

NO. 63898-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

A.O.G,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY, JUVENILE  
DIVISION

The Honorable Steven J. Mura, Judge

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REPLY BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR IN REPLY<sup>1</sup>

1. The court erred to the extent it found J.T.'s entire testimony was credible. CP 69 (Motion to Reconsider, Finding of Fact 4).<sup>2</sup>

2. The court erred in finding J.T.'s pants and underwear were removed when the sexual contact occurred, indicating more than a transitory touching. CP 70 (Motion to Reconsider, Finding of Fact 6).

3. The court erred in finding appellant guilty of child molestation. CP 70 (Motion to Reconsider, Conclusion of Law 1); CP 68 (Finding of Guilt, Conclusion of Law 1).

4. The court erred in concluding as a matter of law that sexual curiosity and sexual motivation are synonymous. CP 70 (Motion to Reconsider, Conclusion of Law 3).

5. The court erred in denying appellant's motion to reconsider. CP 70 (Motion to Reconsider, Conclusion of Law 4).

6. The court erred in finding the contact between appellant and J.T. was for sexual motivation. CP 68 (Finding of Guilt, Finding of Fact 9).

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<sup>1</sup> The excessive delay in filing written findings of fact and conclusions of law has necessitated these additional assignments of error in reply. Under JuCR 7.11(d), the findings of fact and conclusions of law should have been filed no later than 21 days after the notice of appeal was filed. Notice of appeal was filed July 27, 2009. CP 13. When appellant's opening brief was filed nearly four months later on November 24, 2009, there were still no written findings of fact or conclusions of law from the adjudication hearing or the hearing on the motion to reconsider.

<sup>2</sup> The Findings of Fact and Conclusions of Law from the Finding of Guilt and the Motion to Reconsider are attached as appendices to this brief.

B. STATEMENT OF THE CASE IN REPLY

The adjudication hearing in this case took place June 2-4, 2009. On June 4, 2009, the court made extensive oral findings. 1RP 404-14. The court found J.T. credible *only* in that A.G. touched her private parts one time during the charging period. 1RP 410. The court explicitly and repeatedly stated J.T. was not credible as to the number of times the contact occurred or the manner in which it occurred. 1RP 410-12. Even more explicitly, the court declared, “I cannot say it [the touching] was outside of clothing or inside of clothing.” 1RP 411.

This limited credibility finding related directly to the court’s findings on admissibility of J.T.’s hearsay statements. The court excluded nearly all J.T.’s out-of-court statements because numerous suggestive interviews “irreparably” contaminated her memory. 1RP 375, 377, 406.

The defense moved to reconsider the finding of guilt on the grounds that the one incident could have occurred outside the charging period and that touching alone was insufficient evidence of sexual gratification. CP 37-41; 2RP 8-9. The State argued there was evidence of sexual gratification because J.T.’s pants and underwear were removed. 2RP 4-5. No one reminded the court it had explicitly found those details not credible.

The court declined to change its mind. 2RP 18. The court began by noting it had not reviewed the previous oral ruling, so some things might be repeated. 2RP 11. The court clarified its prior ruling that J.T. was credible that the touching happened at least one time during the charging period. 2RP 15. The court reiterated its previous finding that J.T. was not credible as to how many times the touching occurred. 2RP 13.

The court went on to discuss the sexual gratification finding. 2RP 16. The court stated the touching was for purposes of sexual gratification because it happened more than once and because J.T. described her pants and underwear were removed. 2RP 16. The court also concluded sexual curiosity was equivalent to a sexual gratification purpose. 2RP 17.

Over six months later, after appellant's opening brief was filed, the court entered written findings of fact and conclusions of law from both the adjudication hearing and the motion to reconsider. CP 67-70. The findings from the adjudication hearing state that J.T.'s "initial disclosure to her foster mother Angel Finsrud that [A.G.] touched her private parts was spontaneous and credible. . . . In subsequent interviews the victim was asked leading questions contaminating her memory. . . ." CP 67. The court found J.T. "spontaneously disclosed to her foster mother that the Respondent had touched her private parts. She gave no additional details at that time." CP 67.

The findings from the motion to reconsider state, “The testimony of Irma Bartlett and [J.T.] were both credible” and “[J.T.]’s pants and underwear were removed when the sexual contact occurred, indicating more than a transitory touching.” CP 69. The court also concluded as a matter of law that sexual curiosity and sexual gratification are synonymous. CP 70.

