

NO. 68595-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

E.B.,

Appellant.

68595-3-I
APPEALS DIVISION
JAN 11 2011
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HILYER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

MICHAEL P. MOHANDESON
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Juvenile Division
1211 E. Alder
Seattle, Washington 98122
(206) 296-9025

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A. ISSUE PRESENTED

It is well settled that a witness cannot be contradicted or impeached by information that is collateral to the principal issues being tried and that a trial court's ruling on the admissibility of extrinsic evidence offered for this purpose is reviewed for abuse of discretion. Here, the trial judge did not allow the appellant to present potential impeachment testimony on a film that had nothing to do with whether the appellant had sexual intercourse with the 12-year-old victim, but did allow the appellant to otherwise extensively impeach the victim's credibility. Was the trial judge's evidentiary ruling a proper exercise of his discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Elijah Burgos was charged by Amended Information in King County Juvenile Court with the crime of Rape of a Child in the Second Degree and Child Molestation in the Second Degree in the alternative. CP 31-32; RCW 9A.44.076; RCW 9A.44.086. The matter proceeded to a bench trial before the Honorable Bruce Hilyer. The judge found Burgos guilty of Rape of a Child in the Second Degree. 2RP 153; CP 33, 51. The court imposed a

standard range sentence of 15-36 weeks at JRA (Juvenile Rehabilitation Administration). CP 64.

2. SUBSTANTIVE AND OTHER RELEVANT FACTS

As Burgos does not assign error to any of the findings of fact they are a verity on appeal. Cowiche Canyon Observatory v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Accordingly, the State relies on such written findings (attached as Appendix A and designated as CP 47-52) to provide much of the underlying substantive factual information to this Court. The additional information relevant to the present appeal is contained below and taken from the verbatim report of proceedings.¹

Impeachment Summary

During her direct examination D.I. recounted that when she first disclosed to her older sister Katrina what had occurred between her and Burgos she included information that Burgos had “fingered” her and said that Katrina asked her if Burgos had put his penis inside of her; D.I. told Katrina that she did not know if Burgos penetrated her vagina with his penis. 1RP 113. When Katrina

¹ The verbatim report of proceedings are designated as follows: 1RP 3/19/12; 2RP 3/20/12; 3RP 4/11/12.

testified, she did not recall D.I. saying anything about Burgos fingering D.I. nor to asking D.I. if Burgos had penetrated her with his penis. 2RP 96-97.

D.I. testified that when she first disclosed what had occurred between her and Burgos to Katrina that it was only her and Katrina present. 1RP 112-13. D.I. did, however, acknowledge having a discussion about what had occurred between her and Burgos with both Katrina and Sabrina at the same time on a different occasion after the date she first told Katrina. 1RP 122. Katrina testified that their other sister, Sabrina, was present at the time of D.I.'s initial disclosure and that it came up when Katrina and Sabrina were having their own private conversation where they were sharing secrets. 2RP 97-98. D.I. wanted to join in on their conversation, and although Katrina initially denied D.I.'s request to join in, D.I. persisted in asking for 10-15 minutes until Katrina finally relented under the guise that D.I. said she had a big secret she could share. 2RP 98-99.

D.I. testified that she and Katrina confronted Burgos over Facebook the very same day she told Katrina about what had happened. 1RP 121. Katrina testified that she and D.I. confronted

Burgos over Facebook on a day after D.I. made the disclosure to her. 2RP 90-91.

In terms of the information that D.I. disclosed to Katrina and Sabrina when she spoke to them together, she did not mention performing oral sex on Burgos or that Burgos penetrated her vagina with his penis, which caused her pain. 1RP 122-23. When D.I. finally disclosed what occurred to her parents, she left out the same information that she left out with her sisters, to also include the fact that she experienced some vaginal bleeding in the days following the incident. 1RP 124.

