge to give it so much weight that it would trump the undisputed, corroborated evidence of the pre-2012 rapes, preventing Ware from proving them by a preponderance.

Leaving aside the fact that this claim of consensual sexual contact was entirely based on extremely unreliable hearsay, the other major problem with this theory is that the Judge was explicitly barred from using this hearsay-based "impeachment" to impeach Ware's denial of consent. Even though the Rules of Evidence need not be applied in SAPO hearings, per ER 1101, the SAPO statute includes its own a rape shield rule so that its application is not made discretionary by ER 1101:

No evidence admissible under this section [regarding the prior sexual activity or the reputation of the petitioner] may be introduced unless ruled admissible by the court after an offer of proof has been made at a hearing held in camera to determine whether the respondent has evidence to impeach the witness in the event that prior sexual activity with the respondent is denied. The offer of proof shall include reasonably specific information as to the date, time, and place of the past sexual conduct between the petitioner and the respondent. Unless the court finds that reasonably specific information as to date, time, or place, or some combination thereof, has been offered as to prior sexual activity with the respondent, counsel for the respondent shall be ordered to refrain from inquiring into prior sexual activity between the petitioner and the respondent. The court may not admit evidence under this section unless it determines at the hearing that the

evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice. The evidence shall be admissible at trial to the extent an order made by the court specifies the evidence that may be admitted and areas with respect to which the petitioner may be examined or cross-examined.

RCW 7.90.080(2). This creates two fundamental problems for Nelson.

First, the Judge did not engage in any of the mandatory procedures (*in camera* hearing; offer of proof; findings of sufficient specificity; determination of relevance; weighing prejudicial/probative value; and limiting the scope) that are mandatory prior to considering evidence of consensual sex between the parties as evidence impeaching a petitioner's claim that she did not consent on particular occasions.

Second, even if the court had followed the mandatory procedure, Nelson's evidence came nowhere near meeting the legal requirement of specificity as to date, time, place, or any other circumstances. Nelson's evidence that he dated and sometimes had a sexual relationship with Ware at best amounted to a claim that he had sexual affairs with her at some point in 2002 and at some point in 2011-12, with no specification whatsoever as to the date, time of day, location, etc. for even one specific incidence of consensual sexual contact.

Therefore, Nelson's argument that the judge was allowed to deny protection based on the pre-2012 assaults is incorrect both because denial of relief may not be based even "in part" on that issue, and because he

neither followed the procedural rules nor introduced the specific substantive evidence required before using evidence of consensual sexual contact for impeachment purposes. Nelson did not dispute the pre-2012 (other than this impermissible impeachment), so the Judge had no authority to infer consent or rely on the supposed impeachment value of the alleged consensual contact.

B. CREDIBILITY IS A RED HERRING IN THIS CASE.

Nelson argued, “the issue of witness credibility was pivotal in the court’s decision to deny Ware’s petition for a SAPO.” Brief of Respondent at 36. From looking at the Findings of Fact/Conclusions of Law, that would appear facially to be the case. However, reading the oral ruling makes it difficult to accept that characterization of the case.

1. The Judge’s oral ruling demonstrates that credibility was neither a sufficient basis nor the actual reason for the denial of relief .

Technically, written findings supersede an oral ruling when the two are inconsistent. State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003). However, the oral findings are arguably a better reflection of what actually motivated the Judge’s decision when she made the decision to deny relief. In this case, the Judge read thirteen declarations and heard nearly a full day of testimony from seven witnesses, yet she didn’t step down from the bench or take even a moment of quiet time to deliberate

before giving her oral ruling. RP 189-192. When Ware requested some specific factual findings, the Judge asked Nelson's attorney to prepare a draft. The resulting written Findings were entered long after the court knew that the decision was being appealed, so they reflect the interest both Nelson and the Judge had in shielding the ruling from review by casting every issue as a credibility issue. RP 196. Juxtaposing the oral and written findings demonstrates this problematic shift in several ways.

