Supreme Court No. 95963-3
Division III, No. 34925-0-III

IN THE
SUPREME COURT
OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
EASTON CHARLES YALLUP
Petitioner

PETITION FOR REVIEW FOLLOWING
APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KLICKITAT COUNTY

The Honorable Judge Brian Altman

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Easton Yallup asks this Court to accept review of the Court of Appeals' decision that affirmed his bench trial conviction of two counts of first-degree rape of a child.

B. DECISION FOR WHICH REVIEW IS SOUGHT

Mr. Yallup seeks review of the Court of Appeals, Division III, published opinion filed on May 10, 2018. A copy of the published opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether this Court should accept review where the decision of the Court of Appeals to treat "on or between" charging language the same as "on or about" charging language conflicts with other decisions in this state and presents a significant question of constitutional law.

Issue 2: Whether this Court should accept review of Division III's directive that the absence of findings of fact and conclusions of law should only be challenged via motions to compel the filing of the same, conflicting with long-standing precedent that permits the Appellant to choose to challenge the issue in his briefing.

D. STATEMENT OF THE CASE

Following a bench trial in Klickitat County, Easton Yallup was convicted of two counts of first-degree rape of a child as to his ex-girlfriend's daughter M.V. RP 116; CP 75.

The charging document alleged Mr. Yallup committed two counts of rape of a child "on or between 01/01/2010 through 12/31/2013." CP 1-2; RP 21 (emphasis added). Details of sexual abuse were provided only by M.V. RP 64-69. M.V. testified Mr. Yallup repeatedly called her into his bedroom on the bed where he had "nasty" videos on, took off her clothes, licked her

bare vagina, and sometimes pushed her hand onto his penis both under and over his clothes. *Id.*; Exhibit P1. M.V. said the first incident happened at the end of her fourth grade year when she was 10-years-old, i.e., spring 2013, which was within the charging period. RP 56-57, 66; CP 1-2. She said the last incident occurred in June when she was 11-years-old and living with the family on Woodland Street in Goldendale, i.e. June 2014, which was six months outside the charging document window. RP 56, 60, 67, 71-72; CP 1-2. M.V. testified the aforementioned sexual occurrences occurred repeatedly, at least 10 times, but did not specify any particular timing other than the first and last occurrences. RP 66.

After the bench trial, the court found Mr. Yallup guilty as charged of two counts of first-degree rape of a child. RP 116; CP 75. The trial court did not enter detailed written findings and conclusions until three months after the opening brief was filed in this appeal, the delay of which was apparently due to the trial judge's unavailability in retirement. *See* CP 1-139, 75; State's Response Brief, pg. 6 n.1.

On appeal, Division III of the Court of Appeals held there was no reason to treat the charging document language in this case "on or between" different from other cases with charging language "on or about," such that the testimony was sufficiently specific to uphold at least two counts of rape of a child as charged. *State v. Yallup*, No. 34925-0-III, 416 P.3d 1250 (Wash. Ct. App. May 10, 2018), Slip Opinion pg. 5, n.5.

As to the late entry of findings at the trial court, the Court of Appeals warned it was not appropriate for Appellant, through counsel, to merely request the State to file the necessary findings and conclusions before filing the opening brief (Slip Opinion, pg. 9, n.5), or, when this "informal" method proved unsuccessful, to then raise issue with the missing findings in the Appellant's Opening Brief "for his own benefit" in the appeal (*id*. at 9). Instead, the Court of Appeals held the Appellant should have moved the reviewing court to compel the State to file missing findings and conclusions prior to filing the Appellant's Opening Brief. *Id*. at pg. 7, n.5, pg. 10.

Mr. Yallup now files this petition for review to challenge the second count as occurring outside the charging period, and the permissibility of appellants to continue to challenge the absence of written findings of fact and conclusions of law as an issue on appeal.

E. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Issue 1: Whether this Court should accept review where the decision of the Court of Appeals to treat "on or between" charging language the same as "on or about" charging language conflicts with other decisions in this state and presents a significant question of constitutional law.