When D.I. made her initial report to Officer Webber in July 2010 she similarly did not mention that she performed oral sex on Burgos, that Burgos vaginally penetrated her with his finger or his penis, that it hurt when he penetrated her with his penis, or that she experienced any bleeding. 1RP 125-26; 2RP 35, 36. In fact, D.I. reported to Officer Webber that she did not think there was any penetration of her vagina by Burgos' penis because she did not feel any pain. 2RP 27, 31. D.I. reported to Detective McMillian that she did experience pain during the incident. 2RP 27. Although D.I. testified at the trial that she took her underwear down to her ankles, she told Officer Webber that she only took her underwear down to

her knees. 2RP 12-13. D.I. also testified at the trial that she had gotten off of Burgos at some point to turn off the television but had told Officer Webber that she straddled Burgos the entire time. 2RP 44-45.

D.I. made no mention to Officer Webber that she cried at any point that evening but told Detective McMillian, and testified at the trial, that she did cry afterward. 1RP 109-10; 2RP 30-31, 33. D.I. told Officer Webber that Burgos only told her where to touch him, his penis. 2RP 28-29, 46-47. When D.I. subsequently spoke to Detective McMillian she told McMillian that Burgos actually took her hand and put it on his body. 2RP 29-30. D.I. told Officer Webber that she told Burgos to put her pants back on but testified during the trial that she put her own pants back on and that what she told Officer Webber on this point was inaccurate. 1RP 109; 2RP 32, 47.

D.I. acknowledged at trial that she never made any mention to either Officer Webber or to Detective McMillian that Burgos told her not to say anything about what had happened, though she testified for the first time at trial that Burgos told her not to say anything. 1RP 110; 2RP 33.

When D.I. later spoke to a nurse at the Harborview Sexual Assault Center she disclosed that she and Burgos had kissed, that

she had performed oral sex on Burgos, that he had touched her breasts under her bra, that he had penetrated her vagina with his finger and his penis, that she experienced some vaginal bleeding a couple of days later and that she had pain when she urinated. 1RP 81-82. The nurse testified that it was somewhat unusual for someone to experience bleeding days after the fact, but that the pain during urination could be, among other things, the result of a vaginal tear. 1RP 82-83, 84. However, by the time D.I. met with the nurse it was in late July 2010 and no physical abnormalities were detected. 1RP 79, 83.

Katrina testified that D.I. had a tendency to overdramatize and exaggerate things, to include historically adding "extreme details," to make it seem worse than it was in order to get Katrina and Sabrina into trouble. 2RP 98, 125-26. Contrary to what D.I. recounted, Katrina also testified that she did not need to wake D.I. up before she, Katrina, turned in for the night on the evening of the incident. 2RP 101.

During the defense interview with D.I. she disclosed for the first time that right before she straddled Burgos he asked her if she had ever heard of the movie "No Strings Attached." 1RP 130. D.I. testified during direct examination that the movie was about two

people who were not involved in a relationship but secretly engaging in sexual activity, a “friends with benefits kind of thing.” 1RP 130. D.I. further testified that Burgos said that the situation between them was probably going to turn out similar to that. 1RP 130.

During cross examination D.I. stated that she had seen the most recent version of the movie “No Strings Attached” but that there had been different versions of the movie. 2RP 37. D.I. had heard of and was familiar with the prior version but had not actually seen the prior version. 2RP 37-38.

At the conclusion of the State's case Burgos informed the court that he wanted to call the defense investigator to testify as an “impeachment witness.” 2RP 128. Burgos made an offer of proof as to what the investigator would testify to, namely that the version of the film “No Strings Attached” that D.I. described had not been released until 2011. 2RP 128-31. Additionally, although there had been an earlier version of the film, Burgos had an unconfirmed belief at the time the offer of proof was made that the earlier version had a plot that was dissimilar to the one that D.I. described (i.e. two people who had a “friends with benefits” arrangement). 2RP 130-

31. The State objected to the investigator being called as a witness and explained its reasons therefor. 2RP 129-30.

In denying Burgos' request to present the additional testimony the trial judge noted that the defense had had "ample opportunity to impeach [D.I.] with her own statements and I haven't limited you at all in that respect. . . ." 2RP 131. The judge then articulated the test for impeaching a witness on a collateral matter and ruled that the information that Burgos sought to admit had nothing to do with the central issues in the case. Id. The judge further noted that the subject matter of the proffered testimony was itself confusing because there were multiple movies at different times and that it was indeed "very collateral" and not worth the time. 2RP 132.

