

NO. 70318-8-1

**COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON**

STATE OF WASHINGTON, Respondent

v.

NANCY LYNN TOMLIN, Appellant

Appeal from the Superior Court of King County
The Honorable Michael J. Trickey, Department No. 34
Pierce County Superior Court Cause No. 10-1-10150-7

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR -5 AM 11:54

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR:

1. Trial counsel should have objected and the trial court erred when it allowed the assistant attorney general [AAG] to appear on behalf of a dependent minor witness in a criminal case where the Attorney General was not a party and where the information presented was unfairly prejudicial against Ms. Tomlin.
2. This case must be remanded to the trial court for entry of findings of fact and conclusions of law pursuant to CrR 3.6.
3. This case must be remanded to the trial court for entry of findings of fact and conclusion of law pursuant to CrR 3.5 where none were entered in the first trial and the statements were admitted again in the second trial pursuant to the earlier court ruling.
4. This court should dismiss Ms. Tomlin's convictions for Rape of a Child in the First Degree when the State failed to prove the charge beyond a reasonable doubt.
5. The trial court erred when it entered findings of fact nos. 9, 10, 11, 12, 17, 18, 19, 20, 21.
6. The trial court erred when it entered conclusions of law numbers II, III.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. The trial court has the duty to ensure the orderly administration of justice. The trial court ensures the orderly administration of justice by, inter alia, permitting only parties with standing to appear in a case. In a superior court criminal case, the parties are the State of Washington and the defendant.
2. The Sixth Amendment to the U.S. Constitution and Wash. Const. art. 1, sec. 22 [amend. 10] extends to all defendants the right to effective assistance of counsel. That right is violated when trial counsel fails to object to the intrusion of a nonparty in a criminal case, especially where that party provides unfairly prejudicial about the defendant that taints her credibility.
3. The trial court is required to enter findings of fact and conclusions of law following a suppression hearing pursuant to CrR 3.6. This mandatory obligation provides a thorough and concise record of the trial court's reasoning and facilitates appellate review. Failure to comply with the rule requires remand for entry of such findings.

4. The State has the burden to prove their case beyond a reasonable doubt. There is not sufficient evidence and this Court must dismiss Ms. Tomlin's convictions.
5. CrR 3.3 requires the entry of written findings when the trial court determines that a defendant's statement is admissible at trial. When a CrR 3.5 hearing is held, the ruling at the first trial must be memorialized in such findings for subsequent trials, as in this case. Where no findings have been entered and the admissibility of defendant's statement remains an issue, this court must remand the case for entry of the required findings.
6. In a bench trial, the trial court is required to enter findings of fact which must be supported by substantial evidence.
7. In a bench trial, the trial court must enter conclusions of law that are supported by findings of fact. The appellate court will make a de novo review of the conclusions of law.

C. STATEMENT OF THE CASE:

1. PROCEDURE.

The State of Washington charged Nancy Tomlin in King County Superior Court case no. 10-1-10150-7 SEA with Rape of a Child in the First Degree. CP 1-5.

After a first trial that resulted in a hung jury, the matter was set for retrial before King County Superior Judge Michael Trickey on March 25, 2013. The State was represented by deputy prosecutor Val Richey. RP 3/25/13 3. Ms. Tomlin was represented by Kevin McCabe. *Id.*

On the first day of trial, and without objection from defense counsel, assistant attorney general Comiskey, attorney in the dependency of EJ – the defendant’s son and a witness [not victim] in this case, appeared to provide materials objecting to his testimony in this case. RP 3/25/13 12, 25-26 . Cominsky was there to provide information to the court about to the court about the child’s competency and testifying. RP 3/25/13 9. There were no allegations whatsoever that Ms. Tomlin had ever sexually abused her own child. RP Vol. I 13. Nevertheless Comiskey informed the court that “there were other concerns” and that the AG was recommending termination of her parental rights. RP 3/25/13 39.

The trial court permitted AAG Comiskey to address the court . RP 3/25/13 25-26. The court then inquired about matters occurring in the dependency action, in which, of course, Ms. Tomlin had separate counsel, who was not there to speak for her. RP 3/25/13 27-28. The trial court also noted that there was a CASA [court appointed special advocate] and queried whether that individual was entitled to notice and an opportunity to be heard. RP 3/25/13 30.

Comiskey urged the court to make a competency determination on based on reviewing “the information that exists about the child. RP 3/25/13 31. Comiskey conceded that the Department’s plan for EJ was *not* reunification with Ms. Tomlin. RP 3/25/13 38.

The trial court ordered the parties to provide those materials from the dependency file that it wanted the court to consider relevant to the competency issue. RP 3/25/13 52.

Both the prosecutor and defense counsel reminded the court that the competency in a criminal case is determined by its own legal standard. RP Vol. I, 36 [the prosecutor: “. . .we have slightly different interests in this, and mine is whether or not this witness should be called to trial.”]; [defense counsel: alluding to one of the *Allen*¹ factors. . .]

After reading the dependency reports and hearing argument, including that from the AAG, the trial court denied Ms. Tomlin’s motion to have an expert interview the child EJ. RP 3/26/13 19. The trial court balanced the defendant’s right to compulsory process to any potential harm that might come to the child, determined that the process would be harmful and that there would be minimal gain to Ms. Tomlin. RP 3/26/13 20.