The issue in this case is whether the evidence must show the offenses occurred "on or between" the dates set forth in the charging document, or if, as the Court of Appeals held, the testimony about an offense occurring six months outside the charging period was nonetheless sufficient to uphold Mr. Yallup's second count based on the generic testimony from the child witness. Testimony established that one of the offenses occurred during the charging period (the count not challenged herein), but that a second or subsequent offense may have occurred at least six months after the dates set forth in the charging document. The Court of Appeals found the evidence sufficient to prove this second offense, likening this case to others where evidence was found sufficient even though possibly outside the charging period, since the charging document in those other cases alleged the crime happened "on or about" certain specified dates. Slip Opinion, pg. 5. But here, Mr. Yallup was not charged with offenses "on or about" a certain time; he was charged with offenses "on or between 01/01/2010 through 12/31/2013" (CP 1-2; RP 21 (emphases added)). And, the generic testimony provided by M.V. did not fall within this time specified by the charging document so as to be sufficient to affirm count two against Mr. Yallup. Review is thus warranted pursuant to RAP 13.4(b).

The Court of Appeals' decision in this case conflicts with long-standing precedent that requires the State to prove an offense occurred within the charging period. *See e.g., State v. Jensen*, 125 Wn. App. 319, 325, 104 P.3d 717, *review denied*, 154 Wn.2d 1011 (2005).

It is true, as the Court of Appeals held, that the language "on or about" has been found sufficient to prove the timing of an offense where timing was not a material issue in a case. *See e.g. State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788 (1996). In other words, where a charging document alleged that repeated sexual abuse occurred during a certain charging period, and where the last specific offense occurred a month after that charging period, the charging language "on or about" has been construed sufficient to include those offenses occurring the following month after the end date charged, or "about" the latter date charged. *Id*.

Here, however, Division III has extended *State v. Hayes, supra*, so that the charging language in Mr. Yallup's case of "on or between" is essentially to be interpreted the same as the charging language in *Hayes, supra*, of "on or about." Slip Opinion, pg. 5-7. In doing so, the Court of Appeals' decision conflicts with *State v. Jenson, supra*, requiring the State to prove an offense occurred within the charging period. Division III's decision also conflicts with *Hayes*, *supra*, since that court relied on evidence only a few weeks outside the "on or about" charging period to affirm the conviction, but that court specifically refused to rely on incidences that were two years outside the "on or about" charging dates. 81 Wn. App. at 434. The Court

there also emphasized how important the word "about" was to its decision to affirm the conviction based on an offense a few weeks outside the charging period, or "about" the charging period. *Id*. at 432-35.

Here, however, Division III likened "on or between" charging language with an outside date in December 2013 to sustain Mr. Yallup's conviction based on testimony of sexual abuse occurring on or before June 2014, which extends *Hayes, supra,* further than that court suggested should occur, and is directly contrary to *Jenson, supra*, requiring proof of offenses to match the period charged. 125 Wn. App. at 325.

Furthermore, Division III relied on M.V.'s generic testimony about ongoing sexual abuse, finding that time was not a material element since M.V. had described the details of the offenses (other than their timing) with sufficient specificity to be reliable. Slip Opinion, pg. 6-7. However, Division III failed to acknowledge or distinguish the case law cited and emphasized by the Appellant, to wit *State v. Edwards, infra*, which holds the State is not required to elect particular acts on certain dates to support a count in ongoing abuse cases so long as the evidence shows the multiple specific and distinct incidents occurred during the charging period. *State v. Edwards*, 171 Wn. App. 379, 401, 294 P.3d 708 (2012) (evidence must "clearly delineate[] specific and distinct incidents of sexual abuse during the charging periods.") (emphasis added) (citing *Hayes*, 81 Wn. App. at 431).

