

NO. 50037-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

M. B. (a juvenile),

Appellant.

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

The Honorable Christopher Wickham, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court erred in preventing appellant from cross-examining the complaining witness with evidence of motivation to testify falsely against him, in violation of his constitutional rights to present a defense and to confront the witnesses against him.

2. The trial court erred in failing to enter written findings of fact and conclusion of law as required by JuCR 7.11(d).

Issues Pertaining to Assignments of Error

1. Whether the court committed constitutional error in ruling appellant could not cross-examine the complaining witness about her knowledge of appellant's prior sexual offenses, which provided a motive to falsify allegations and testimony concerning appellant's actions toward her?

2. Does the trial court's failure to file written findings of fact and conclusion of law as required by JuCR 7.11(d) require remand for their entry, and for further appeal if necessary once they are entered?

B. STATEMENT OF THE CASE

1. Procedural Facts

On May 26, 2016, the Thurston County Prosecutor charged male juvenile appellant M.B. (d.o.b. 3/7/2002) with second degree rape by forcible compulsion of E.F. (1/4/2001), a female, on May 1, 2016. CP 2.

An adjudication hearing was held December 12-14, 2016, before the Honorable H. Christopher Wickham. 1RP¹ 1-264. By oral ruling, Judge Wickham found M.B. guilty as charged. 1RP 257-62. Written findings of fact and conclusion of law as required under JuCR 7.11(d), have never been filed.

On December 20, 2016, Judge Wickham imposed a standard range disposition of 80-100 weeks of incarceration. CP 16-26; 2RP 11. M.B. appeals. CP 29.

2. Substantive Facts

The events leading to the rape charge occurred during a mixed gender sleep-over at M.B.'s grandmother's house. M.B.'s grandmother, Georgia Acosta, also has a granddaughter, K.A. (d.o.b. 5/31/2001), M.B.'s cousin. 1RP 93-94, 184. Both K.A. and M.B. occasionally stay at Acosta's home in Lacey. 1RP 96, 182. Both had arranged to spend the night at Acosta's home on Saturday, April 30, 2016, and each had invited a friend to join them: K.A. invited the complaining witness, E.F., and M.B. invited his male friend, B.S.² 1RP 96, 183. K.A. had romantic

¹ There are three volumes of verbatim report of proceedings referenced as follows: **1RP** – two-volume consecutively paginated set for the dates of December 12-14, 2016; and **2RP** – December 20, 2016 (sentencing).

² The record fails to reveal B.S.'s date of birth. Given the nature of B.S.'s testimony about being best friends with M.B. and having a romantic

interest in B.S., as did B.S. in K.A. 1RP 112, 223. E.F. had a boyfriend, “Jordan,” at the time. 1RP 42, 100, 121, 134. She believed, however, that M.B. had a crush on her at the time, which she thought was “cute.” 1RP 152. B.S. also thought M.B. has a crush on E.F. 1RP 233.

The four teens spent the evening in M.B.’s room at his grandmother’s listening to music, playing with their phones and talking. 1RP 97, 115, 131-32, 144, 162, 187-88, 225. M.B. and K.A.’s grandmother would periodically check in on them. 1RP 162-63. At 11:30 p.m., the grandmother told the teens they had to go to bed at midnight in separate rooms, one for the boys and one for the girls. 1RP 164, 189. When she checked on them at 12:30 a.m., M.B. and B.S. were asleep in M.B.’s room, and K.A. and E.F. were asleep in an adjacent room with the respective doors closed, so she went to bed and closed her door. 1RP 164.

The testimony about what occurred after the grandmother went to bed varied from teen to teen. According to E.F., M.B. had been trying to kiss her all evening and repeatedly asking her to have sex with him, to which E.F. claimed she repeatedly said “no.” 1RP 131-32. After they all went to bed, she claimed M.B. continued to send messages asking her to

relationship with K.A., it appears B.S. is also a juvenile of about the same age as M.B., A.K. and E.F. (14 to 15 years old in May 2016). 1RP 223.

have sex with him, to which she again replied “no,” and told him she was going to bed. 1RP 133.

