

No. 64453-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

GARY RALPH KING,

Appellant.

---

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

The Honorable Jay White

---

BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in failing to file written findings of fact and conclusions of law following a bench trial as required by CrR 6.1.

2. There was insufficient evidence to support the court's verdict that Mr. King was guilty of counts 1 and 2.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Due Process Clause requires the State to prove every element of the offense beyond a reasonable doubt. First degree child molestation requires the State to prove a defendant had sexual contact with a child. Where the evidence presented failed to show Mr. King had engaged in any touching of the boys for his sexual pleasure, is he entitled to reversal of his convictions for child molestation with instructions to dismiss?

2. CrR 6.1(d) requires the trial court enter written findings of fact and conclusions of law following a bench trial. In the instant case, Mr. King waived his right to a jury trial and agreed to a bench trial. However, no written findings of fact and conclusions of law were entered following the trial. Does the failure to enter written findings of fact and conclusions of law require remand?

### C. STATEMENT OF THE CASE

Gary King was living in Tukwila with his girlfriend, Marlene Moesch, when he met two boys, seven year old B.F. and five year old E.F. The boys lived in the neighborhood with their grandmother, Marilyn Fryhling, who was raising them. 6/3/09RP 6-9, 6/8/09RP 130-32. At the time, Mr. King was recovering from surgery and periodically working. 6/3/09RP 21, 6/8/09RP 136. Mr. King rode his bicycle for rehabilitation and exercise, and began riding with the boys three to four times a week. 6/3/09RP 9, 6/8/09RP 132-33. With Ms. Fryhling's consent, Mr. King began taking the boys to the park and other area locations, sometimes with Ms. Fryhling and sometimes without her. 6/3/09RP 10-16, 6/8/09RP 134-35. This friendship among the boys and Mr. King lasted from the spring of 2006 to the end of 2006. 6/3/09RP 20.

In November 2006, Mr. King helped the boys and Ms. Fryhling move to another location in Tukwila. 6/3/09RP 22. Mr. King continued to go to the boys' house where he would play with them and they would watch movies together. 6/3/09RP 22. On at least four occasions, Mr. King slept with the boys at their house. 6/3/09RP 24. The boys would sleep in their beds and Mr. King would sleep on the floor. 6/3/09RP 25. On two occasions, Ms.

Fryhling checked and noted all three were sleeping the floor.

6/3/03/09RP 25-30. Ms. Fryhling noted Mr. King stayed over at her house with the boys when a wind storm occurred in December 2006, which knocked out power in the area. Ms. Fryhling was certain the wind storm occurred December 23 through 24, 2006.

9/3/09RP 71. Evidence established this wind storm actually occurred December 13 through 14, 2006. 9/8/09RP 37-38.

In January 2007, after being persistently questioned by Ms. Fryhling, E.F. told her that Mr. King had inappropriately touched him. 6/3/09RP 42. Under similar persistent questioning by Ms. Fryhling of B.F., B.F. refused to talk. 6/3/09RP 47. Ms. Fryhling subsequently contacted the police. 6/3/09RP 49.

The boys later made statements to a teacher at their school and their therapists. 6/4/09RP68-69, 78-85, 99-101. The boys were questioned by Detective Stock of the Tukwila Police Department, Carolyn Webster, the prosecutor's interview specialist, and Dr. Rebecca Wiester. CP 51-53; 6/8/09RP 10-14. The boys made disclosures to Detective Stock and Dr. Wiester but made no disclosures to Ms. Webster. *Id.* Based on these disclosures, Mr. King was subsequently charged with two counts of first degree child molestation. CP 29-30.

The amended information alleged:

That the defendant GARY RALPH KING in King County, Washington, during a period of time intervening between June 1, 2006 through January 29, 2007, being at least 36 months older than E.M.F. (dob 4/30/01), had sexual contact for the purpose of sexual gratification, with E.M.F. (dob 4/30/01), who was less than 12 years old and was not married to E.M.F. (dob 4/30/01);

CP 29. The amended information used the same wording for count two but inserted B.S.F. as the victim. CP 30.

Mr. King waived his right to a jury and the matter was tried to the court. CP 33; 5/26/09RP 28-32. At the conclusion of the trial, the court issued an oral ruling finding Mr. King guilty as charged. 6/24/09RP 24. The court supplemented its oral ruling with what it titled "Court's Memorandum in Support of Oral Rulings and Verdict." CP 34-89; 6/24/09RP 2-3.

**D. ARGUMENT**

1. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 6.1

In making its oral/written ruling following the bench trial, the court orally and, at the conclusion of its written verdict, ordered the prosecutor to prepare written findings of fact and conclusions of law pursuant to CrR 6.1(d):

Pursuant to Criminal Rule 6.1(d), the State is directed to propose upon a minimum of five days' notice of presentation separately stated findings of fact and conclusions of law consistent with and in support of the court's decisions on the issues of child competency, child hearsay and the court's verdict as set forth herein.

CP 89; 6/24/09RP 19. The court entered the Judgment and Sentence on November 2, 2009, and Mr. King filed his Notice of Appeal on November 9, 2009. CP 90-101. Written findings of fact and conclusions of law as to guilt, as required by CrR 6.1 and by the court's own order, have never been entered.

CrR 6.1 (d) requires:

In a case tried without a jury, the court *shall* enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days notice of presentation to the parties.

(Emphasis added.) The term “shall” indicates a mandatory duty on the trial court. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994). And the importance of written findings and conclusions was reinforced by the Supreme Court decision *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). In *Head*, the Supreme Court noted:

A trial court’s oral opinion and memorandum opinion are no more than oral expressions of the court’s informal opinion at the time rendered. An oral opinion “has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.”