Mr. Yallup would not necessarily be contesting Division III's reliance on the generic testimony provided by M.V. if her generic testimony

fell within the date range set forth in the charging document. But Division III's decision conflicts with *State v. Edward,* and *State v. Jenson, supra*, neither of which cases were cited by Division III, since it affirms Mr. Yallup's second count based on generic testimony outside the charging period.

The facts of this case are most akin to *State v. Edwards*, cited extensively in Appellant's Opening Brief, but not mentioned by Division III in its ruling. There, like here, the victim provided generic testimony about sexual abuse wherein the offender touched the minor sexually 10 to 15 times. 171 Wn. App. at 383-84. The victim described the first incident in detail and said the subsequent touchings always occurred the same way. *Id*. But it was not clear after the first incident when the subsequent 10 to 15 acts may have occurred. *Id*. at 403. The Court held, "[t]he evidence does not clearly delineate between specific incidents of sexual abuse during the charging period." *Edwards*, 171 Wn. App. at 403 (emphasis added). As such, one of the two child molestation counts could not stand due to inadequate generic testimony about when the 10 to 15 other sexual encounters occurred. *Id*.

In another case relied upon by the Appellant, but not mentioned in Division III's ruling, the court emphasized that it was important for a victim's generic testimony to at least describe incidences with enough specificity so that they fall somewhere within the time period charged. *State v. George*, Nos. 46323-7-II and 46326-1-II, 2016 WL 687264, at *1-6 (Wash. Ct. App.

Feb. 17, 2016).[1] In *George*, the victim said the multiple sexual offenses occurred when she was nine or ten years old and in the fourth grade. *George,* 2016 WL 687264, at *5. And, significantly, the charging period in that case spanned that same time period described by the victim. *Id*. The court affirmed, but in doing so it relied on the fact that the generic testimony fell within the charging period. *Id*. ("[The victim] clearly defined the time period by giving the grade she was in and her age when the acts occurred. Further, the charging period encompasses the period that AQ described.")

After the Appellant's initial briefing, additional cases involving ongoing child sexual abuse have also emphasized the importance of generic testimony matching the charging period. *See e.g., State v. Hernandez*, No. 49434-5-II, 2018 WL 1505494, at *5 (Wash. Ct. App. Mar. 27, 2018)[2] ("[Then nine-year-old] D.R. clearly defined when the molestation began and ended and testified to when Hernandez specifically touched her inappropriately with his hands. Further, the charging period encompasses the period that D.R. described.") *See also State v. Ehrmantrout*, No. 75873-0-I, 2018 WL 1256225, at *3 (Wash. Ct. App. Mar. 12, 2018)[3] (multiple counts would stand based on child's generic testimony of up to 10 sexual offenses occurring during the child's sixth grade year where the child described the general time period and this period matched that set forth in the three counts

[1] "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1. This case is cited as persuasive authority only.
[2] See FN1.
[3] See FN1.

charged.) *State v. Kirkwood*, No. 74777-1-I, 199 Wn. App. 1061, *review denied*, 189 Wn.2d 1028 (Wash. Ct. App. July 24, 2017)[4] (generic testimony sufficient from the victim of a resident molester where the charging period spanned four years from the child's fifth birthday until her ninth birthday, and "the charging period encompasses the period that D.S. described.")

Division III's decision conflicts with *Hayes, supra, Edwards, supra, Jenson,* and *George, supra,* and the additional unpublished authorities now cited for this Court's consideration, since it affirms a second count against Mr. Yallup based on generic testimony that does not fall within the charging period, meriting review under RAP 13.4(b)(2). Moreover, since there is not sufficient evidence that a second offense occurred during the charging period, review is also merited as this case raises a significant question of constitutional law pursuant to RAP 13.4(b)(3). *See e.g.*, *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015) (In every criminal prosecution, due process requires the State to prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime). *Accord State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

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[4] See FN1.

Issue 2: Whether this Court should accept review of Division III's directive that the absence of findings of fact and conclusions of law should only be challenged via motions to compel the filing of the same, conflicting with long-standing precedent that permits the Appellant to choose to challenge the issue in his briefing.