During closing argument Burgos argued at length why D.I. was not credible and cited to the numerous inconsistent statements made by D.I., the conflicting testimony by D.I.'s own sister Katrina, Katrina's characterization that D.I. has a tendency to exaggerate things, the arguably suspicious context surrounding D.I.'s initial disclosure, and the physical factors which he claimed made what D.I. reported implausible. 2RP 138-49.

Despite the numerous impeachment efforts by Burgos, the trial judge found D.I. to be credible. 2RP 152-53; 3RP 5, 7-8; CP 50 (finding 27). Indeed, the trial judge found that D.I. was poised and embarrassed when she testified and noted that he could conceive of no possible reason for D.I. to make up the allegations or to put herself through the ordeal of the criminal justice process. 2RP 152-53. The judge went on to say in his oral ruling that he was “absolutely convinced” that D.I. was telling the truth and “completely convinced” that Burgos had committed Rape of a Child in the Second Degree. *Id.*; 3RP 5, 7-8. The judge also noted that the Facebook evidence corroborated D.I.’s testimony, though he would have found D.I. credible even without the existence of such evidence. 2RP 153; 3RP 7-8; CP 50 (finding 27).

C. **ARGUMENT**

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN DENYING BURGOS’ REQUEST TO OFFER ADDITIONAL POTENTIAL IMPEACHMENT TESTIMONY AGAINST D.I. ON A COLLATERAL MATTER.

Although Burgos characterizes the trial court’s decision not to allow him to offer additional testimony about the movie at issue as him being denied his constitutional right to present a defense,

Burgos was afforded ample opportunity to present a defense. Additionally, the trial judge's decision not to allow the testimony was tantamount to an evidentiary ruling, and the judge properly exercised his discretion in denying Burgos' request because the information was extrinsic evidence on a collateral matter.

"Although [a defendant] does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence." State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010); State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

ER 607 states that "The credibility of a witness may be attacked by any party, including the party calling the witness." However, it is well settled that a witness cannot be contradicted or impeached by the use of facts collateral to the principal issues being tried. Aguirre, 168 Wn.2d at 362; State v. Fankhouser, 133 Wn. App. 689, 693, 138 P.3d 140 (2006); State v. Teal, 117 Wn. App. 831, 845, 73 P.3d 402 (2003); State v. Hall, 10 Wn. App. 678, 680, 519 P.2d 1305 (1974).

The test for whether or not a fact is a collateral matter is as follows: "Could the fact, as to which error is predicated, have been shown in evidence for any purpose independently of the

contradiction?" Hall, 10 Wn. App. at 680; State v. Oswald, 62 Wn.2d 118, 121, 381 P.2d 617 (1963). "Put another way, a witness may be impeached on only those facts directly admissible as relevant to the trial issue." Fankhouser, 133 Wn. App. at 693.

Additionally, while a cross-examiner is, within the sound discretion of the trial court, permitted to inquire into collateral matters testing the credibility of a witness, he or she does so at the risk of being concluded by the answers given. Oswald, 62 Wn.2d at 121. Extrinsic evidence cannot be used to impeach a witness on a collateral issue. State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996). This rule applies even when the extrinsic evidence may have some indirect bearing on motive, bias or prejudice. State v. Carlson, 61 Wn. App. 865, 876, 812 P.2d 536 (1991).

Furthermore, ER 403 permits the exclusion of evidence which, among other things, can lead to confusion.