E.F. next recalled being awoken by M.B. turning on the bedroom light and poking her in the face, and then M.B. and B.S. telling her she had to get out because B.S. wanted alone time with K.S., so she got up and went to M.B.’s room and lay down. 1RP 133. E.F. claims M.B. then returned to his room, sat on the bed next to her and tried to get her to lay on her back as he asked her to have sex with him. 1RP 134. E.F. claims that when she said, “No. I have a boyfriend,” M.B. forced her to have penile-vaginal intercourse with him as she pleaded with him to stop, claiming he held her down with an arm across her chest and by holding her wrists to her shoulders. 1RP 134-36, 148-49. E.F. said she managed to force him off her with a knee and walk out of the room, claiming M.B. asked her if he could at least finish. When she said “no,” M.B. allegedly said she was going to give him “blue balls,” to which E.F. replied, “You deserve it.” 1RP 136. E.F. said she returned to the room where K.A. and B.S. were, told B.S. to leave, which he did, and then texted a friend about what had just occurred. 1RP 136-37.

E.F. recalled that B.S., K.A. and M.B. were then back and forth between the two rooms talking, with M.B. coming to her several times to talk about what had occurred, and the last time he came in she claimed he

said he had told K.A. that E.F. had cheated on her boyfriend. 1RP 138. When E.F. next saw K.A., she told her “I didn’t cheat on my boyfriend,” and when K.A. asked what she was talking about, she told her M.B. had raped her. 1RP 138. In response, E.F. recalled K.A. going into M.B.’s room, slapping him in the face, and then returning with B.S. to ask what E.F. wanted to do about it. 1RP 138.

According to M.B., he had not been trying to kiss or touch E.F. all day. 1RP 189. But he admitted that after his grandmother had checked to make sure they were asleep in separate rooms, he and B.S. went into the girls’ room, woke them up by flicking the lights off and on. 1RP 190-91. When K.A. said she wanted to talk to B.S., M.B. left and returned to his room and sat on his bed and watched music videos. 1RP 191. Thereafter E.F. “barged” loudly into his room, lay next to him on the bed and they “shared a mutual kiss.” 1RP 191-92. They continued to kiss and caress for a while, and then E.F. started touching M.B.’s penis, both over and under his clothing. 1RP 193. At one point M.B. asked E.F. for a “blow job,” but she repeatedly declined. 1RP 214. M.B. then tried to remove E.F.’s pants, but she stopped him and then removed them herself, lay on the bed, spread her legs and guided M.B.’s penis into her vagina. 1RP 193-95. According to M.B., E.F. wanted to have sex with him, and was

clearly enjoying it based on her physical responses. 1RP 195-96. M.B. denied ever holding E.F. against her will. 1RP 196.

M.B. recalled that after about two minutes of intercourse, E.F. became concerned M.B.'s grandmother would catch them in the act and said she wanted to stop. 1RP 195-97. M.B. tried to reassure her that would not happen, and even told her to "just let it happen." 1RP 197, 215. But when she continued to insist they stop, he did. 1RP 197. E.F. got dressed and left M.B.'s room. 1RP 198. After E.F. left, B.S. and K.A. came into his room, K.A. struck M.B. in the face, which shocked M.B. 1RP 200-01.

According to B.S., he also recalled both he and M.B. waking up the girls in their room by turning on the lights. 1RP 226. B.S. sat with K.A., and M.B. sat with E.F., first talked a bit and then both E.F. and M.B. got up and went to M.B.'s room, leaving B.S. alone with K.S. 1RP 226-27. B.S. recalled that about 30 minutes later, he heard E.F. leaving M.B.'s room saying something about "have fun with blue balls" and then she came in the girls' room, appearing angry and teary-eyed, turned on the light and told B.S. to get out. 1RP 227-28. B.S. returned to M.B. and asked him what happened to which M.B. explained that they had been having sex when E.F. stopped, said "Have fun with blue balls," and then left. 1RP 229.