Despite the Appellant's informal attempts, through counsel, to encourage the State to file the missing written findings of fact and conclusions of law following the bench trial in this case, such filing was not made prior to the Appellant's opening brief being filed, and it was indicated they would not be filed due to the retired judge's unavailability. See Slip Opinion, pg. 9-10, n.6; Appellant's Opening Brief, pg. 32n.3. The Appellant proceeded to file the opening brief based on the assurance that there was no intention for such findings and conclusions to be entered and signed by the same trial court judge who heard this matter. *See id.* In the opening brief, the Appellant challenged the lack of written findings and conclusions and asked that the matter be remanded. In his reply brief, the appellant challenged the newly entered findings and conclusions as having been tailored and prejudicial to his appeal, seeking reversal. Division III then criticized this manner of Appellant raising issue with the missing findings, instructing that the Appellant should have instead filed a motion to compel the State to file the written findings and conclusions (Slip Opinion, pg. 10), rather than making an issue of it in the briefing to use for Appellant's "own benefit" (Slip Opinion pg. 9).

Division III's ruling conflicts with long-standing precedent that supports the very same process utilized by Appellant in this case to challenge

the lack of written findings and conclusions, challenging the same in the Appellant's briefing. "[F]ailure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions." *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998); *State v. West*, No. 47491-3-II, 2017 WL 359100, at *1 (Wash. Ct. App. Jan. 24, 2017) (see FN1 above, as this unpublished case is cited for persuasive authority only); *State v. McCarty*, 152 Wn. App. 351, 354, 215 P.3d 1036 (2009) (complete failure to enter written findings and conclusions would normally require remand); *State v. Otis*, 151 Wn. App. 572, 576-77, 213 P.3d 613 (2009) (remand for entry of findings was the appropriate remedy where the trial court failed to enter written findings of fact and conclusions of law following a bench trial).

Division III seeks to limit Appellants to the remedy of moving to compel entry of written findings and conclusions, rather than raising the issue in an appellant's briefing. When an appellant challenges missing or late entry of findings in his briefing, doing so enables him to also seek reversal of the conviction in some circumstances. This is because reversal is required where the defendant can show actual prejudice resulting from findings being tailored to those issues raised on appeal. *State v. Head,* 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998) (prejudice may be found to exist where there is a strong indication the findings were "tailored" to meet the issues raised on appeal. *Accord State v. Taylor*, 69 Wn. App. 474, 477, 849 P.2d 692 (1993) (citing cases).

Division III is now limiting the Appellants' options to seek the remedy that may best advance his appeal and has the greatest likelihood of obtaining a reversal. *See* Slip Opinion, pg. 9 (criticizing the Appellant for raising the issue in his opening and reply briefs as an attempt to use the State's deficiencies for his "own benefit.") It does so under the guise that it is doing so to protect appellants from their attorneys overlooking viable issues for the appeal. Slip Opinion pg. 10n.9. However, if additional issues become apparent after written findings and conclusions are untimely entered while the appeal is pending, appellants may make supplemental challenges based on those newly identified issues. Therefore, the suggestion that this limited procedure would better protect appellants is not actually fitting. Rather, by limiting the Appellant from seeking reversal or remand in his briefing, Division III is actually choosing to limit the Appellant from a potentially greater remedy.

Division III's decision to restrict the Appellant's remedy from seeking reversal or remand conflicts with the aforementioned authorities where this very same procedure has repeatedly been utilized. Mr. Yallup requests that this Court accept review of this issue pursuant to RAP 13.4(b)(1) and (2).

F. **CONCLUSION**

For the reasons stated herein, Mr. Yallup respectfully requests this Court grant review.

Respectfully submitted this 7th day of June, 2018.