A trial court's ruling on the admissibility of testimonial evidence is reviewed for abuse of discretion. Aguirre, 168 Wn.2d at 361. A trial court abuses the exercise of its discretion when its ruling is manifestly unreasonable or based upon untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Although Burgos had a constitutional right to present a defense, such right was not without limits and in this instance meaningfully satisfied. The trial court afforded Burgos the opportunity to fully cross examine D.I., including questioning her about the film itself, and to impeach her credibility by probing her numerous inconsistent statements, the timing of such statements, the circumstances surrounding her initial disclosure, and making inquiry into whether it was physically possible for the sexual intercourse to have occurred as she described. *See lengthy rundown of such information supra at 2-9.*

Furthermore, D.I.'s sister Katrina was even permitted to testify that D.I. had a tendency to exaggerate things, wherein D.I. would add "extreme details" to make things seem worse than they were to get Katrina and their sister Sabrina into trouble. 2RP 98, 125-26. Burgos then rigorously emphasized all this information during his closing argument in an effort to cast significant doubt on D.I.'s credibility. 2RP 138-49. As such, Burgos' right to present a defense was not violated when the trial court denied him the opportunity to *further* attempt to impeach D.I.'s credibility through the testimony of his investigator on the collateral issue of the film "No Strings Attached."

D.I.'s testimony surrounding Burgos' isolated and passing reference to the film "No Strings Attached" near the outset of when he became physically intimate with her had no bearing on the principle/central issue of whether Burgos in fact had sexual intercourse with D.I. Contrary to Burgos' argument that the information about this film went "to the heart of the defense case—demonstrating both that D.I. was not credible and that the events of the alleged rape could not have occurred as D.I. contended," such information about the content of the film, its release date, and whether or not there are multiple similar versions of the film would otherwise have no relevance or independent purpose outside of an effort to impeach D.I.'s credibility.

The central issue in the case, i.e. the events concerning and constituting the rape itself, would not in any way turn on a passing reference to a film. Rather, such information was being offered solely to further impeach D.I.'s credibility beyond the numerous ways already utilized by Burgos to do so. In fact, Burgos' attorney indicated that she wanted to call the defense investigator as an "impeachment witness" on this issue. 2RP 128.

Burgos was afforded the opportunity to make an offer of proof as to what the defense investigator may testify to and even then was at that time unsure as to whether the prior version of the film had a similar plot to the more recent one released in 2011. Given what information existed before the trial court at the time the request to call the defense investigator was made, the judge was well within his discretion not to allow the additional testimony, finding it to be collateral to the central issue at hand and even confusing.

Burgos now cites to a movie website to support his contention that a prior version of the film "No Strings Attached" from 2008 has a plot completely dissimilar to the version from 2011 (i.e. two people having sexual relations without any commitment).² That information is outside the record in this case and should not be considered on appeal. See State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10 (1991); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). However, assuming such information is proper in the present appeal, that same website does list a version of a

² It is unclear that the 2008 version of the film with the title "No Strings Attached" that Burgos references in his appeal is the same one that his investigator may have testified about. As already mentioned, it is unclear from the record whether the investigator was even going to be able to testify about a movie with a differing plot and what that basis of knowledge rested upon (i.e. a website, an actual viewing of the film, etc.).

film with this same title from 2009 that could be similar to that from 2011:

Andy is looking for Mr. Right and Claire doesn't believe in monogamy. After meeting Justin at a dating place, Andy hopes he's the one he's meant to be with. Meanwhile, Claire gets caught up between Ethan and Jonathan. A film about love and unconventional relationships.

<http://www.imdb.com/title/tt1670686/>.³

As such, the trial prosecutor was not necessarily “wrong” as Burgos now alleges. Brief of appellant at 13. Indeed there are a total of 11 listings for that film, and while insofar as it can be ascertained from the face of the website the rest of them may concern subject matter different from the 2011 version, apparently not all of them do. See <http://www.imdb.com/find?q=no+strings+attached&s=all>.