First, unlike the written Findings, in the Judge's explanation of why she was denying relief (prior to being questioned by Ware's attorney) she did not mention credibility even once. RP 194-96. Her only explanation was that Nelson's wife said she was his alibi for the night of the 2012 assault, and Ware should have produced additional witnesses regarding the 2012 assault (her neighbor and neighbor's son⁴). RP 193-94.

In accordance with Nelson's attempts to construe this case as all about Ware's credibility, his brief inaccurately asserts that the Judge found that, "Ware falsely testified that Nelson raped her on October 13." Brief of

⁴ The oral ruling places remarkable weight on the absence of these witnesses, which is both inexplicable and unfair. First, the Judge stated that she could not grant a SAPO without hearing from those witnesses, even though their testimony about the assault would have been mainly hearsay and would have been cumulative (in terms of demonstrating the timeline) with the affidavit of Rhonda Mattax, to whom Ware disclosed the rape less than 12 hours later (yet the judge did not mention Mattax at all in her oral or written analysis of this issue). Second, the weight given to their absence was particularly problematic because Ware and her attorney were not informed that third party witnesses would be allowed to testify (and that it would be a nearly full-day mini-trial rather than the more typical 30-45 minute hearing on the 13 affidavits), until after the hearing commenced. RP 5-6, 194-95

Respondent at 2. The Judge did not find that, either in the oral ruling or the written Findings. Rather, the Judge said she just wasn't sure enough of the "timing of the events, the nature of the events" without the neighbors testifying, and that, "Without [the neighbors' testimony] before the court, I cannot issue a sexual assault protection order, which is a document that has grave consequences for the person it's issued against." RP 194. In other words, neither the oral ruling nor the written Findings include a finding that Ware lied. The Judge merely said she couldn't decide whether or not the assault occurred, and denied relief out of concern for how it would affect Nelson. RP 194-96.

In sum, the transcript of the whole oral ruling offered by the judge when she denied the SAPO (prior to when Ware's attorney began questioning her) was just under two pages, used the word credibility zero times, and referenced the pre-2012 assaults zero times. RP 192-94. In contrast, the section in the Findings of Fact just about the pre-2012 period was more than three pages, mentioned credibility five times, and addressed each individual allegation of sexual assault alleged by Ware (although mostly just to state that there was "insufficient credible evidence" of each, without any explanation).

Second, after the Judge finished, Ware's counsel asked for any reasons that the judge found Nelson's wife's alibi testimony more credible

than the testimony and corroboration Ware presented regarding the 2012 rape. RP 194. The Judge did then address the issue of credibility, sort of, but her assessment of credibility was based on impermissible rape shield evidence that was never properly admitted for that purpose: “I did find the wife’s more credible because I understand that there was more to the relationship between these two individuals over the years than was shared by Ms. Ware.” RP 194; RCW 7.90.090(4). The only other issue the Judge raised at that point, purportedly as a credibility issue, was the absence of the neighbors. RP 195.

Finally, after the Judge finished her brief explanation of the credibility issue, Ware’s attorney asked the Judge why she wouldn’t grant relief based on any of the pre-2012 rapes. RP 195. In answering this question, the only reason the Judge said she found “insufficient evidence” of the previous rapes was that the Judge did not have a copy of one of the two protection orders Ware obtained against Nelson as a teenager. RP 194. The Judge’s gave the following explanation for why failing to produce the 1994 order, which expired eighteen years earlier, was a credibility issue:

[T]here’s insufficient evidence in the record for me to make a finding that there was a sexual assault in the 1990s or in the early 2000s.... [N]obody has presented me with the order from the 1994 protection order which was granted for Ms. Ware. I don’t have that before me. I don’t know why that was ordered. The only evidence that I have is that it wasn’t contested. And I don’t know whether

that was a sexual assault order or that was just an anti-harassment order, so on that basis I can't make the decision.