Kristina M. Nichols, WSBA #35918
Attorney for the Petitioner

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent	)	Supreme Court No. _____
vs.	)	COA No. 34925-0-III
EASTON CHARLES YALLUP Defendant/Petitioner	)	PROOF OF SERVICE

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on June 7, 2018, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's petition for discretionary review to:

Easton Charles Yallup, DOC #343551
T-A-64
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-2049

Having obtained prior permission, I also served a true and correct copy of the same document on the Respondent at paappeals@klickitatcounty.org using Division III's e-service feature.

Dated this 7th day of June, 2018.

Kristina M. Nichols

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APPENDIX A

Renee S. Townsley
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CASE # 349250
State of Washington v. Easton Charles Yallup
KLICKITAT COUNTY SUPERIOR COURT No. 151001215

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. Randall Krog (J. Altman's case)
c: Easton Charles Yallup
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FILED
MAY 10, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. EASTON CHARLES YALLUP, Appellant.	)))))))))	No. 34925-0-III PUBLISHED OPINION

KORSMO, J. — Easton Yallup appeals from his convictions at bench trial on two counts of first degree rape of a child. We affirm the convictions and remand to strike an award of restitution.

FACTS

This case revolved around allegations by M.V., 14 years old at trial, that Mr. Yallup had licked her vagina on multiple occasions when she was 10 and 11. After a late decision to waive jury trial, the matter proceeded to a bench trial in the Klickitat County Superior Court before the Honorable Brian Altman on October 5, 2016.

Investigation revealed that Mr. Yallup lived with M.V. and her mother in three different locations in Goldendale. The child reported that incidents of sexual abuse

occurred at all three locations. The prosecutor charged two counts of first degree child rape occurring between January 1, 2010, and December 31, 2013. At trial, M.V. testified that the first incidents of abuse occurred when she was 10 and finishing the fourth grade. The abuse ended shortly before her 12th birthday. Since she was born in August 2002, and her fourth grade year ended in 2013, there was a comparatively narrow window (last 16 months) of the charging period in which the offenses occurred.

At the conclusion of trial, Judge Altman explained his decision in detail:

> [M.V.] who is now fourteen, testified that the Defendant had sexual intercourse with her as it's defined in Washington law at least ten times she said and fewer than fifteen times during an approximate three year period. The incidents of intercourse ended . . . when her mother, [L.J.], finally kicked the Defendant out of the house where he had been staying off and on as her paramour for a period of a couple of years at least.
> . . . .
> [Regarding] issues that reasonably go to doubt, the Court has to analyze those issues in the context of [M.V.]'s testimony. Thus, the three year old timeframe of the charging instrument is not dispositive. Victims this age subjected to multiple assaults rarely remember exact times and dates. Especially when, as in this case, at least initially, she couldn't understand what was actually going on. . . .
>
> My finding was that her entire story from her testimony here today, her interview, the reaction of the troubled alcoholic mother, Ms. [W]'s participation as a friend, all have a heft as a fact finder and determiner of credibility and feel and patina of the truth. I believed [M.V.]
>
> The very graphic details of her narrative had those idiosyncratic details that ring of truth. An invented tail [sic] does not sound like this. She told it consistently without variation, without coercion, with embarrassment and reluctance, but she told it. In my view, she was

> victimized by the Defendant consistently and repeatedly and the statutory elements of the crime have been proven beyond a reasonable doubt.

Report of Proceedings at 114-15.

A mandatory presentence investigation (PSI) was completed and sentencing occurred November 21, 2016. Included in the criminal history was a 1996 federal offense of Abusive Sexual Contact. Clerk's Papers at 99. The court and PSI both calculated an offender score of 10 that included 3 points for the federal offense. No comparability analysis was conducted on the record. The court used the offender score of 10 to impose a minimum term of 318 months.

Mr. Yallup timely appealed to this court. Judge Altman retired the following month. The findings of fact required by CrR 6.1 had not been entered at that time. Counsel for Mr. Yallup filed the brief of appellant in early May 2017. Judge Altman filed findings of fact on August 24, 2017. The brief of respondent was filed the following day. A reply brief was timely filed. A panel of this court considered the matter without hearing argument.