C. SUMMARY OF ARGUMENT

J.T. was subjected to numerous suggestive interviews, and the court determined her memory was irreparably contaminated. Nevertheless, the court found her initial disclosure to her foster mother was spontaneous and credible. That disclosure included only the fact that A.G. touched her private parts when the family lived in Ferndale, with no other details.

Because the court made no indication it was changing its mind, the credibility finding on reconsideration should be interpreted as consistent with these prior rulings. It should be interpreted not as a blanket declaration that J.T. was credible, but as a reiteration of the court’s prior finding that she was credible only in her initial disclosure.

In light of the court’s credibility findings, the finding that J.T.’s pants and underwear were removed is unsupported by substantial evidence in the record. The only evidence supporting this finding is J.T.’s contaminated and incredible testimony. Without this finding, there is no evidence the touching

was for purposes of sexual gratification and A.G.'s adjudication of guilt should be reversed.

D. ARGUMENT

1. THE COURT FOUND J.T. CREDIBLE ONLY AS TO HER INITIAL DISCLOSURE AND NOT TO ANY OF THE DETAILS.

When an oral opinion explains written findings, the court examines the written findings in light of the oral ruling. State v. B.J.S., 140 Wn. App. 91, 169 P.3d 34 (2007) (citing State v. Hescocock, 98 Wn. App. 600, 605, 606, 989 P.2d 1251 (1999)); see also Goodman v. Darden, Doman & Stafford Assocs., 100 Wn.2d 476, 481-82, 670 P.2d 648 (1983); Kinnear v. Graham, 133 Wash. 132, 133, 233 P. 304 (1925). Particularly when written findings of fact are insufficiently specific, courts look to the oral ruling to explain or interpret written findings. See State v. Parker, 81 Wn. App. 731, 737, 915 P.2d 1174 (1996) (looking to court's oral ruling to support adjudication of guilt); State v. White, 31 Wn. App. 655, 658, 644 P.2d 693 (1982) (“[T]he court's oral decision may be considered in interpreting a finding of fact”). When properly viewed in light of the court's oral rulings and its written findings from the adjudication hearing, Finding of Fact 4 from the motion to reconsider is *not* a blanket declaration that J.T.'s testimony was credible.

At adjudication, the court found J.T. largely lacked credibility. The oral ruling at adjudication makes clear that the court found J.T. credible only

in a few very limited respects. 1RP 410-12. The court's subsequent written findings are consistent, stating that 1) J.T.'s initial disclosure to her foster mother was credible, 2) since that time numerous suggestive interviews contaminated her memory, and 3) that initial disclosure stated only that A.G. touched her private parts but gave no additional details. CP 67.

The court did not change its mind about J.T.'s limited credibility. At the hearing on the motion to reconsider, the court began its oral remarks by stating that it had not reviewed its previous oral ruling before the hearing. 2RP 11. The court did not intend to change that previous ruling, but merely to explain it. 2RP 11 ("I wanted to explain a little bit what my reasoning was."). Indeed, the court denied the motion to reconsider its prior ruling. Therefore, its ruling on that motion should not be interpreted as changing what the court found at the adjudication hearing.

The court's various findings should be harmonized and construed consistently with each other. The only way to do so is to interpret the written finding of credibility as limited by the same concerns that motivated the court at the adjudication hearing. The finding on reconsideration that J.T.'s testimony was credible should be construed as a reiteration of the same limited credibility finding made at the adjudication hearing – J.T. was credible *only* in what she told Angel Finsrud before the suggestive interviews began.

This Court defers to the trier of fact on questions of credibility. E.g., B.J.S., 140 Wn. App. at 97. Given the lateness of the written findings, the court's determination on J.T.'s credibility is a bit of a moving target. Nevertheless, when harmonized with the court's other rulings, the court only found J.T. was credible that A.G. touched her private parts at least once. She was not credible as to any details of the incident.

2. THE FINDING THAT J.T.'S PANTS AND UNDERWEAR WERE REMOVED IS UNSUPPORTED BY THE RECORD BECAUSE THE COURT FOUND THESE DETAILS WERE NOT CREDIBLE.

When proper deference is given to the trier of fact's limited finding of credibility, the finding of fact regarding removal of J.T.'s pants and underwear is unsupported by the evidence. The findings from the adjudication hearing make no mention of removal of pants and underwear. CP 67-68. The oral ruling at the adjudication was entirely consistent with this, as the court stated, "I cannot say it was outside of clothing or inside of clothing." 1RP 411. This shows that the lack of a finding regarding pants and underwear was not an oversight, but an intentional omission of a fact that was not proved.