¹ *State v. Allen*, 70 Wn.2d 690 (1967)

The trial court did grant the defendant an interview of the child EJ. RP 3/26/13 21. The trial court entered an order setting forth the conditions for the interview. 3/26/13 49.

The defense later withdrew EJ as a witness. RP 4/8/13 82.

During the first trial, the court had held a CrR 3.5 hearing. Ms. Tomlin's CrR 3.5 motion rested on the argument that police used threats to gain entry into her residence. RP 3/26/13 83.

Redmond Police Department Detective Fein testified that she contacted Ms. Tomlin at her residence and ask if she could come in to talk about a friend that had been playing over with her son. RP 3/26/13 93. Ms. Tomlin stated that she did not want the police to come inside her residence, but she stepped outside and spoke with them. *Id.* Based on the nature of the subject, Det. Fein wanted to pursue the conversation inside Ms. Tomlin's residence. RP 3/26/13 96. After describing the allegations in detail, Det. Fein told Ms. Tomlin that she wanted to hear "her side of it" and they all went into her residence. RP 3/26/13 100. After Ms. Tomlin's taped statement, she was arrested. RP 3/26/13 106.

The trial court denied Ms. Tomlins' motion. RP 3/27/13 12-13. The written findings required by CrR 3.5 have never been entered. *Passim.*

The court held a CrR 3.6 suppression hearing during trial. RP 3/27/13. Findings of fact and conclusions of law were never entered.

Passim.

On March 31, 2013, Ms. Tomlin was hospitalized with a severe ear infection. RP IV 2. Her physician prescribed narcotic drugs for pain which caused her to be dizzy, confused and did not relieve the pain. RP 4/1/13 3. Ms. Tomlin also had been prescribed other medications and a recommendation from her physician that her recovery period would be ten days. RP 4/1/13 3. Based on her medical conditions, the defense asked for a ten day recess. RP 4/1/13 3. Defense counsel noted that Ms. Tomlin could not even hear. RP 4/1/13 3, 7.

On April 4, 2013, when trial resumed, trial counsel informed the court that Ms. Tomlin's ear medication which she had to take throughout the day incapacitated her hearing. RP 4/4/13 16. The court invited trial counsel to ask for recesses as needed. RP 4 /4/13 17.

After listening to the evidence and closing arguments, the trial court found Ms. Tomlin guilty of first degree child rape. RP 5/3/13 3

The trial court entered findings of fact and conclusions of law as required by CrR 6.1 in support of its decision. CP 161-164.

The court sentenced Ms. Tomlin to the low end of the standard range to 93 months to life in the Department of Correction with numerous other conditions. RP 5/3/13 17; CP 148-158.

On July 27, 2013, the trial court convened a hearing to correct a minor omission in the judgment and sentence. RP 6/27/13 2. At that time, trial counsel asked the trial court to indicate that its oral ruling and the transcript of its oral ruling should be the findings of fact and conclusions of law for purposes of appeal in this case. RP 6/27/13 8.

The prosecutor responded:

And I will object to that. I am trying to prepare them. I have numerous cases, I have a tremendous caseload right now, and I've been at training and presenting trainings. I just haven't had time to finish them. I also want to review my proposed findings with the transcript of the court's oral ruling to make sure that everything is lined up on that. But I don't see any reason why the Court should forego findings when they're required by the rule. I apologize that they haven't been done yet, but they are on the top of my list to get done as soon as I can.

RP 6/27/13 8.

The court acknowledged that it had not reviewed a substantial body of case law, that it stood by its oral ruling and that "if the State's going to submit proposed findings, we'll take up your objection at that time or appellate counsel's objection at that time." RP 6/27/13 9.

The required CrR 3.6 findings of fact and conclusions of law were never filed. *Passim*.

Ms. Tomlin timely filed this appeal. CP 159-160.

2. TESTIMONIAL:

On Saturday November 27, 2010, Redmond Police Department Detective McGinnis entered the apartment of Trudy Sherman, mother of NS, to start an investigation regarding possible sexual assault of NAS. RP 4/4/13 18, 24,57. NAS looked her in the eyes and spontaneously said “she sucked my penis, Nancy did.” RP 4/4/13 25. McGinnis told Sherman that she would not interview NAS that day and that an appointment would be made for a later interview. RP 4/4/13 26. Sherman also provided a written statement to police. RP 4/4/13 28. McGinnis then gave her business card to Sherman, instructed her not to have contact with Ms. Tomlin, and left. RP 4/4/13 31.

After the police left, Ms Sherman had NAS reenact the event with her. RP 4/9/13 73. Ms. Sherman had NAS play Nancy and she played NAS. RP 4/9/13 73.

At the time of the alleged abuse incident, Sherman and Ms. Tomlin lived in the same apartment complex although there were two apartment buildings between theirs. RP 4/4/13 83.

The incident which formed the basis for the investigation and subsequent charges occurred the day before Thanksgiving, November 24, 2010. The day before Thanksgiving NAS went to play at Ms. Tomlin's house. RP 4/4/13 101.

On November 24, 2010, Ms. Tomlin planned to spend the day cooking items for her Thanksgiving dinner. RP 4/11/13 133. Ms. Tomlin asked Sherman if NAS could play with her son EJ that day while she cooked and Sherman agreed to that NAS could do so and brought NS to the house to play with EJ in the afternoon. RP 4/11/13 134.