ANALYSIS

The appeal raises four substantive issues: (1) whether the evidence supported the conviction for two counts within the charging period, (2) whether the untimely entry of findings prejudiced Mr. Yallup, (3) whether counsel performed ineffectively by failing to urge a comparability analysis of the federal conviction, and (4) whether the court erred in

directing that restitution be made as a condition of community custody.[1] We address those contentions in the order listed.

Sufficiency of the Evidence

Appellant contends that because his victim could not identify the particular dates on which she was abused, it is unclear if both of the events occurred during the charging period. This issue is governed by longstanding precedent.

"Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014) (citing *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005)). "'Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id*. at 106. In reviewing insufficiency claims, the appellant necessarily admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Finally, this court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

[1] Mr. Yallup also asks that we not impose appellate costs in the event the State substantially prevails. We leave that issue to our commissioner in the event costs are claimed. RAP 14.2.

This approach applies the evidentiary sufficiency standard dictated by the Fourteenth Amendment to the United States Constitution. *Jackson v. Virginia*, 443 U.S. 307, 317-18, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Specifically, *Jackson* stated the test for evidentiary sufficiency under the federal constitution to be "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id*. at 319. Washington promptly adopted this standard in *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (plurality); *Id*. at 235 (Utter, C.J., concurring); *accord, State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

Under *Jackson*, the test is whether the trier of fact *could* find the element(s) proved. In the context of testimony of repetitive abuse overlapping a charging period, the case law also provides an answer to Mr. Yallup's challenge. *See generally*, *State v. Hayes*, 81 Wn. App. 425, 914 P.2d 788 (1996). That answer is derived from two settled principles.

The first principle is that the charging period is more flexible than the mere time frame alleged in the information. When charging using "on or about" or similar language, the proof is not limited to the delineated time period. *State v. Osborne*, 39 Wash. 548, 81 P. 1096 (1905); *see Hayes*, 81 Wn. App. at 432 n.12 (citing cases). *Hayes* distilled the general rule: "where time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute

of limitations, so long as there is no defense of alibi."[2] 81 Wn. App. at 432. Time is not an element of most sex offenses. *Id*. at 433, 437; *State v. Cozza*, 71 Wn. App. 252, 258-59, 858 P.2d 270 (1993).[3]

The second principle involves the situation of the "resident child molester:" a person who has regular access and frequently abuses his victim, leading to a lack of specificity of timing for each offense. *State v. Brown*, 55 Wn. App. 738, 748-49, 780 P.2d 880 (1989). In those cases, alibi or misidentification are not genuine defenses. *Id*. at 748. Rather, the true issue is credibility. *Id*.; *Hayes*, 81 Wn. App. at 433. *Hayes* described the three factors that were needed to prove sex abuse based on "generic" testimony:

> First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the alleged victim is credible on these basic points.

Id. at 438.

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[2] The victim's testimony placed the incidents between the spring of 2013 (end of fourth grade) and August 2014 (12th birthday), a period that extends nearly eight months past the end of the charging period and is within the statute of limitations period.

[3] The charging language here stated "on or between," arguably a narrower construction than "on or about," but appellant has presented no authority suggesting that *Osborne* does not remain good law in this context.

Hayes answers Mr. Yallup's argument. As to the first element, M.V. described acts of sexual intercourse (committed with the tongue or by penetration with a finger)—the essential component of a rape charge. She testified that these acts occurred more than 10 times; only two counts were charged. Third, the victim provided specific testimony about location and age to adequately describe the time period when the acts occurred.[4]

The *Hayes* factors are satisfied. More specificity from the victim was not required. Judge Altman applied the correct factors and was satisfied that two counts occurred within the charging period. The evidence supported that determination.

The evidence was sufficient.

Late Findings

Mr. Yallup next challenges the trial court's entry of late findings, arguing that they were tailored to answer his appellate challenges. We are unhappy with both the late findings—a problem that seems to be increasing of late[5]—and the way they were

[4] Although the members of this panel appreciate the sensitivity with which young witnesses must be treated, particularly when dealing with the topic of sexual abuse, better questioning to tie down the time frame of events in light of the victim's testimony, could have resolved this issue more readily. Whenever trial testimony might suggest that behavior occurred outside the charging period, clarification typically is in order.