RP 196. These claims are reiterated in Finding of Fact 9. The problem is, even if it was reasonable to expect a party to have retained an order that expired nearly two decades earlier, both of the Judge's claims about the record were indisputably inaccurate, based on the objective evidence.

Specifically, the Judge claimed: "The only evidence that I have is that it wasn't contested," but if she had taken a moment to review the evidence before denying the SAPO, she might have remembered that this was patently false. The printout of the docket from that case states describes the final order entered in the case as: "Ord for Protection Contested." CP 9. Additionally, the Judge claimed: "And I don't know whether that was a sexual assault order or that was just an anti-harassment order." RP 196. However, the printed docket from that case clearly states: "Case type: Domestic Violence Protection." CP 9. A Domestic Violence Protection Order (DVPO) cannot be granted based on mere harassment, but requires proving by a preponderance: "Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault..., sexual assault..., or stalking." RCW 26.50.010. Those were the only justifications the court could come up with, at the time she gave her ruling, for denying the order. All of the other credibility analysis

showed up for the first time in the written Findings, after the Notice of Appeal, when the Judge adapted the draft findings Nelson prepared.

It is in this context that this Court is asked to pause and seriously consider Nelson's argument that if a finding includes the word credibility it is entitled to absolute deference, irrespective of the actual substantive content of the finding. Brief of Respondent at 27. If the court does endorse that position, it is accepting that merely by inserting the word credibility into each finding, the judge can prevent review of findings that are indisputably false (like those regarding the 1994 DVPO) or that are totally unrelated to credibility (like the issue with the neighbors).

2. The oral ruling and findings both ignore the genuine issues of credibility raised in this case, which belies its centrality to the ruling.

As both parties' Statements of the Case demonstrate, this was not even close to a "he said/she said" case, because Ware presented numerous witnesses and corroborating evidence, Nelson did not directly dispute this evidence, and Ware impeached Nelson's witnesses based on actual issues of credibility and reliability. Nevertheless, Nelson argues that "Ware's evidence that she was repeatedly sexually assaulted by Nelson for over 23 years rests on her credibility," and that the proceedings were "driven almost entirely by witness credibility." Brief of Respondent at 26, 29 (emphasis added). If that was truly the case, and this was all about

credibility, one would expect the Findings to reflect an effort to address the credibility and corroboration issues raised by both sides, yet the Findings only address the issues raised by Nelson, not any of the numerous impeachment and corroboration issues raised by Ware.

First, the Judge made no findings regarding the demeanor, tone, body language, inherent implausibility, motive to lie, etc. of any of the witnesses. To the minimal extent that she did address specific credibility issues, she made Findings about Nelson's evidence but none about Ware's. For example, she did not address the issues Ware raised regarding the parties' ability and opportunity to lie. Ware's corroborating evidence (such as the previous protection orders and relocations) mean she could not have been fabricated her narrative in 2012 when she prepared her SAPO petition. In contrast, the lack of any corroboration means that all of Tisler's testimony could have been fabricated after Nelson was arrested, and Nelson's wife's testimony was based almost entirely on what Nelson told her after she bailed him out of jail. RP 171, 178-82, 184.

A second example of this double standard relates to the only issue Nelson used to try to impeach Ware based on alleged inconsistency. Specifically, Nelson argued that it was inconsistent that Ware's affidavit said that by the time Nelson attacked her it was "getting dark," but in the courtroom she testified it was "was dark" in her apartment, and Finding 18

provided that this supposed inconsistency “undermines her credibility.” RP 48. Compare that with Nelson’s close friend, Heiko Garber, who: (1) testified that on the very same night, he had no recollection of how dark it was when he dropped Nelson off at home after their hunting trip, and (2) testified that he took Nelson home after the hunt, between 6:00 and 6:30, but also admitted that his written affidavit said they didn’t even finish hunting until 7:00. RP 128. Nevertheless, the court made no negative findings about Garber’s credibility.