Ms. Tomlin took the boys to the store, returned to her residence to cook and let the boys play in EJ's bedroom. RP 4/11/13 144. After a short period of time, Sherman was at her door screaming. RP 4/11/13 145. NS had not screamed. RP 4/11/13 145.

The women walked into EJ's room and NS told Sherman that he did not want to go home. RP 4/11/13 146. Sherman looked around Ms. Tomlin's residence. RP 4/11/13 147. Sherman then left. RP 148.

EJ is younger than NAS and at one point in the afternoon Ms. Tomlin changed EJ's pull-up's [a type of diaper] and then spun him around in play. RP 4/11/13 150. NAS watched this game said, "Twirl me, Nancy, twirl me." RP 4/11/13 150. After she did, Ms. Tomlin said she was tired and that she was done with the twirling. RP 4/11/13 151.

.On November 24, 2010, the day of this incident, Robert Murphy, Ms. Tomlin's fiancé, arrived at Mr. Tomlin's residence at about 7:30 p.m., which was later than he had planned due to inclement weather. RP 4/11/1333 39. When he entered Ms. Tomlin's residence, NAS was present playing with EJ. RP 4/11/13 40. Ms. Tomlin was getting ready to take NS home. RP 4/11/13 42.

Shortly thereafter she took NAS home. RP 4/11/13 151.

Sherman's recollection of events differed. She claimed that about an hour after NAS left for Ms. Tomlin's house she heard screams that sounded just like her son's voice. RP 4/4/13 103-104. Sherman claimed to have heard the screams although her building was not adjacent to Ms. Tomlin's building and in fact was separated by other buildings. RP 4/9/13 44. She walked over to Ms. Tomlin's house and Ms. Tomlin invited her inside. RP 4/4/13 104. When she arrived at Ms. Tomlin's residence, Sherman talked about some other things before she mentioned that she thought she had heard NAS screaming. RP 4/9/13 46. Sherman did not say that she had been worried about NAS. RP 4/9/13 49.

Sherman never had been inside Ms. Tomlin's residence and Ms. Tomlin gave her a tour. RP 4/4/13 104-105.

When Sherman got around to checking on her son, NAS said that he was okay. RP 4/4/13 1056. After Ms. Tomlin returned NAS to his

residence that evening, both of them said they had been wrestling and had a lot of fun. RP 4/4/13 112, 114.

NAS made no mention of any alleged abuse at Ms. Tomlin's residence until late Friday when Sherman was trying to get him to go to sleep. RP 4/4/13 126. NAS resisted going to sleep and Sherman was about to spank him with the belt. RP 4/4/13 125. Sherman asserted that on the Friday after Thanksgiving as she was putting NAS to bed he told her that Ms Tomlin had sucked his penis. RP 4/4/13 126.

Sherman discussed the matter with her ex-husband, who urged her not to call the police because he did not believe NS. RP 4/4/13 130. Sherman did not call the police until the following Monday. RP 4/4/13 130.

As Det. McGinnis told Sherman, she made an appointment for NAS to be interviewed. Carol Webster, a child victim interviewer with the King County Prosecuting Attorneys Office, interviewed NAS. RP 4/8/13 86. During the interview, Webster asked NAS about his underwear and he could not recall whether he said he was wearing any that day. RP 4/8/13 87. NAS had forgotten whether he wore underwear that day. RP 4/8/13 88. NAS told Webster that he had been at Ms. Tomlin's house, that she sucked on his private, that he called his mother, and then she came and picked him up. RP 4/8/13 102; RP 4/9/13 152. However, later NAS denied

that he ever told the child victim interviewer Carol Webster that his mother came to get him from the Tomlin home; he steadfastly maintained that he had walked home alone. RP 4/9/13 152.

NAS made many other number of inconsistent statements about what had happened to him.

At one time he testified that one day when NS was at EJ's house playing, Ms. Tomlin came into the bedroom and grabbed their hands to swing them around. RP 4/9/13 132. NS thought it was fun to go up in the air. RP 4/9/13 133. After Ms. Tomlin stopped one time, she set NS on the floor and put her mouth on his privates. RP 4/9/13 133-134. Before this happened she had pulled down his pants and underwear. RP 4/9/13 135. NS was angry and yelled "stop." RP 4/9/13 136.

NS stated that immediately afterwards, he ran home. RP 4/9/13 140, 147, 158, 159, 160. He ran home because he knew he needed to tell someone what had happened. RP 4/9/13 141. When he arrived home within minutes of the event, he immediately told his mother what had happened. RP 4/9/13 141.

NAS could not recall what he had testified to in the prior trial. NAS did not recall testifying in the first trial that contact lasted fifteen seconds. RP 4/9/13 155. NAS stated that he did not experience pain

during the event, only that he felt “weird.” RP 4/9/13 136-137. In the first trial, NAS had testified that he experienced pain, burning. RP 4/9/13 154.

NAS made many different statements about the position he was in when the alleged abuse occurred. These statements are set forth in detail in the arguments below. However, NAS’s new versions continued right up to the eve of the second trial.

Right before trial, NS told his mother than Ms. Tomlin pulled his pants down and sat him on the bed. RP 4/4/13 242-143. NS stated that then Ms. Tomlin sucked his penis. RP 4/4/13 143. Sherman had disclosed this to the prosecutor the day before she testified. RP 4/4/13 143.