According to K.A., M.B. woke her and E.F. after they had gone to bed by flicking their bedroom light on and off. 1RP 98. K.A. initially tried to ignore him, but when he kept it up, K.A. got out of bed and played along with the “joke” and eventually sprayed M.B. with “a can of Fabreze,” which produced laughter. 1RP 99. When E.F. asked K.A. to tell M.B. to stop, he did, and returned to his room. 1RP 100. K.A. recalled next going to the kitchen for water, and when she returned, E.F. said to her, “I didn’t cheat on Jordan.” 1RP 100. When K.A. asked E.F. what she was talking about, E.F. replied, “[M.B.] raped me.” 1RP 100-01. K.A. testified that after that, she went to M.B., slapped him in the face, and told him he cannot force people to have sex with him. 1RP 101.

When interviewed by police after the incident, M.B. said he thought E.F. was making up the rape allegation against him because she had a boyfriend. 1RP 60. M.B. also expressed to the officer that he was surprised by the allegation given that there were people close by who would have heard if she had made screamed or made sounds of distress. 1RP 61.

At some point prior to the evening hours on April 30, 2016, K.A. and E.F. returned to K.A.’s home because her father had called for a family meeting, to which E.F. was invited to if she wished to attend. 1RP 112-15. The topic of the meeting was to discuss M.B.’s past conduct,

which includes committing indecent liberties at age 12, and attempted first degree child rape at age 13. CP 14; 1RP 114, 145. M.B. was serving a SSODA³ at the time of the alleged incident here. CP 14. When cross examined about the family meeting by defense counsel, the trial court, in response to prosecution objection for being “beyond the scope of direct,” limited the defense inquiry of E.F. to eliciting she knew M.B. was “on probation” on April 30, 2016, but not that she knew it was because of sex offenses. 1RP 145-46.

When defense counsel questioned M.B. about reporting the alleged incident to his probation officer, M.B explained he did so because he is required as part of his probation to report any “unapproved sexual contact.” 1RP 204. When defense counsel asked M.B. what he meant by “unapproved sexual contact,” the prosecutor objected based on “relevance.” Id. In response, defense counsel argued it was important for the fact-finder to know why M.B. called his probation officer, and further, that it was important that the fact finder know E.F. was aware of M.B.’s past sex offenses because that knowledge could have emboldened E.F. to follow through with false allegations of rape against M.B. because they would be more believable in light of M.B.’s history of sex crimes. 1RP

³ SSODA refers to “Special Sex Offender Disposition Alternative.” See RCW 13.40.162.

204-06. The trial court warned defense counsel that questioning M.B. about his past offenses would open the door for the prosecution to explore them in detail. 1RP 206-07. In light of the court's ruling, defense counsel asked only why he felt the need to contact his probation officer after the incident, to which M.B. replied it was because he had sex. 1RP 207.

In closing and rebuttal argument, the prosecution noted the case turned on who was more credible, M.B. or E.F., and urged the court to find E.F. credible and M.B. not. 1RP 237-42, 255, 257. In contrast, defense counsel argued the only evidence of forcible compulsion was E.F.'s uncorroborated testimony, that the evidence tended to show E.F. regretted cheating on her boyfriend so she made up the rape allegation knowing it would likely be believed in light of M.B. sex offense history. 1RP 242-52

In its oral ruling finding M.B. guilty, the trial court began by noting;

although there has been evidence submitted that [M.B.] is on juvenile probation, there was no evidence as to what his prior offenses might have been, and if the court has been involved in any prior proceedings involving [M.B.], I at the current moment do not remember them, and I have not considered his criminal history in evaluating this case.

IRP 257-58. The court ultimately concluded E.F.'s version of events was more credible than M.B.'s, and on that basis found M.B. guilty. IRP 261-62.