The inclusion of this fact in the findings on the motion to reconsider appears to be a clerical error that resulted because six weeks elapsed between the adjudication and the motion to reconsider and then it was nearly five

more months before the written findings were presented. At the hearing on the motion to reconsider, defense counsel argued the mere fact of the touching was insufficient to prove sexual gratification. 2RP 9. The State argued the court could find sexual gratification because J.T.'s pants and underwear were removed. 2RP 4-5. Neither side pointed out to the court that it had explicitly and with good reason found these details not credible. It appears the court simply failed to recall the facts and then recited the State's reasoning in reiterating its prior finding of sexual gratification. 2RP 16.

3. WITH NO DETAILS REGARDING THE TOUCHING, THERE IS INSUFFICIENT EVIDENCE IT OCCURRED FOR PURPOSES OF SEXUAL GRATIFICATION.

A.G. does not ask this Court to "ignore established case law allowing juvenile courts to infer sexual gratification based on the facts and circumstances of the sexual conduct." Brief of Respondent at 9. On the contrary, A.G. merely asserts that there must be evidence of facts and circumstances from which such a purpose can reasonably be inferred. None exists here.

The State cites no Washington case holding that a sexual gratification purpose can reasonably be presumed from mere touching of a sexual part when the case involves children. Brief of Respondent at 9. The case cited by the State does not support its argument that A.G. bears the burden to present evidence on this question. Brief of Respondent at 14. The

court in T.E.H. noted that specific facts and circumstances surrounding the conduct in that case supported an inference of sexual gratification. State v. T.E.H., 91 Wn. App. 908, 916-917, 960 P.2d 441 (1998) (“TH forced TTS to disrobe and intentionally molested him with his hands and his body, including his penis. When told to stop, he continued.”). No such facts and circumstances are in evidence here.

Moreover, childish game-playing or curiosity is not equivalent to sexual gratification. The Washington Supreme Court recently reversed a 12-year-old’s conviction because his plea was involuntary. State v. A.N.J., \_\_\_\_ Wn.2d \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_, slip op. at 17, 29 (No. 81236-5, filed Jan. 28, 2010), The court held the plea was involuntary because there was no evidence A.N.J. understood that “mere contact with the genitals of another person was not sufficient for the crime charged.” Id. at 30-31.

In explaining its holding, the court specifically stated, “A child’s game of ‘Icky Poke-U’ certainly does not necessitate sexual gratification.” Id. at 30. Here, there was no credible evidence the contact was anything other than a childish game. In the absence of such evidence, A.G.’s adjudication of guilt should be reversed.

E. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, A.G. requests this court reverse his adjudication of guilt for insufficient evidence.

DATED this 22nd day of February, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER J. SWEIGERT  
WSBA No. 38068  
Office ID No. 91051

Attorney for Appellant

MTW

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WHATCOM COUNTY  
WASHINGTON

BY \_\_\_\_\_

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY, JUVENILE DEPARTMENT

8 In Reference To:  9 ALEXANDER GRAY,  10 Juvenile,  11 _____	) No.: 08-8- 00493-5 ) ) ) FINDINGS OF FACT AND ) CONCLUSIONS OF LAW ) RE: MOTION TO RECONSIDER FINDING ) OF GUILT )
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THIS MATTER came before the Court for adjudication of the above-entitled matter on July 14, 2009. Having taken evidence and having heard argument from both parties, the Court makes the following regarding adjudication:

**I. FINDINGS OF FACT**

1. Nothing in Jennifer Thomas's background or testimony indicated she had a motive to make a false allegation against Alexander Gray.
2. One act of sexual touching was proven to occur in the home in Ferndale, WA during the time frame alleged.
3. Jennifer Thomas's testimony was consistent that an incident occurred in an upstairs bedroom, after playing video games in a multi-level home which was consistent with the Gray family home in Ferndale Washington versus the mobile home Custer Washington.
4. The testimony of Irma Bartlett and Jennifer Thomas were both credible.
5. The testimony of Irma Bartlett was credible that the disclosure occurred in Custer, WA.

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6. Jennifer Thomas's pants and underwear were removed when the sexual contact occurred, indicating more than a transitory touching.