This website also notes that the 2011 version was released on January 11, 2011, roughly eight months after the date of the crime. However, it is unknown how soon before the movie's release that previews started playing for the film, as previews sometimes begin well in advance of a film's release. Had previews

³ Relying simply on the information on the website without actually watching this film, it is unclear to what extent this film is similar to or different from the 2011 version.

been released by the date of the crime, it is possible that Burgos had seen them and accounts for why Burgos made the movie reference.

Alternatively, the very title of the movie is a cliché and is itself suggestive of a “friends with benefits” scenario. Perhaps Burgos told D.I. that their evening could be a no strings attached situation without a reference to a movie and D.I.’s memory was mistaken about there being a movie tied to it because they had watched multiple movies that evening and she had seen the 2011 version by the time of trial.

If anything, the above information and possible explanations illustrate and reinforce the trial judge’s position that such evidence would be confusing and a waste of time, particularly in light of both the extensive impeachment that had already taken place and the trivial value that this supposed passing reference to a movie had on whether the rape itself actually occurred. Indeed, the prosecutor did not even mention the movie reference in his closing argument. 2RP 132-38, 150-52. The trial judge’s ruling was proper and within his discretion under both ER 403 and the rule against admission of extrinsic evidence on collateral matters.

Finally, even if the trial court did err when it did not allow Burgos to call his defense investigator to offer testimony about the film, any such error was harmless. A trial court's error in refusing to admit testimony requires reversal if there is a reasonable possibility that the testimony would have changed the outcome of the trial. Aguirre, 168 Wn.2d at 361.

Burgos made an offer of proof as to what his investigator might possibly testify to and the court essentially indicated that such evidence would have no meaningful evidentiary impact on the central issue in the case, and possibly just confuse matters. 2RP 128-32. As previously discussed, the purpose of presenting such evidence would be to further impeach or impugn D.I.'s credibility beyond the numerous other avenues of impeachment that had already been undertaken.

However, despite those extensive efforts to impeach D.I., the judge found her to be very credible. Indeed, the trial judge alluded to D.I.'s credibility numerous times in his oral findings and then again in his written findings. 2RP 152-53; 3RP 5, 7-8; CP 50 (finding 27). The Facebook evidence also corroborated the fact that at least some level of sexual contact occurred between Burgos and D.I. by Burgos' own admission, though even absent that

evidence the court still would have found D.I. credible. 2RP 121-23, 153; 3RP 7-8; Ex. 11; CP 50 (finding 27). As such, Burgos cannot demonstrate that the admission of additional evidence about the film would have had a probable impact on the outcome of the trial.

Additionally, even if this Court were to hold that the trial court erred and that in doing so Burgos was denied his constitutional right to present a defense, thereby triggering a beyond a reasonable doubt constitutional standard of harmless error,⁴ it is still abundantly clear that the ultimate outcome of the trial would not have changed, based again on the trial judge's numerous references to D.I.'s credibility, despite both extensive impeachment of D.I. and Katrina's unfavorable characterization of D.I.'s willingness to exaggerate, and on the judge's comments about the lack of weight any further testimony about the movie would have after receiving Burgos' offer of proof on the issue. 2RP 131-32, 152-53; 3RP 5, 7-8. The trial judge was in the best position to evaluate D.I.'s credibility based not only on what she said, but on her actual physical presentation in court. Similarly, the trial judge

⁴ See *State v. L.B.*, 132 Wn. App. 948, 954, 135 P.3d 508 (2006) (noting that in a bench trial context a constitutional error is harmless if the State can prove beyond a reasonable doubt that the error did not contribute to the verdict).

was in the best position to evaluate the likely impact of the additional evidence at issue on D.I.'s credibility and on the ultimate outcome of the trial when electing not to allow it.

D. **CONCLUSION**

For the aforementioned reasons this Court should deny Burgos' motion for a new trial and instead affirm his conviction.