[5] This is the third case assigned to the writing judge within the past six weeks in which necessary findings were missing, but the appellant did not seek this court's assistance before filing his brief.

addressed to this court. Ultimately, we conclude that Mr. Yallup has not established that the findings were tailored to prejudice his appeal.

Court rules and statutes mandate that trial courts enter written findings in several different circumstances, including bench trials in civil and criminal cases, along with specific findings required for termination trials, marriage dissolution proceedings, etc. Criminal rules mandating the entry of written findings include CrR 3.5, CrR 3.6, and CrR 6.1(d). Although the obligation is placed on the trial judge to enter the findings, we recognize the near universal practice of delegating the drafting of findings to the prevailing party.

Here, Judge Altman's pending retirement (and desire to spend much of that time at sea) was well known, even to the bench of this court. Trial was held more than two months before his departure from the bench. In an ideal world, the findings necessitated by CrR 6.1(d) would have been entered at the time of sentencing when Judge Altman would be sitting in Goldendale and the parties would be present. When that did not occur, the prosecutor should have proceeded to bring the matter to the judge's attention before his retirement and departure.

Some time prior to the filing of appellant's brief, counsel for the appellant discovered that the findings mandated by CrR 6.1(d) were not present. Our record does

not reflect what efforts, if any, the parties made to resolve that situation.[6] This court's records carry no indication that either party brought it to the attention to our clerk of court or our commissioner's office. Instead, appellant filed a brief and attempted to use the absence of findings for his own benefit. Respondent made efforts to get the findings entered and delayed its own briefing to accomplish that fact. Appellant filed a reply brief challenging the findings.

This process ultimately served no one. The purpose of findings of fact is to facilitate review. *State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). Instead, our focus here was turned to the process by which the findings were created rather than the merits of the findings. Accordingly, and with the knowledge that this is not the only recent case where similar events occurred, we set forth how the parties *should* have behaved.

The initial failure is with the respondent.[7] The prevailing party must make efforts to get findings entered in a manner that facilitates timely review of an appeal. Although the ultimate responsibility rests with a trial judge, the reality is that the prevailing party

[6] Although not in our record, both parties acknowledge in their briefing that appellant's counsel contacted the prosecutor about the problem and that he then began an effort to obtain defense trial counsel's agreement with the proposed findings while the court clerk attempted to locate Judge Altman in transitu. We commend counsel for her professionalism in starting efforts to resolve the problem in an informal manner.

[7] We know that sometimes other actors—judges, court clerks, trial counsel—may be the cause of delay, but that is not what happened here.

has the most at risk and should make sure that a busy trial judge is presented with the opportunity to enter appropriate findings in a timely manner.

When that initial responsibility is not met, the appellant should, as counsel did here, make best efforts to alert respondent that action is needed.[8] Basic principles of civility and professionalism dictate that all counsel should attempt to resolve problems before they grow into bigger issues. If informal methods fail, then appellant should enlist this court's assistance. Notification that required findings are missing and an indication that a continuance of the briefing obligation is necessary would be one way to approach the problem. Another would be to file a motion to compel entry of findings. In either instance, notifying this court and obtaining its assistance should lead to a timely resolution of the finding issue so that counsel can obtain the necessary record to address the client's case.[9] This approach should lead to a speedier consideration of the case than attempting to address the issue by the briefing process.

However, that did not happen here, so we must consider the issue of the late findings. Mr. Yallup argues that the late findings were tailored to address his appeal.

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[8] Counsel also may learn that the findings process already is underway simply by speaking to the other side.

[9] Counsel for appellant has an obligation to review the record and determine whether meritorious issues exist for appeal. That obligation cannot be met without having an adequate record for review that includes findings required by our rules and statutes. It usually will not serve the client's best interests to file a brief with an inadequate understanding of the record.