Det. Fein contacted Ms. Tomlin at her residence and advised her of the allegations. RP 4/10/13 21-22. Ms. Tomlin stated that NS had played with EJ at their house and that at one point they all had wrestled. RP 4/10/13 23. Ms. Tomlin explained that the wrestling was a term used for the twirling game since she put the boys down on the bed when they were done. RP 4/10/13 23. She did not deny physical contact with either EJ or NAS. RP 4/10/13 23. Ms. Tomlin provided a taped statement after which she was arrested and booked into custody. RP 4/10/13 32.

There had been some minor incidents of friction between Ms. Tomlin and Sherman prior to November 24, 2010.

Robert Murphy, a friend to Ms. Tomlin, recalled meeting Sherman when he helped Ms. Tomlin move. RP 4/11/13 34. At that time, Sherman looked disdainfully at Ms. Tomlin and said, “Oh, you’re dating a white man.” RP 4/11/13 34.

In the past, Sherman often had asked Ms. Tomlin to pick up NAS until 8:30, 9 p.m. RP 4/11/13 124.

Although these frictions were minor, Ms. Tomlin believed that NAS’s mother put him to telling lies about what she supposedly did. RP 4/11/13 20. Ms. Tomlin could think of no other reason. At her previous trial, her attorney had advised her not to give her opinion about that. RP 4/11/13 20-21.

Later on Sherman gave police several pairs of NAS’s underwear, RP 4/4/13 138. The State had submitted numerous pairs of boys’ underwear to the Washington State Patrol Crime Lab in the apparent hopes that NS had been wearing underwear on the date of his alleged contact with Ms. Tomlin and that there might be her DNA found on them. After testing by forensic scientist Denise Rodier, the scientist excluded Ms. Tomlin from the relevant items tested. RP 4/8/13 151, 153, 154, 155-156, 164-165.

Ms. Tomlin did believe that otherwise no child, especially NAS, would say such a thing about her. RP 4/11/13 21.

D. LAW AND ARGUMENT:

1. TRIAL COUNSEL SHOULD HAVE OBJECTED TO AND THE TRIAL COURT SHOULD NOT HAVE ALLOWED THE ASSISTANT ATTORNEY GENERAL LACKED STANDING TO APPEAR AND WHERE THAT APPEARANCE PREJUDICED MS. TOMLIN.

In Washington a criminal case is initiated when the State properly serves “an indictment, information or complaint” upon the defendant in any court in the state, and the defendant then is required to plead thereto as prescribed by law without any further action or proceeding. *RCW § 10.37.010*². Thus in a criminal case, the parties are the state and the charged defendant. Washington law does not recognize any other parties to a criminal action. *Passim*.

The right to effective assistance of counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. *See, e.g., In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). “Counsel is

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RCW 10.37.010

Pleadings required in criminal proceedings

No pleading other than an indictment, information or complaint shall be required on the part of the state in any criminal proceedings in any court of the state, and when such pleading is in the manner and form as provided by law the defendant shall be required to plead thereto as prescribed by law without any further action or proceedings of any kind on the part of the state.

ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice.” *Id.*

In this case, trial counsel’s failure to object to the inexplicable presence of the AAG on behalf of Ms. Tomlin’s own son falls below an objective standard of reasonableness and did prejudice Ms. Tomlin.

This composition of a criminal case is so fundamental and well-known that any reasonably competent criminal defense counsel should know that her adversary is only the prosecutor and that no one attorney has standing to appear at the bar.

In the instant case, on the first day of trial, the following parties appeared before the trial court: the State of Washington represented by the King County Prosecuting Attorney’s Office, the defendant, Nancy Tomlin, represented by counsel Kevin McCabe, and Assistant Attorney General Mary Ann Comiskey from the dependency action interposing an objection that the defendant’s child not be allowed to testify on her behalf. RP 3/25/13 3, 4, 6. The defendant’s child was not the alleged victim in this case. RP 3/25/13 13.

Because this was a criminal case and not a dependency case, the AAG representing the child was present but of course Ms. Tomlin’s dependency attorney was not present. RP 3/25/13 30.

Comiskey informed the court that although there were no allegations that the defendant had sexually abused her child, there were "other concerns about the child." RP 3/25/13 13-14.

Comiskey's statements to the court were based on dependency documents some of which contained opinions from individuals who had evaluated the child for that action RP 3/25/13 27. These documents, of course, had been provided to Ms. Tomlin's dependency attorney. RP 3/25/13 32. However, none of the relevant current documents had been provided to defense counsel. RP 3/25/13 34. Of course, dependency documents are sealed by statute. RP 3/25/13 40.

The AAG intended to seek termination of Ms. Tomlin's parental rights. RP 3/13/25 39. The AAG opposed any further evaluations for competency in the criminal case or involvement of the child in the criminal case. RP 3/25/13 31. The AAG wanted the court to review the existing information in the dependency file and made its determination on that information alone. RP 3/25/13 31.

The trial court and the actual parties to the criminal case knew this was not constitutionally permitted. RP 3/25/13 34, 36, 53-54..

In this case, the trial court should not have permitted a nonparty, specifically the AAG, to appear at the criminal trial and to provide information regarding the competency of a child witness who is Ms.