DATED this 28 day of November, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
MICHAEL P. MOHANDESON, WSBA #30389
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Appendix A

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KING COUNTY, WASHINGTON
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SUPERIOR COURT CLERK
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs

ELLIJAH BURGOS,
DOB 05/21/1994

Respondent

No 11-8-02235-0

Findings of Fact and Conclusions of
Law Pursuant to JuCR 7 11(d)

A fact finding was held in this case on March 19 and 20, 2012, before Judge Bruce Hilyer. The State of Washington was represented by Deputy Prosecuting Attorney Benjamin Halasz and Senior Deputy Prosecuting Attorney Michael Mohandeson. Respondent appeared in person and was represented by his attorney, Dana Brown. The Court heard sworn testimony and arguments of counsel, and now makes and enters the following findings of fact and conclusions of law.

Findings of Fact

- 1 In May 2010 Respondent Elijah Burgos told Katrina Hargis that he had fought with his father and needed a place to stay. Katrina knew Respondent, but not well. She did, however, consider him a friend. Katrina asked her parents if Respondent could stay the night, and she met him outside their three-bedroom apartment in Kirkland, WA.
- 2 Katrina's parents, Ray and Karen Ishak, had been at a dance showcase with D I, their twelve-year old daughter. They returned home late that evening. When they arrived home they met with Respondent and let him stay the night. Also staying at the apartment that night were D I's two younger brothers. Her other sister, Sabrina, was staying at a friend's house that evening.

Daniel T Satterberg, Prosecuting Attorney
Juvenile Court
1211 E Alder
Seattle Washington 98122
(206) 296 9025 FAX (206) 296 8869

Findings of Fact and Conclusions of Law - 1

1 3 Katrina folded out their hide-a-bed couch in the living room for Respondent to sleep on
2 Katrina, D I , and Respondent decided to watch movies on the couch Ray and Karen went to
bed, and D I 's younger brothers were in bed

3 4 D I had met Respondent once before, through her old sister Katrina She did not know him
4 well D I changed out of the clothing that she had been wearing for ballroom dancing and
got into her pajamas, which consisted of a tank top and shorts that had an elastic waistband
5 She also had on underwear and a bra

6 5 At some point while the three were watching a movie Katrina decided to go to sleep and left
7 Respondent and D I together alone in the living room After Katrina left, Respondent and
8 D I started chatting and Respondent put his arm around D I

9 6 Respondent started talking about what he had done with past girlfriends and non-girlfriends
10 He said that he had kissed some of them who were 13 and 14 years old He asked how old
11 D I was, and she said she was 12 He said that he had played games with those girls,
12 including the "nervous game," which is a way to feel the other person up while giving them a
13 chance to tell you when to stop

14 7 Respondent eventually told D I to sit on his lap She was nervous and scared and sat on his
15 lap, straddling him, with her legs on either side of him, while he was seated on the pull-out
16 couch with his back up against the backrest They sat in that position talking for 10 to 30
17 minutes He asked her if she had seen the movie *No Strings Attached* and said it could be
18 like that He then kissed her on the mouth and started feeling her up He told her that he
19 could tell she was a dancer because of her body He put his hands under her shirt and then
20 over and under her bra, touching the skin of her breasts

21 8 Respondent then pulled D I 's shorts and underwear down to her knees and eventually ankles
22 and put his finger into her vagina At some point Respondent unzipped his pants, though his
23 pants remained on His penis was outside of his underwear and his pants He moved D I 's
24 hand down to touch his penis

1 9 He motioned her head down to his penis She resisted some and he kept pushing her head
2 down At that time she was feeling scared and thought that Respondent would be mad if she
3 didn't do what he wanted She moved down and put her mouth around Respondent's penis
4 At the time of her trial testimony she could not recall if the penis was hard or soft

5 10 She tried to come up and Respondent held her head down He eventually let her up and he
6 put his penis in her vagina It hurt D I badly when Respondent put his penis in her vagina