C. ARGUMENTS

1. THE TRIAL COURT DEPRIVED M.B. OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES.

Exclusion of evidence that E.F. knew about M.B.'s past sex offense convictions violated M.B.'s constitutional right to present a defense. It also violated M.B.'s right to confront the witnesses against him through cross-examination. The evidence was relevant to show E.F. had a motive to falsify her allegations and testimony against M.B. Accusing M.B. and helping him get convicted provided a defense to E.F. against allegations she cheated on her boyfriend, Jordan. No compelling interest justified exclusion of the evidence. Reversal of the conviction is required because the prosecution cannot prove this constitutional error is harmless beyond a reasonable doubt.

- a. The right to present a defense and the right to confront adverse witnesses through cross-examination are fundamental to the integrity of the criminal justice system.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. State v.

Cayetano-Jaimes, 190 Wn. App. 286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 3, 22. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Defendants have the right to present evidence that might influence the determination of guilt before a jury. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

In conjunction with the right to present a defense, defendants have the constitutional right to confront the witnesses against them. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); U.S. Const. amend. VI; Wash. Const. art. 1, § 22. Defense counsel exercises the right to confrontation primarily through the cross-examination of the State's witnesses, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). An important function of the constitutional right to cross-examination is to expose a witness's motivation for testifying. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). Absent a valid justification, excluding relevant defense evidence denies the right to present a defense

because it "deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." Crane, 476 U.S. at 689-690.

A trial court's decision to exclude evidence is generally reviewed for abuse of discretion. State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). But constitutional issues, such as claimed violation of a defendant's Sixth Amendment right to present a defense and confront witnesses, are reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Dobbs, 180 Wn.2d 1, 10, 320 P.3d 705 (2014).

- b. The constitutional right to present a defense and to confront witnesses required that M.B. be allowed to cross-examine E.F. about her knowledge of his past sex offense convictions.

It was uncontested that on April 30, 2016, E.F. had a boyfriend named "Jordan." And the record shows E.F. was made aware of M.B.'s prior sex offense convictions at K.A.'s "family meeting" during the afternoon of April 30, 2016, and thus knew of his indecent liberties and attempted rape convictions prior to spending the night. This evidence was admissible to impeach E.F.'s testimony. Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or

less probable than it would be without the evidence." ER 401. "All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant." State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)). The defense theory was that E.F. made up the allegation of rape against M.B. because she felt guilty about cheating on her boyfriend by have consensual sex with M.B., and she was emboldened to make the allegation despite being false because M.B.'s history of prior sex offenses made it more likely her false allegations would be believed. As her credibility was central to the prosecution's case, any evidence impeaching her version of events was highly relevant.

A decision to exclude relevant defense evidence by prohibiting cross-examination on a crucial witness's motive to testify falsely is no run-of-the-mill evidentiary decision. A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Defendants in a criminal case are given extra latitude in cross-examination to show credibility, especially when the particular prosecution witness is essential to the State's case. State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). "The partiality of a

witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Davis, 415 U.S. at 316.

In light of these considerations, "ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987) (citing Karl B. Tegland, Washington Practice, Evidence § 105 (2d ed.1982); United States v. Wasman, 641 F.2d 326, 329 (5th Cir. 1981)). That E.F.'s had been made aware of M.B.'s prior sex offense conviction was crucial to M.B.'s defense. It was the only way to meaningfully attack E.F.'s credibility. The defense was skewered the moment the trial court barred M.B.'s counsel from cross-examining E.F. about this knowledge and how it might motivate her to fabricate the allegations against M.B. When courts weigh evidence under ER 403, the balance must be struck in favor of admitting defense evidence. Young, 48 Wn. App. at 413 (citing United States v. Dennis, 625 F.2d 782, 797 (8th Cir. 1980)). The trial court struck the wrong balance in excluding evidence of E.F.'s knowledge of M.B.'s sex offense convictions.