Tomlin's son. RP 3/25/13 12 During the course of the AAG's argument, the AAG informed the court that although Ms. Tomlin had not sexually assaulted her son, "there were other concerns" and that the AAG was recommending termination of her parental rights. RP 3/25/13 14

The AAG's unfairly and highly prejudicial comments about the defendant occurred at the outset of this trial. These comments, made by a government who noted that she had access to a file replete with psychological evaluations, were the type of character evidence that is not admissible in Washington. Further, the AAG's characterization of Ms. Tomlin as an unfit mother with "other concerns" in a case of child sexual abuse against a very young child portrayed Ms. Tomlin in a negative light and adversely affected her credibility. Did these "other issues" include untruthfulness, psychological issues that might cause her to justify actions that others might see as sexual contact disregard of the needs and safety of young children? The impropriety of the AAG's role in this and the substantial likelihood of unfair prejudice resulting therefrom mandates reversal for Ms. Tomlin.

2. THE TRIAL COURT'S FAILURE TO ENTER CrR 3.6
FOF/COL PREVENTS MS TOMLIN FROM RAISING
SUPPRESSION ISSUES ON APPEAL.

The trial court's duty regarding the entry of finding of fact and conclusions of law after a suppression hearing is set forth in Criminal Rule [CrR] 3.6:

Rule 3.6. Suppression hearings -- Duty of court (a) *Pleadings.* Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary is required, the court shall enter a written order setting forth its reasons. (b) *Hearing.* If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

These findings of fact and conclusions of law must be entered prior to the conclusions of the case and prior to the appeal to permit appellate review and out of fairness to the defendant. However, under the appellate courts they will allow tardy entry of these findings and conclusions of law under certain circumstances. Thus, even where the court failed to enter *CrR 3.6* findings and conclusions until after the appellant's opening brief is filed, appellate court will reverse only if the appellant can establish

that he or she was prejudiced by delay, or that the findings and conclusions were tailored to meet the issues presented in the brief. *State v. Byrd*, 83 Wn. App. 509, 922 P.2d 168, review denied, 130 Wn.2d 1027, 930 P.2d 1229 (1997).

In the instant case, the suppression hearing was a critical component of the case. This is so because the Ms. Tomlin's contended that police was taken after the police used threats to enter her residence. RP 3/26/13 120 Ms. Tomlin's only statements to police were made in her residence after this unlawful entry into her residence. RP 3/26/13 122. Immediately after making those statements, police arrested Ms. Tomlin and transported to the King County Jail, where she was booked and then charged with child rape in the first degree. RP 3/26/13 105, 124 CP 1-5.

The suppression hearing was held prior to the first trial in 2011. The suppression hearing findings of fact and conclusions of law should have been entered during that trial. They were not.

It is not possible for Ms. Tomlin to fully present this issue on appeal without these findings. Given the lengthy period of time between suppression hearing and this date, this court should order this matter back to the trial court for entry of findings of fact and conclusions of law. The court should permit appellant the opportunity to fully brief the issue on the merits after the findings of fact and conclusions of law are entered.

Even where the court failed to enter CrR 3.6 findings and conclusions until after the appellant's opening brief is filed, appellate court will reverse only if the appellant can establish that he or she was prejudiced by delay, or that the findings and conclusions were tailored to meet the issues presented in the brief. *State v. Byrd*, 83 Wn. App. 509, 922 P.2d 168, review denied, 130 Wn.2d 1027, 930 P.2d 1229 (1997).

3. THE TRIAL COURT'S FAILURE TO ENTER CrR 3.5 FOF/COL PREVENTS MS TOMLIN FROM RAISING ISSUES RELATED TO ON APPEAL.

The trial court's duty regarding the entry of finding of fact and conclusions of law after a hearing to determine the admissibility of a defendant's statements is set forth in Criminal Rule [CrR] 3.5, entitled "Confession Procedure":

(a) *Requirement for and time of hearing.* When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) *Duty of court to inform defendant.* It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the

hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) *Duty of court to make a record.* After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

(d) *Rights of defendant when statement is ruled admissible.* If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

In this case, the trial court in the first trial held a CrR 3.5 hearing and did not enter CrR 3.5 findings.

Nevertheless, during cross-examination the prosecutor used the transcript from her conversation with the detective. RP 4/10/13 167, 184; RP 4/15/13 16-17.

Had the trial court from the first trial entered required findings, then Ms. Tomlin would be able to raise the issue of the admissibility of her statements of appeal. Because the statements were used in the second trial, were intimately related to the suppression issue for which no findings of fact and conclusions were entered, and undoubtedly affected the trial court's findings of fact nos.20. This is so because that in that finding, the trial court specifically weighed Ms. Tomlin's trial testimony against the statement she gave to detectives.

4. MS. TOMLIN IS ENTITLED TO REVERSAL OF HER CONVICTION WHERE THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT SHE COMMITTED THE CHARGED CRIME.

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 9, 133 P.3d 936 (2006); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Hosier*, 157 Wn.2d at 8, 9; *Salinas*, 119 Wn.2d at 201. "A claim of insufficiency admits the truth of the State's evidence" and all reasonable inferences. *Salinas*, 119 Wn.2d at 201.