Based on the above Findings of Fact, this Court makes the following:

**II. CONCLUSIONS OF LAW**

- 1. Respondent is guilty of Count 1 in the States amended information of Child Molestation First Degree.
- 2. The Respondent is found not guilty of Counts 2 and 3 of the State's amended information.
- 3. For the purpose of "sexual contact" in RCW 9A.44.010(2), sexual curiosity and and sexual motivation are synonymous.
- 4. Respondents Motion to Reconsider is denied.

DATED THIS 13th day of January, 2010.

13 **STEVEN J. MURA**  
\_\_\_\_\_  
Judge Steven Mura

Copy received:

Presented by:   
\_\_\_\_\_  
David Freeman, WSBA #36861  
Deputy Prosecuting Attorney

  
\_\_\_\_\_  
Lee Grochmal, WSBA # 2449  
Attorney for Juvenile

MTW

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WHATCOM COUNTY  
WASHINGTON

BY \_\_\_\_\_

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON  
FOR WHATCOM COUNTY, JUVENILE DEPARTMENT

In Reference To:	)	No.: 08-8-00493-5
	)	
ALEXANDER GRAY,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
Juvenile,	)	RE: FINDING OF GUILT
	)	
	)	

THIS MATTER came before the Court for adjudication of the above-entitled matter on June 4, 2009. Having taken evidence and having heard argument from both parties, the Court makes the following regarding adjudication:

**I. FINDINGS OF FACT**

1. Jennifer Thomas was born March 27<sup>th</sup>, 2001 and at the time of trial is eight years old.
2. Jennifer Thomas and the Respondent are not married.
3. At the time of the offense Jennifer Thomas was less than twelve years old and the Respondent more than 36 months older than the Jennifer Thomas.
4. Jennifer Thomas's initial disclosure was to her foster mother Angel Finsrud that Alexander Gray touched her private parts was spontaneous and credible. In subsequent interviews of Jennifer Thomas gave various accounts as to how many times the sexual touching occurred. However, the Court finds Jennifer Thomas's testimony consistent and credible that Alexander Gray had touched her on at least one occasion. In subsequent interviews the victim was asked leading questions contaminating her memory, and it is for that reason the Court can not find the Respondent guilty of counts 2 and 3.
5. Jennifer Thomas spontaneously disclosed to her foster mother that the Respondent had touched her private parts. She gave no additional details at that time.

Findings of Fact and Conclusions of Law - I  
Re: ALEXANDER O. GRAY

Whatcom County Prosecuting Attorney  
311 Grand Avenue Suite 201  
Bellingham, WA 98225  
(360) 676-6784  
(360) 738-2532 (fax)

- 6. The evidence showed a lack of motive by Jennifer Thomas to make up the allegation for attention, to punish Alexander Gray, or to get back in the Gray family home.
- 7. Jennifer Thomas's testimony that she went to her grandmother for help regarding sexual touching by Alex Gray was corroborated by the testimony of the Respondent's grandmother, Irma Bartlett, albeit the circumstances and extent of the disclosure differed.
- 8. One of the alleged acts occurred when Alexander Gray touched Jennifer Thomas, with his hand, while the Gray family resided in Ferndale, in Whatcom County Washington, during the time period charged.
- 9. In the facts and circumstances as described, in the bedroom, the purpose of the contact between the Respondent and Jennifer Thomas was for sexual motivation.

Based on the above Findings of Fact, this Court makes the following:

II. CONCLUSIONS OF LAW

- 1. Respondent is guilty of Count 1 in the States amended information of Child Molestation First Degree.
- 2. The Respondent is found not guilty of Counts 2 and 3 of the State's amended information.

DATED THIS 13th day of January, 2010.

JS STEVEN J. MURA  
\_\_\_\_\_  
Judge Steven Mura

Copy received:

[Signature]  
Lee Grochmal, WSBA #24149  
Attorney for Juvenile

Presented by:  
[Signature]  
David Freeman, WSBA #36861  
Deputy Prosecuting Attorney

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63898-0-1
	)	
A.O.G.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22<sup>ND</sup> DAY OF FEBRUARY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X]     DAVID FREEMAN  
          WHATCOM COUNTY PROSECUTOR'S OFFICE  
          WHATCOM COUNTY COURTHOUSE, SUITE 201  
          311 GRAND AVENUE  
          BELLINGHAM, WA 98227

[X]     A.O.G.  
          210 FRASER STREET, #106  
          BELLINGHAM, WA 98229

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2010.

x *Patrick Mayovsky*