M.B. had the constitutional right to confront E.F., his accuser, through cross-examination. Any prejudice to the prosecution that might result from knowing E.F. was aware M.B. had sex offense conviction must

be weighed against M.B.'s right to effective cross-examination. The trial court failed to do this. The State's interest in excluding prejudicial evidence must "be balanced against the defendant's need for the information sought,' and relevant information can be withheld only 'if the State's interest outweighs the defendant's need.'" Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). "We must remember that 'the integrity of the truthfinding process and [a] defendant's right to a fair trial' are important considerations." Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 14).

E.F.'s was made aware of M.B.'s prior sex offenses when she attended the family meeting with K.A. 1RP 114, 145. Through effective cross-examination, the defense would have been able to show that this prior knowledge by E.F., coupled with the fact she had a boyfriend, provided strong motive for E.F. to falsify her account of what happened between her and M.B. in his bedroom. E.F. likely determined that in given of M.B.'s history of past sex offenses, her false rape claim would be more believable and would provide a plausible excuse for being unfaithful to her boyfriend. M.B. had the right to put that impeachment evidence on the record for consideration by the fact-finder.

The trial court failed to accord proper weight to M.B.'s Sixth Amendment right to present a defense and "to be confronted with the

witnesses against him." Courts must safeguard the right to present a defense "with meticulous care." State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). But the trial court's ruling here shows no such care. In ruling evidence of E.F.'s knowledge of M.B.'s sex offense history was excluded, the court did not even mention M.B.'s right to confront the witnesses against him, treating the matter as an ordinary evidentiary decision. 1RP 146.

If evidence is relevant, the burden is on the prosecution to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process at trial. Hudlow, 99 Wn.2d at 15-16. That is, the prosecution must demonstrate a compelling state interest to exclude a defendant's relevant evidence. Id.; Darden, 145 Wn.2d at 621. Even so, "[e]vidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000). "[F]or evidence of *high* probative value 'it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.'" Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16).

Neither the prosecution nor the trial court identified a compelling interest in keeping the fact-finder from hearing about E.F.'s motive to lie. The impeachment evidence was relevant to the defense and was of high probative value in relation to the complaining witness's credibility. Not even a compelling interest could keep it out. Jones, 168 Wn.2d at 720.

The defendant must be allowed to conduct reasonable cross-examination on a subject relevant to the witness's motive to lie, even if the subject matter is potentially inflammatory to the jury. Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988). In Olden, for example, the trial court committed constitutional error in prohibiting the defense from cross-examining the complaining witness regarding her interracial relationship with her boyfriend to show she lied about being raped to avoid jeopardizing that relationship. Olden, 488 U.S. at 229-32. Speculation as to the effect of jurors' racial biases did not justify exclusion of cross-examination with such strong potential to demonstrate the falsity of the witness's testimony. Id. at 232.

Cases such as Olden teach the notion of "inflammatory" evidence cannot be relied on as a talisman to exclude relevant defense evidence. If the evidence is an important part of the defense case, the rights of the accused must be honored. Cross-examination is designed to expose a witness's motivation in testifying and thereby "expose to the jury the facts

from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Id. at 231 (quoting Davis, 415 U.S. at 316-17).

The trial court, acting the evidentiary gatekeeper and fact-finder in M.B.'s adjudication, prevented itself from fairly judging the credibility of E.F.'s testimony. The prosecution did not have a compelling reason to prevent admission of evidence relevant to M.B.'s defense. On the contrary, the purpose of cross-examination is to test the credibility of witnesses. Darden, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process; thus, whenever the right to confront is denied, the ultimate integrity of the fact-finding process is called into question. Id. The court erred in excluding probative defense evidence without a compelling interest.

c. Reversal is required because this constitutional error is not harmless beyond a reasonable doubt.