Another problem was that the in the Findings ignored the absence of any basis for believing that Ware had any motivation, after ten years of avoiding contact with Nelson, to re-establish contact with him, only to fabricate and falsely disclose a rape to her friends and family, file a police report, and seek criminal charges against him. The reason the judge could not make findings impeaching Ware on this issue—which is actually material to credibility—is that Nelson presented no evidence (or any hearsay, or even any theory), to explain why Ware might do this.

Next, the Judge made no findings about Tisler’s credibility, even though he was the only witness who testified that he had any personal knowledge that Ware and Nelson ever dated, he had a substantial motivation to lie (to keep his close friend out of jail), and he was impeached in several ways: (1) he testified that Nelson agreed to entry of

the DVPO in 1994, but the Superior Court docket itself describes the hearing as “contested,” (2) he could not recall the only corroborated double-date (the trip to the fair); (3) Tisler’s only reasonably specific anecdote about seeing Ware and Nelson together was the airport incident, but that testimony was internally inconsistent (between direct and cross examination); (4) other than the airport incident, Tisler’s testimony that the parties dated was so vague that it would be impossible to either verify or disprove it, whereas Ware and Stewart’s testimony was very specific, and (5) Tisler admitted that the basis for some of his testimony amounted to, “Well, I just assume....” RP 135-37, 140-41, 144-46. Despite these issues, the Judge made no findings about Tisler’s credibility issues.

Finally, and most surprisingly if credibility was indeed central to the ruling, the Judge made no Findings regarding the impeachment of Nelson’s wife. Even more than Tisler, Nelson’s wife had obvious and extremely compelling reasons to lie about his alibi: (1) her conversation with Nelson happened right after she bailed him out of jail; and (2) the Nelsons have several children, and Nelson’s wife alleged that he would lose his job as a guard at Western State Hospital if a SAPO was entered against him, even if he was never criminally charged. RP 159-60, 170-71.

It is also strange that in a decision focused on credibility the Judge would rely so heavily on Nelson’s wife’s hearsay testimony, because her

own testimony established Nelson was so skilled at lying to her that he hid his “affair” with Ware from 2011-12, hid the 2002 “affair” from her for a decade, and offered her absolutely no evidence other than his word (*e.g.*, letters, bills, or phone records) that he and Ware had an affair. (RP 179-84) Also, it is worth noting (although the Judge failed to do so) that after his wife bailed him out of jail, and Nelson was trying to convince her that he was just a cheater, not a rapist, he said he would “do whatever it takes to make it [their marriage] work.” RP 187. Presumably “whatever it takes” could include more lies. The Findings did not address any of these issues.

In addition to impeaching Nelson’s witnesses, Ware presented significant evidence corroborating Nelson’s long history of physically abusing, raping, threatening, and stalking her. However, the Judge did not, in either her oral ruling or her written Findings, acknowledge the positive evidentiary value of any of the following examples of corroborating evidence which took this case well out of the world of “he said/she said”:

- The 1990 Anti-Harassment Protection Order and 1994 DVPO.
- Stewart’s corroboration of the 1989 date at the fair, her observations of Ware’s obvious distress after that date, and her testimony that as the mother of a 14 year old girl, she would have known if her daughter was dating anyone as Tisler alleged. CP 49.

- Stewart’s testimony that Ware then received 50-100 obsessive, threatening letters from Nelson (which Stewart saw with her own eyes), and Ware’s emotional state disintegrated until she attempted suicide and got counseling where she disclosed the rape. Id.
- Stewart’s testimony about observing similar changes in Ware’s mental and physical health during each of the relevant time periods of contact with Nelson. CP 49-51; RP 114.
- Testimony from three witnesses who described personal observations of Ware’s severe and consistent fear of Nelson (*e.g.*, Stewart testified that when confronted by Nelson Ware would “stand there like a deer in the headlights” with a “look of pure fright”; McQuiston observed that when she spoke about Nelson she “trembled and cried”; and Broderson said that he and Ware were so frightened of Nelson that he purchased a gun for protection. CP 45-47, 50, 58.
- Testimony from the three witnesses who personally assisted Ware when she repeatedly relocated secretly (usually at night, without leaving a forwarding address) to avoid Nelson. Id.
- The Affidavit of Rhonda Maddax, which stated that the morning after the 2012 assault Ware called her, “whimpering” and “shell-

shocked,” to disclose the rape, and that Ware was so frightened to leave her apartment that Maddax brought her groceries. CP 39.