They were not. The written findings address exactly what would be expected from a bench trial and are not an expansion of Judge Altman's oral ruling. There is no mention of the issue actually raised by appellant's brief—whether the testimony placed the two counts within the charging period or not. The findings do not address the issue. Instead, the findings simply reflect that the two events occurred within the charging period rather than within the specific period described by the testimony.

The findings were not tailored. This argument is without merit.

Ineffective Assistance of Counsel

Mr. Yallup next argues that trial counsel was ineffective by failing to demand a comparability analysis. On this record, he cannot establish he was harmed by his attorney's alleged failure to act.[10]

Well settled standards govern review of this contention. An attorney must perform to the standards of the profession; counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by the attorney's failure. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A

[10] Respondent alleges in its briefing that defense counsel was shown a copy of the documents and decided not to challenge use of the federal conviction. Appellant rightly argues that this information is not part of the record and cannot be used on appeal. We agree and decline to consider the information. The trial prosecutor should have noted the agreement on the record at sentencing and/or encouraged defense counsel to either agree with the calculation or express any concerns that might have existed.

strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-92. When a claim can be disposed of on one of the *Strickland* prongs, a reviewing court need not consider both prongs. *Id*. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

When considering a conviction from another jurisdiction, Washington courts will compare the foreign offense with Washington offenses in order to properly classify the crime. RCW 9.94A.525(3). Here, Mr. Yallup was convicted of "abusive sexual contact." 18 U.S.C. § 2244. That is an umbrella statute covering aggravated sexual abuse of adults and children, general sexual abuse, and sexual abuse of minors or wards. 18 U.S.C. §§ 2241-43.

We need only address the prejudice question.[11] Typically, when counsel is alleged to have failed to file an appropriate motion or lodge a proper objection, a defendant must establish that he would have prevailed in the trial court in order to show that he was

[11] Given the serious nature of most of the federal crimes listed under the "abusive sexual contact" label, it is conceivable that counsel would not challenge the classification lest the facts reveal that Mr. Yallup's federal offense was one that would qualify him as a persistent offender under the "two strikes" statute applied to sex offenders. RCW 9.94A.030(38)(b). As explained above, we simply do not have enough information to know whether counsel made a strategic choice or not.

prejudiced by counsel's failure to act. *McFarland*, 127 Wn.2d at 333-34. Mr. Yallup cannot meet that burden in this appeal because the necessary evidence is not in the record. Without having the federal court information, it is not possible to determine whether the trial court (and the PSI writer) incorrectly classified the offense.[12] Without establishing prejudice, Mr. Yallup cannot show that his counsel performed ineffectively. *Id*.

Mr. Yallup has not established ineffective assistance of counsel. Because any showing of error requires a better record than we have here, his remedy is to bring a personal restraint petition (PRP) wherein he can marshal his evidence and argument. *E.g.*, *McFarland*, 127 Wn.2d at 338 n.5; *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).[13]

The allegation of ineffective assistance is, on this record, without merit.

Restitution Award

The final argument we address is Mr. Yallup's contention that the court erred in ordering restitution as a condition of his community custody. The State concedes that the

[12] *Compare*, *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007). There, defense counsel performed deficiently when he failed to object to the trial court's incorrect comparability analysis. Since the trial court's legal analysis was incorrect and resulted in a persistent offender finding, the prejudice to Mr. Thiefault was clear; the matter was remanded for another comparability analysis. *Id*. at 417.

[13] Mr. Yallup is cautioned to carefully review his evidence and the law before bringing a PRP lest a new sentencing hearing worsen his position. *See* footnote 11.

restitution order should be stricken because no restitution was ordered within the six month period dictated by the statutes. We accept the concession and direct that the restitution order be stricken.

Affirmed and remanded to strike.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Pennell, A.C.J.

NICHOLS AND REUTER PLLC / EASTERN WASHINGTON APPELLATE LAW

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