7 11 D I told Respondent that it hurt and that they were done He told her to make sure that she
8 didn't tell anyone or else something would happen She understood him to mean that they
9 would both be in trouble D I was crying and went to bed crying She muffled the noise
10 because she didn't want anyone to hear her She went to bed at 3 or 4 a m Her sister Katrina
11 was a sound sleeper and did not wake up when D I came into the room they shared

- 1 12 The next morning D I 's family spoke with a family friend who was also a police officer
2 concerning Respondent's reports about his father D I had decided not to tell anyone what
3 had happened and was trying hard to act like nothing was wrong She was intimidated and
4 nervous
- 5 13 At one point the next day D I found herself alone in a room with Respondent He acted
6 confused to her and said that his memory of what happened the night before was foggy D I
7 told him exactly what had happened He then started rubbing her thigh and told her she was
8 better than other girls he'd had Later that day, Respondent returned to his home
- 9 14 D I was embarrassed and ashamed by what had happened She felt that she could have done
10 more to stop it She decided to keep things to herself Several days after the incident she had
11 some bleeding from her vagina when she went to the bathroom and felt pain when she
12 urinated
- 13 15 The incident involving Respondent continued to bother D I and several weeks later she
14 decided to broach the subject with Katrina D I told Katrina that she and Respondent had
15 done things and that she was not proud of it She decided not to tell Katrina everything that
16 had happened because she was too embarrassed and ashamed
- 17 16 Katrina was at that time skeptical of what D I told her D I told Katrina that she could prove
18 it to Katrina by using Facebook The two of them then got online and D I signed into her
19 Facebook profile D I started a chat session with Respondent who was signed into his
20 profile, which had the screen name "Elijah Burgos "
- 21 17 D I wrote him something to the effect of, "Hey What's up? That night was fun " He
22 responded that it was, that he enjoyed the kiss, and that they should do it again Katrina then
23 instructed D I to write to Respondent that Katrina was there Respondent responded "Fuck"
24 and told Katrina not to tell anybody (note This Facebook conversation was not admitted into
evidence as an actual written exhibit as Detective Oneill could not locate it in the Facebook
records that he received from Facebook)
- 18 D I also instructed Katrina that she was not permitted to mention the incident to their
parents Later, D I told Katrina and Sabrina together what DI had previously told Katrina
She also told Sabrina not to tell anyone
- 19 D I had decided not to tell her parents because she was ashamed, embarrassed and worried
about getting herself and Respondent into trouble
- 20 Later, Katrina discussed the incident with Summer, a friend of Respondent's and Katrina's
On May 29, 2010, Respondent wrote messages to Katrina on Facebook concerning her
telling Summer about what he had done to D I Respondent wrote, among other things
"BTW, thanks for telling Summer about what happened I asked that no one was to be told
and you told her That was NOT cool at all " After Katrina stated that Summer brought it up
with her Respondent stated, "Alright, I directly tell you not to tell anyone anything " See
trial exhibit 10 for full text of conversation

1 21 In July 2010 D I decided to tell her parents She told her parents most of what had
2 happened, but not everything She was too embarrassed and ashamed to mention all that had
occurred

3 22 D I's parents called the Kirkland Police Department and on July 16, 2010, D I provided a
4 recorded interview to police D I was still too embarrassed and ashamed to mention
5 everything that had occurred sexually between her and Respondent She also was scared and
6 wanted to keep people out of trouble

7 23 About a week later D I decided to tell her parents about the parts she had left out It
8 continued to bother her that she had not described everything and she decided to get it off
9 her chest She told them Respondent had put his penis in her vagina and into her mouth She
10 told them that it hurt and that she had bleeding afterwards