The Judge’s oral ruling and findings did not reference any of this corroborating evidence (other than saying that the 1994 protection order somehow decreased her credibility, because she didn’t still have a copy); and the Judge did not reference a single one of these impeachment issues.

Nelson cites federal case law indicating that a trial judge need not make findings regarding every fact asserted. Respondent’s brief at 25.

Ware does not disagree, but the case law cited by the Respondent in fact supports the Appellant’s argument regarding the rules on specific factual findings. For example, Zack v. Comm’r of Internal Revenue noted, “we do not insist that trial courts make factual findings directly addressing each issue that a litigant raises,” but “the trial court’s findings must support the ultimate legal conclusions reached....”291 F.3d 407, 412 (2002).

Zack’s reasoning is also consistent with Ware’s argument: “The findings are necessary not only to reveal the logic behind the trial court’s decision, but also to enable an appellate court to conduct a meaningful review of the trial court’s order.” Id.; accord State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998); Appellant’s brief at 28. The degree of detail required by CR 52 depends on the type of case, but the real question is whether the facts are specific enough to support the conclusions. Id.

If a judge denies a an *ex parte* SAPO, the judge must justify that denial with specific written findings. RCW 7.90.110(3) (“If the court declines to issue an *ex parte* temporary [SAPO], the court shall state the particular reasons for the court's denial ... [which] shall be filed with the court.”) It would make no sense to require the *ex parte* judge to provide a detailed justification for denying two weeks of protection, yet allow the hearing judge to deny protection permanently with no specific explanation.

Therefore, Ware agrees that the Judge was neither obligated to address every piece of corroborating evidence, nor every impeachment issue regarding Nelson’s witnesses. However, it cannot be sufficient under CR 52 for the Judge to issue a ruling that depends entirely on finding “insufficient credible evidence” without a single word regarding any of the credibility issues or corroborating evidence supporting Ware’s case. That simply does not justify the court’s legal conclusion (that Ware failed to prove any of the sexual assaults by a preponderance), and precludes the any possibility of meaningful appellate review.

IV. CONCLUSION

Ware presented detailed, corroborated of numerous instances of nonconsensual sexual penetration or conduct. Nelson failed to deny that he committed those acts. Instead, Nelson and the Judge relied on meager hearsay evidence of a consensual sexual relationship, which was

inadmissible for impeachment without an *in camera* hearing. If this Court will not scrutinize a SAPO denial this problematic, based solely on the Judge's frequent but unsupported references to credibility, the majority of the Sexual Assault Protection Order Act will become meaningless and unenforceable. Therefore, Ware respectfully requests that this Court find that the Judge's findings: are not supported by the record, misuse the term 'credibility,' and do not support the Judge's Conclusions of Law. She further requests that this court find that her undisputed evidence of numerous rapes pre-2012 satisfied her legal burden, triggering the statutory mandate to grant relief, notwithstanding the 2012 alibi testimony.

Dated this 28th day of August, 2013.

Respectfully Submitted,



Emily Cordo, WSBA #37077
Attorney for Julie Ware

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I served one copy of this brief on the Respondent's attorney by email, pursuant to our agreement to accept service by email:

Kristina Selset

119 Frist Ave South, Suite 320

Seattle, WA 98104

kristina.selset@comcast.net

Dated this 28th day of August, 2013.



Emily Cordo, WSBA #37077

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