Violation of the right to present a defense and to confront witnesses is constitutional error. Jones, 168 Wn.2d at 724; State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996), review denied, 131 Wn.2d 1011, 932 P.2d 1255 (1997). "[A]ny error in excluding evidence is presumed prejudicial and requires reversal unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place." Johnson, 90 Wn. App. at

69. For confrontation errors, the reviewing court must assess whether the error is harmless beyond a reasonable doubt by "assuming the damaging potential of the cross-examination were fully realized." Van Arsdall, 475 U.S. at 684. The prosecution bears the burden of overcoming the presumption of prejudice and proving harmlessness beyond a reasonable doubt. Maupin, 128 Wn.2d at 928-29; Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The prosecution cannot meet its burden here. As both parties acknowledged in closing, the case hinged on the credibility of E.F. and M.B. 1RP 237-42, 242-52, 255, 257. They were the only ones who knew what really happened. Evidence of E.F.'s prior knowledge of E.F.'s sex offense history coupled with the fact E.F. had a boyfriend at the time, would have showed a motive for her to testify falsely against M.B. Such evidence would have provided a basis for a rational fact-finder to question her account of what happened. Assuming as we must that "the damaging potential of the cross-examination" regarding her prior knowledge were "fully realized," the result is that E.F.'s credibility is undermined along with the prosecution's case. Van Arsdall, 475 U.S. at 684.

The evidence is not so overwhelming as to necessarily lead to a finding of guilt. No one in the home heard E.F. cry out for help or make any attempt to alert others that M.B. was forcing himself on her, and E.F.

admitted no doing so, ostensibly to protect her friend K.A. from getting in trouble. 1RP 137. The text messages E.F. claimed M.B. had repeatedly send asked to have sex with her were never found on her phone. 1RP 48-49. Nor was any bruising discovered on E.F.'s body to corroborate her claim M.B. held her down with his forearm and by holding her hands by her shoulders. 1RP 135-36. A physical exam after the alleged incident did not provided a basis to conclude whether the sexual intercourse that occurred was consensual or not. 1RP 76-89.

Moreover, M.B. testified in his own defense and provided an exculpatory version of events. He denied raping E.F., explaining instead that it was consensual to start, and when E.F. complained about getting caught by his grandmother, M.B. complied with her demand to stop. 1RP 195-97. Although minds can differ about the believability of his testimony, "[a]n appellate court ordinarily does not make credibility determinations" in assessing whether an error affected the verdict. Maupin, 128 Wn.2d at 929. This means the reviewing court will not presume one side's witnesses are credible and the other side's witnesses are not. The credibility and weight to be attached to the testimony of a witness is for the trier of the fact. Id. at 929-30 (citing Zillah Feed Yards, Inc. v. Carlisle, 72 Wn.2d 240, 244, 432 P.2d 650 (1967)). The trial court's exclusion of evidence from which a fact-finder could have inferred

that E.F. had a personal interest in testifying against M.B. was harmful because it deprived the fact-finder of information relevant to an assessment of E.F.'s credibility, which was essential to the prosecution's case.

"The [fact-finder's] estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence." Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). As sole judges of witness credibility, the fact-finders are entitled to have the benefit of the defense theory before them so that they could make an informed judgment regarding the believability of the complaining witness's testimony. Davis, 415 U.S. at 317. Instead of constricting the scope of M.B.'s counsel's cross-examination, the trial court should have allowed the wide latitude mandated by due process and the right to confrontation. The denial of these constitutional rights corrupted and distorted the fact-finding process. Reversal of the conviction is required.

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

JuCR 7.11 provides in relevant part:

(d) **Written Findings and Conclusions on Appeal.** The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its

decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

Written findings of fact and conclusions of law are necessary because the trial court's oral statements are merely an informal opinion which is "necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." **Error! Bookmark not defined.**State v. Dailey, 93 Wn.2d 454, 458, 610 P.2d 357 (1980) (citation omitted); see also State v. Smith, 68 Wn. App. 201, 206, 842 P.2d 494 (1992) ("a trial court is always entitled to change views expressed in an oral opinion upon presentation of findings of fact"). Moreover, this 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 challenge the sufficiency of the evidence on appeal. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Accordingly, "[a]n oral opinion 'has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.'" Head, 136 Wn.2d at 622 (citations omitted).