*Head*, 136 Wn.2d at 622, quoting *State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

The *Head* Court determined that in adult bench trials where written findings and conclusions are not filed, remand for entry of findings is the appropriate remedy. *Head*, 136 Wn.2d at 622. But, at the hearing on remand, no additional evidence may be taken as the findings and conclusions are based solely on the evidence already taken. *Head*, 136 Wn.2d at 625.

We hold that the failure 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. An appellate court should not have to comb an oral ruling to determine whether appropriate

“findings” have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

*Head*, 136 Wn.2d at 624.

Here, despite specific orders to the prosecutor to prepare written findings and conclusions, the court has never entered the required written findings of fact and conclusions of law following the bench trial. The written findings and conclusions are especially necessary here because of the wide disparity in testimony between the witnesses. The court’s oral/written verdict reviews very broadly the evidence presented at trial without the specificity necessary for appellate review.

Accordingly, this Court must remand Mr. King’s matter for the entry of the CrR 6.1 findings, or reverse and dismiss Mr. King’s convictions.

2. THE STATE FAILED TO PROVE MR. KING TOUCHED EITHER BOY FOR THE PURPOSE OF SEXUAL GRATIFICATION

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466,

471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, 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.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

RCW 9A.44.083(1) sets forth the elements of first degree child molestation:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

The trial court candidly noted in its oral ruling that the only element at issue was whether Mr. King had sexual contact with either or both boys during a period intervening between June 1,

2006, and January 29, 2007. CP 83-84, 86-87. Mr. King agrees with the court's finding, but contends the State's evidence failed to prove this element.

Neither child could state when the alleged touching occurred except in very general terms, with the only specificity being that it happened during a sleepover by Mr. King. The school officials as well as the boys' therapists merely parroted what the boys had said to them, once again making very general allegations without any reference to time. Finally, neither the police interview nor the interview by the prosecutor's interviewer provided any additional evidence regarding the time when this alleged abuse occurred.

b. The evidence failed to prove sexual contact occurred. Here, the court found Mr. King touched B.F.'s and E.F.'s penises on a sleepover at their house in the month of December 2006. CP 84-88. The court candidly admitted the only person who testified as to specific dates of the alleged touching was Ms. Fryhling, who it also noted "may be incorrect as to the precise dates." CP 85. But the court's finding misses the point: the precise date of the alleged incident is *the* essential issue this case turns on because, the court found the touching occurred on December 13-15, thus Mr. King is not guilty of the offenses.

Ms. Fryhling noted Mr. King stayed over her house with the boys when a wind storm occurred in December 2006, which knocked out power in the area. She was adamant the touching occurred during this sleepover. CP 50; 9/3/09RP 769/8/09RP 36-37. E.F. stated the touching occurred during Mr. King's sleepover. CP 53. Ms. Fryhling was certain the wind storm occurred December 23 through 24, 2006. 9/3/09RP 71. Evidence established this wind storm actually occurred December 13 through 14, 2006. 9/8/09RP 37-38. Ms. Fryhling never mentioned anything to Detective Stock nor Dr. Wiester, the sexual assault nurse, that she believed Mr. King slept over on December 23 and 24, 2006. CP 50-52. The first time any mention of December 23 and 24, 2006, occurred was during Ms. Fryhling's trial testimony. CP 50-51

The evidence that the sleep over occurred on December 13 to 14, 2006, is important because Mr. King's witnesses were consistent in testifying that a birthday party for Mr. King occurred December 14, 2006, which would have made it impossible for Mr. King to have engaged in any of the conduct alleged. Since the evidence established the only time Mr. King slept over with the boys was during the windstorm, the windstorm occurred during a time when Mr. King was at his girlfriend's residence at his birthday

party, the inescapable conclusion is the State failed to prove any touching occurred during the period charged in the information. Accordingly, the State failed to prove that Mr. King was guilty of touching the boys for his sexual gratification.

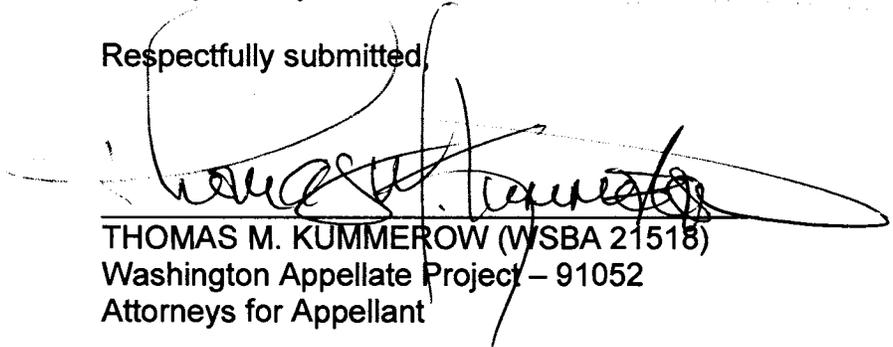
c. This Court must reverse and remand with instructions to dismiss the conviction. Since there was insufficient evidence to support Mr. King's convictions, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Mr. King submits this Court must reverse his convictions with orders to dismiss or remand for the entry of written findings.

DATED this 20th day of May 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and somewhat cursive.

THOMAS M. KUMMEROW (WSBA 21518)  
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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64453-0-I
v.	)	
	)	
GARY KING,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> GARY KING 918935 MCC-WSRU PO BOX 777 MONROE, WA 98272-0777	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

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**SIGNED** IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF MAY, 2010.

X \_\_\_\_\_ 

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