The criminal rules for superior court judges require that, following a bench trial, the judge enter findings of fact and conclusions of law. **CrR 6.1(d)**. Findings and conclusions comprise a record that may be reviewed on appeal. **State v. Head**, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)). Each element must be addressed separately, setting out the factual basis for each conclusion of law. **Id.** at 623 . In addition, the findings must specifically state that an element has been met. **State v. Alvarez**, 128 Wn.2d 1, 19, 904 P.2d 754 (1995). After a bench trial, the appellate court reviews de novo whether the findings of fact the conclusions of law. **State v. Stevenson**, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).

If the reviewing court finds insufficient evidence to sustain a criminal conviction, then reversal is required. **Lee**, 128 Wn.2d at 164; **Hobbs**, 71 Wn. App. at 425. Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. **State v. Hardesty**, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). "The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence." (citing **North Carolina v. Pearce**, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), overruled in part on other grounds by **Alabama v. Smith**, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

In the instant case, the trial court's findings of fact 9, 10, 12, 13, 15, 17, 18, 19, 20, 21 are not supported by substantial evidence. "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding." *State v. Schultz*, 170 Wn.2d 746, 753, 28 P.3d 484 (2011).

In this case, the testimony of NAS and Sherman was irreconcilable. Many of the inconsistencies are set forth in the arguments below. Major inconsistencies which cannot be resolved and which are essential to any finding of guilt where, as here, the trial court found both NAS and Sherman credible include: NAS stated that *he* called for his mother, that he ran home alone after the alleged assault and that he immediately told his mother what happened; RP 4/9/13 147. NAS stated that when the alleged assault occurred, he was lying down on the bed, on the floor, or sitting up. RP 4/9/13 73; RP 4/9/13 134. In contrast, Sherman maintained that she heard NAS screaming across two apartment buildings on a cold, snowy day and that she ran to see what was wrong, but that she visited with her hostess before checking in with NAS; that she left him at the Tomlin residence until Ms. Tomlin brought him home at which time Sherman and Ms. Tomlin visited a bit; NAS did not say that Ms. Tomlin had done anything to him until two days later when he did not want to go

to sleep and she was preparing to spank him. RP 4/4/13 125. After the police were at the house, Sherman did a reenactment with NAS of what had happened. In that reenactment, NAS [playing Ms. Tomlin] knelt at his feet and bobbed her head. RP 4/9/13 71, 72. NAS changed his account of what happened right before trial.

Given the fluctuating accounts of the alleged event, Ms. Tomlin submits that the trial court's FOF that both NAS and Ms. Tomlin were credible and that the trial court adopted their testimony cannot support a conviction. This is so because these statements are inherently incompatible.

Further, in his initial statement to police and throughout the first trial, NAS used the term "penis". Yet at the second trial, he candidly acknowledged that at those times he had no idea what that word meant. RP 4/9/13 147.

Criminal convictions should be based on evidence, not conjecture and guess.

5. THE TRIAL COURT ERRED WHEN IT ENTERED FINDINGS OF FACT NUMBERS 9, 10, 11, 12, 17, 18, 19, 20, and 21.

a. There are some inconsistencies in the evidence. For example, whether NAS knew the word “penis” when he spoke to the first responding officer. Or whether he contradicted himself as to the defendant’s position in the room. **However, these inconsistencies must be evaluated in the context of NAS and his mother.**

This FOF is a non sequitur. The evidence is undisputed that when the police officer first contacted Trudy Sherman and NAS at their apartment NS looked her in the eyes and spontaneously said “she [Ms. Tomlin] sucked my penis, Nancy did.” RP 4/4/13 25. There was no dispute that NAS used the word penis.

However, regarding the remainder of FOF 9, NAS did contradict himself “as to the defendant’s position in the room.” Although this language is extremely vague, it seems that it may refer to Ms. Tomlin’s presence in the bedroom at the time of the alleged act.

NAS gave at least four versions regarding Ms. Tomlin’s position in the room: [1] he said that Ms. Tomlin pulled his pants down, sat him on the bed, and sucked his penis. RP 4/4/13 242-143. [2] he said that Ms. Tomlin put him on the floor, pulled down his pants and underwear, put her mouth on his privates; RP 4/9/13 133-135; [3] NAS said that he could not recall whether he was wearing underwear when any of this occurred; RP

4/8/13/102; [4] he stated that he was standing up when the event occurred.
RP 4/8/13 103.

In one version, NAS said that after the event occurred he yelled for his mother and she came to pick him up. RP 4/8/13 102. In another version, NS stated that immediately afterwards, he ran home. RP 4/9/13 140, 147, 158, 159, 160. He ran home because he knew he needed to tell someone what had happened. RP 4/9/13 141. When he arrived home within minutes of the event, he immediately told his mother what had happened. RP 4/9/13 141.

The trial court's concluding sentence in FOF 9, that "these inconsistencies must be evaluated in the context of NAS and his mother" makes no sense. Is the trial court saying that NAS can only tell the truth in the presence of his mother? If so, that compels the conclusion that NAS is not a competent witness and/or that his mother has such influence over him that he will say whatever he believes she wants him to say.

The last sentence of FOF 9 is *not* a finding of fact and is not supported by any evidence.

b. FOF 10: For example, the court notes a lack of antipathy toward the defendant in both NAS's and Trudy Sherman's testimony. Ms. Sherman testified that she was angry when she learned of the sexual assault, however the court did not observe any hatred or bias or prejudice on the part of part of NAS or Ms. Sherman toward the defendant. The comment that the defendant and Mr. Murphy attributed to Ms. Sherman

regarding “dating the white guy” did not appear to the court to be the type of racial hatred that would cause Ms. Sherman to make things up. Indeed Ms. Sherman’s reaction upon first hearing the report from NAS was that she didn’t believe it happened initially and she did a reenactment with NAS.