11 24 Katrina decided to find out from Respondent his version of events On July 23, 2010, she
12 messaged him on Facebook stating that she personally thought her sister was "over drama-
13 ming up the whole thing" and that she would really like to know Elijah's view on the whole
14 thing so she could pick out what she thought was true Katrina went on in the message to say
15 that she knew what D I had told her and that D I changed her story when she told their
16 parents Respondent responded saying, "You want to know the truth? The whole truth? I'll
17 tell you I didnt tell you originally because I didnt want to embarrass your sister But at the
18 end of Nine, she started telling me how she did so many things with all these older guys and
19 she started hitting on me She kissed me, and I didnt resist because quite frankly I wasnt
20 thinking However, when she started to do things that were a little more extreme, I stopped
21 her She continued to try, but I told her I wouldnt because she was my friend's sister In the
22 end she got upset and just went to bed Believe me or not, I dont care Because if anything
23 had happened that she didnt do, she would have screamed If I had had sex with her she
24 would have either cried or yelled because since she is so young it would probably tear her So
there Goodnight " See also trial Exhibit 11

25 On July 26, 2010, Karen and D I went to the Harborview Center for Sexual Assault and
26 Traumatic Stress They met with Advanced Registered Nurse Practitioner Joanne Mettler
27 D I described what Respondent had done to her D I stated that she had put her mouth on
28 Respondent's penis and that he had put his fingers in her vagina She described that it hurt
29 when Respondent put his penis in her vagina After stating that she had not had a period yet,
30 D I told Ms Mettler that a couple of days after the incident there was blood on the toilet
31 paper after she went to the bathroom D I also said that it sometimes hurt when she went to
32 the bathroom

33 26 D I's parents brought her back to the police station on August 3, 2010 Detective Allan
34 O'Neill had been assigned as the primary investigator and was present for the recorded
35 interview D I gave a second recorded statement, this time relating the entire version,
36 including the penetration of her vagina by his penis, the oral sex, and the pain that she felt

37 27 D I's trial testimony was credible The Facebook evidence corroborated her testimony but
38 the court would have nevertheless found D I's trial testimony to be credible even without
39 such evidence

1 28 Respondent was born on May 21, 1994, and was at least 36 months older than D I , who was
2 born on February 28, 1998

3 29 Respondent was not married to or in a state registered domestic partnership with D I at the
4 time of the incident

5 **Conclusions of Law**

6 I

7 This court has jurisdiction of the subject matter and of Respondent Elijah Burgos in this
8 cause

9 II

10 The following elements of Rape of a Child in the Second Degree have been proven by the
11 State beyond a reasonable doubt

- 12 1 That during a period of time intervening between April 1, 2010 through May 31, 2010, the
13 Respondent had sexual intercourse with D I (DOB 2/28/1998),
- 14 2 That D I (DOB 2/28/1998) was at least twelve years old but was less than fourteen years
15 old at the time of the sexual intercourse and was not married to the Respondent and was not
16 in a state registered domestic partnership with the Respondent,
- 17 3 That D I (DOB 2/28/1998) was at least thirty six months younger than the Respondent, and
- 18 4 That this act occurred in King County, Washington

19 III

20 Respondent is guilty of committing the crime of Rape of a Child in the Second Degree as
21 charged in Count I of the Amended Information

22 IV

23 Judgment should be entered in accordance with Conclusion of Law III In addition to
24 these written findings and conclusions the court hereby incorporates its oral findings and
conclusions as reflected in the record

DATED this 11 day of April, 2012,


Honorable Bruce Hilyer

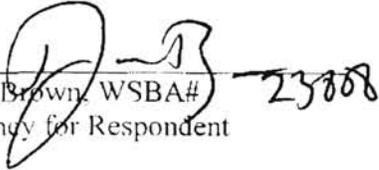
Daniel T Satterberg, Prosecuting Attorney
Juvenile Court
1211 F Alder
Seattle Washington 98122
(206) 296 9025 FAX (206) 296 8869

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Michael Mohandeson, WSBA# 30389
Senior Deputy Prosecuting Attorney

Notice received and approved as to form only



Dana Brown, WSBA#
Attorney for Respondent

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE v. E.B., Cause No. 68595-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name _____

Done in Seattle, Washington

11-28-12
Date