The purpose of requiring written findings and conclusions is to aid the appellate court on review. Head**Error! Bookmark not defined.**, 136 Wn.2d at 622;

State v. Naranjo, 83 Wn. App. 300, 303, 921 P.2d 588 (1996); State v. McCrorey, 70 Wn. App. 103, 115, 851 P.2d 1234 (1993). Timely filing of findings and conclusions also preserves the appellant's right to an appeal without unnecessary delay under Const. art. 1, § 10.⁴

When the court fails to enter written findings, there is a strong presumption on appeal that dismissal is the appropriate remedy. State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997). This presumption is overcome only when the court's oral opinion is clear and comprehensive enough to preclude doubt as to the basis for its decision. State v. Cruz, 88 Wn. App. at 909; accord, State v. Smith, 68 Wn. App. at 211. Generally, however, dismissal is the remedy when the trial court fails to comply with JuCR 7.11 (d) and a juvenile appellant is challenging the sufficiency of the evidence. Naranjo, 83 Wn. App. at 303; McCrorey, 70 Wn. App. at 115-16. As explained by this Court in McCrorey**Error! Bookmark not defined.**:

. . . Although failure to strictly comply with JuCR 7.11(d) does not lead to automatic reversal, see State v. Cowgill, 67 Wn. App. 239, 834 P.2d 677 (1992), the total noncompliance in this case [where McCrorey is raising a

⁴ See State v. Smith, 68 Wn. App. at 208-09 (because over a year had passed since Smith's conviction without findings and conclusions being entered pursuant to CrR 3.6, this Court held that Smith's appeal had been unnecessarily delayed in violation of Const. art. 1, § 10; accordingly, this Court reversed Smith's conviction and dismissed the charge against him).

challenge to the sufficiency of the evidence] precludes review. In general, dismissal is not appropriate absent a showing of prejudice. State v. Charlie, 62 Wn. App. 729, 733, 815 P.2d 819 (1991); State v. Witherspoon, 60 Wn. App. [596, 572, 805 P.2d 248 (1991)]. The total disregard for procedure in this case creates an appearance of unfairness that compels dismissal. See State v. Charlie, 62 Wn. App. at 733; State v. Witherspoon, 60 Wn. App. at 572.

McCrorey, 70 Wn. App. at 115-16; accord, Naranjo, 83 Wn. App. at 303 (the trial court failed to file findings as required by JuCR 7.11 (d); this Court stated that the total absence of findings prevented review of Naranjo's insufficiency of the evidence challenge; accordingly, this Court reversed and dismissed Naranjo's adjudication of guilt); cf. Head, 136 Wn.2d at 624 (the trial court's failure to enter findings and conclusions under CrR 6.1(d) required remand for entry of written findings and conclusions).

Under JuCR 7.11(d), the State had to submit findings of fact and conclusions of law to the juvenile within 21 days after M.B. filed his notice of appeal. E.F.'s notice of appeal was filed January 4, 2017, and it appears from the face of the document that the Thurston County Prosecutor received a copy on that date. CP 29. To date, almost five months later, no findings of fact and conclusions of law have been filed. Although remand is the typical remedy, the Head court recognized the

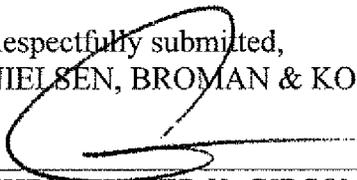
possibility that reversal may be appropriate when the individual can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. Head, 136 Wn.2d at 624-25. M.B. requests this Court remand for entry of written findings of fact and conclusions of law, and reserves the right to offer further argument depending on the content of any written findings and conclusions. Id. at 625-26.

D. CONCLUSION

This Court should reverse and remand for a new adjudication hearing because M.B. was deprived of his constitutional right to present a defense at the first adjudication hearing. This Court should also remand to the trial court for entry of the written findings and conclusions of law required by JuCR 7.11(d).

DATED this 31st day of May 2017.

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May 31, 2017 - 12:01 PM

Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v Mason Blair, Appellant
Superior Court Case Number: 16-8-00235-7

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