Again, this FOF is neither supported by the evidence nor explanatory of the FOF 9.

Starting with the latter, there is simply nothing in this FOF this explains the inconsistencies in the evidence of NAS’s statements or assist in their evaluation “in the context of NAS and his mother.”

Further, there is not a scintilla of evidence in the record to support the last sentence of the FOF that upon hearing the report from NAS, Ms. Sherman did a reenactment with him upon his initial disclosure. To the contrary, Ms. Sherman’s testimony was that after told her what happened, she asked a few questions and then left the bedroom. RP 4/4/13 126-130. Ms. Sherman testified that it was only after the police left her residence after taking the report that she did any sort of “reenactment with him” and this was some five days after the alleged incident. RP 4/9/13 73. Ms. Sherman had NAS play Nancy and she played NAS. RP 4/9/13 73.

Because this FOF is not supported by the record and yet this FOF is expressly stated to support FOF 9, this court must find they are not supported by substantial evidence.

c. FOF 11: Likewise, the fact that nas may have used the word “penis” in his conversation with the officer, but in other circumstances used the word “private” is not particularly significant to the court.

That a young child in the presence of his mother told a police officer that someone had put their mouth on his penis is to disclose a significant event. However, this disclosure becomes even more significant when it is later learned that the child did not even know the meaning of the “penis”. In this case, NAS did not know the word “penis” at the time of disclosure or in the first trial in this case [2011]. RP 4/9/13 175-176.

The trial court simply failed to apprehend the significance of this. The child’s disclosure was not his own. It was not spontaneous. The child used a word that was not his, that he did not even understand.

What was a synonym to the trial court was not a synonym to this child. The child’s word use had great significance, corroborated the defense that this claim was fabricated and raised a reasonable doubt.

This finding of fact is not supported by substantial evidence when one reads entire transcript. It must be stricken.

d. FOF 12: Although there may have been some inconsistencies in the testimony, the essential facts were consistent in the testimony of NAS and Ms. Sherman.

Likewise, this FOF is not supported by substantial evidence.

Consider the conflicting testimony between Ms Sherman and NAS about the events of 11/24/10.

Ms. Sherman testified that she became alarmed when, despite being two buildings from Ms Tomlin's apartment, on that snowy November day, she heard screams that sounded like NAS coming from that direction. RP 4/4/13 103-104. She walked over to Ms. Tomlin's residence, was invited in, visited a while before she mentioned that she had heard NAS screaming, saw that he was fine, and then left without him. RP 4/4/13 103; RP 4/9/13 46; RP 4/9/13 49.

Contrast Ms. Sherman's testimony with that of NAS: He never testified that his mother came over on her own. *Passim*. Instead, he testified that he ran immediately after the alleged abuse. RP 4/9/13 140, 147, 158, 159, 160. He also told the prosecutor's child victim interviewer that after the event he called his mother on the telephone and she picked him at the Tomlin residence. RP 4/8/13 104.

Further, regarding the timing of the disclosure, NAS steadfastly maintained that he told his mother as soon as he got home on 11/24/10. RP

4/9/13 141. In contrast, his mother swore that NAS did not report this until approximately midnight on 11/26/10. RP 4/4/13 124-125.

NS stated that immediately afterwards, he ran home. RP 4/9/13 140, 147, 158, 159, 160. He ran home because he knew he needed to tell someone what had happened. RP 4/9/13 141. When he arrived home within minutes of the event, he immediately told his mother what had happened. RP 4/9/13 141.

Finally, on the most significant fact there are other important inconsistencies. At the first trial NAS testified that Ms. Tomlin used her mouth “to pull his privates up a little.” RP 4/9/13 175. But more importantly, despite the police officer’s uncontroverted testimony that when she walked into Trudy Sherman’s apartment to take the initial report and saw NAS who told that “Nancy had put her mouth on his *“penis”*”, NAS did not even know what the word *“penis”* meant. RP 4/9/13 175-176.

e. FOF 17: During his videotaped interview on December 1, 2010, NAS had his hands over his ears and had his coat on as he was discussing these difficult topics. This was evidence of a child’s reaction to the stress of this situation. The court believes what NAS had to say about the incident in his videotaped interview.

The trial court’s finding of fact here is not supported by substantial evidence. Moreover, this FOF contradicts other FOF made by the trial

court wherein the trial court found credible other contrary statements of NAS.

However, addressing first the child victim interview, there is no competent evidence that the child was stressed during the interview. Although the trial court may make some findings regarding credibility, there is nothing in the record to establish that the trial court was qualified to assess psychological reactions to stress from watching a video. Thus, there is no substantial evidence to support that portion of the finding.

However, more importantly, the trial court's finding that it believes what NAS had to say in the video-taped interview compounds the problem of the trial court finding credible everything NAS said.

However, NAS said many conflicting things about the event to many people. RP 4/9/13 175; RP 4/8/13 102; RP 4/8/13 103 All of these statements cannot be true. Yet the trial court found all of them to be credible.

This type of finding cannot sustain a conviction.

f. FOF 18: NAS was very straightforward and articulate in his testimony. The court finds NAS to be credible and accepts the content of his testimony.

The trial court's finding that NAS was straightforward and articulate does not mean that he was credible where NAS had given so many contradictory versions about what had happened to him.

This argument incorporates by reference all of the foregoing statements regarding NAS's credibility issues and inconsistent statements.

g. FOF 19: Ms. Sherman has not had an easy life and she is disabled. However, she was straightforward and logical in her testimony. The court finds Trudy Sherman to be credible in her testimony and accepts the content of her testimony.

The defendant submits that Ms. Sherman's testimony, at a minimum, was hardly logical. Ms. Sherman testified that she was in her residence, more than 1 apartment away from the Tomlin residence, on a cold and snowy November day when she heard her son screaming for her. RP 4/4/13 103-104. She testified that after she telephoned and received no answer, she walked to the residence, where she was invited in. RP 4/4/13 104. When Ms. Sherman asked if everything was okay, Ms. Tomlin told her that everything was fine. RP 4/4/13 104. Ms Sherman did not ask to see her child whom she had reportedly heard crying so loud that his lamentations reached across an intervening apartment building. Instead, during the course of tour of the Tomlin apartment, she saw NAS, asked him if he has okay, and left him there. RP 4/4/13 104-111.

Sometime later, Ms Sherman called Ms Tomlin and asked her to bring Nathan home. RP 4//4/13 111. Ms. Tomlin did so. *Id.*

First, Ms. Sherman's claim of hearing NAS crying over that long distance, hurrying to his aid, and then not even checking on him

immediately defies reason. Second, when evaluating the logic, reason, and credibility of her testimony in light of the other evidence, especially the testimony of NAS which the trial court also found credible and accepted, one readily determines that there are too many discrepancies for them both to be credible.

Looking at the trial record as a whole, there is not substantial evidence for FOF 19. This is especially true given the trial court's conflicting findings of fact that witnesses whose testimony is patently incompatible are nevertheless credible.

h. FOF 21: On November 24, 2010, the defendant had sexual intercourse with the NAS by sucking upon the penis of NAS with her mouth.

This FOF lacks substantial supporting evidence. The defendant's argument incorporated by reference all of the preceding arguments about the credibility of NAS and Trudy Sherman.

In addition to the inconsistencies previously argued, Ms. Sherman's testimony about the reenactments also is important. In that reenactment, made after the police left, NAS [pretending to be Ms. Tomlin] got on his knees in front of Ms. Sherman, put his hands around her waist, and then made bobbing motions. RP 4/9/13 71-72. In this account, there was no disclosure of any actual contact that meets the legal definition of sexual contact in Washington.

Ms. Sherman testified at trial that NAS had very recently disavowed that reenactment. RP 4/9/13 72. Instead, NAS claimed that Ms. Tomlin sat him down on the bed. RP 4/9/13 73.

In this case, then, NAS stated that Ms. Tomlin put her mouth on his penis, although when he said that he did not even know what a penis was. NAS said this happened when he was standing up or else when he was sitting down or else when he was lying down on the bed. Then he showed his mother that Ms. Tomlin kneeled in front of him and made “bobbling motions”. RP 4/9/13 71-72.

The trial court, having found both NAS and Ms. Sherman credible, of necessity believed all of those statements, which contradict each other.

Thus, there is not substantial evidence to support FOF 19, that the defendant had sexual intercourse with NAS.

6. THE TRIAL COURT ERRED WHEN IT ENTERED CONCLUSIONS OF LAW NUMBERS II AND III.

The trial court’s conclusions of law are not supported by the findings of fact.

i. COL II: On or about November 24, 2010, the defendant had sexual intercourse with NAS.

Ms. Tomlin incorporates arguments made herein on the insufficiency of the evidence supporting the factual findings. She especially emphasizes that NAS accused her of a variety of things,

including simply kneeling in front of her with her hands around his waist and bobbling. This act is particular is not sexual intercourse. This act was described by NAS and reenacted by him with his mother. The trial court expressly found both of them credible.

De novo review requires vacation of this conclusion of law.

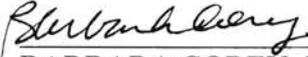
b. COL III: The defendant is guilty of the crime of Rape of a Child in the First Degree as charged in the original Information.

For the reasons argued regarding COL II, the defendant submits that this court must vacate this COL as well.

E. CONCLUSION:

For the foregoing reasons, Ms. Tomlin respectfully urges this court to dismiss this case for insufficiency of evidence. Alternatively, this court must remand the case to the superior court for entry of findings pursuant to CrR 3.5 and 3.6.

RESPECTFULLY SUBMITTED this 3rd day of March, 2014.

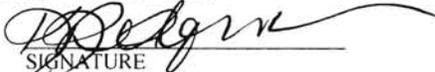


BARBARA COREY, WSBA#11778
v Attorney for Appellant

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct: That on this date, I delivered via ABC-Legal Messengers a copy of this document to King County Prosecutor's Office W554 516 Third Ave. Seattle, WA 98104 and via US Mail, Postage Prepaid to: Nancy Tomlin, DOC#366743, Washington Corrections Center for Women 9601 Bujacich Rd NW, Gig Harbor, WA 98332-8300.

3.8.14
DATED


SIGNATURE