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Division II
State of Washington
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NO. 50750-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY WHITFIELD,
Appellant.

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

Thurston County Cause No. 16-8-00110-5

The Honorable Christopher Lanese, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove rape of a child beyond a reasonable doubt.
2. The state failed to prove child molestation beyond a reasonable doubt.
3. The trial court abused its discretion when it admitted child hearsay statements.
4. The trial court's findings of fact numbers 2, 4, 12, 13, and 23 are not supported by the record.
5. The trial court's conclusions of law are not supported by the findings.

B. ISSUES PRESENTED ON APPEAL

1. Whether the state failed to prove rape of a child beyond a reasonable doubt when E.G.A. testified that Whitfield penetrated his butt, but did not specify that Whitfield penetrated internally?
2. Whether the state failed to prove child molestation where the evidence in support was inadmissible child hearsay?
3. Whether the state failed to prove the crimes of rape of a child in the first degree and child molestation where the

findings were not supported by the evidence in the record?

C. STATEMENT OF THE CASE

1. Procedural History

Anthony Whitfield, a juvenile, age 15, was charged with First Degree Rape of a Child (RCW 9A.44.073) and First Degree Child Molestation (RCW 9A.44.082). CP 36. Whitfield was tried as a juvenile and, after a bench trial, he was adjudicated guilty. CP 77. The juvenile court entered a mandatory standard range disposition. RP 398, 404. This timely appeal follows. CP 90-101.

2. Substantive Facts

Anthony Whitfield lived at Deschutes Apartment complex in Tumwater with his mother. RP 107, 259-60. Mr. and Mrs. Kim, known as Halmeoni and Halaboeji, would often cook food for the neighbors and allow children from the complex to play in their apartment. RP 180-81. The Kims also babysat their two grandsons, E.G.A. and T.N.A., during the week. RP 135, 184. Whitfield went to the Kims' apartment to help Halaboeji with his English lessons, to eat food, and to play with the children. RP 260, 300-01, 324.

On March 5, 2016, E.G.A.'s and T.N.A.'s father, Steven Aguilar, picked them up from the Kims' apartment. 8/3/17 RP 111. Later that

night, E.G.A. took a shower and when he got out, he complained that his butt hurt. When Aguilar asked why, E.G.A. said that Whitfield had touched it. 8/3/17 RP 109. Aguilar then asked T.N.A. if Whitfield had ever done that to him and T.N.A. said that he had. 8/3/17 RP 104-05. Aguilar called 911. 8/3/17 RP 109. Tumwater Police Department Detective Eikum was assigned to investigate. RP 107. Six days later, Aguilar brought the boys to Monarch Children's Justice and Advocacy Center, where Forensic Interviewer, Sue Villa, interviewed them. 8/13/17 RP 5, 14. After the interviews, Detective Eikum arrested Whitfield. 8/3/17 RP 33.

Prior to trial, the state moved to admit the children's statements to their father and to Villa as child hearsay under RCW 9A.44.120. CP 15.

a. Facts elicited at the child hearsay hearing

At the child hearsay hearing, Villa testified extensively about the statements the boys made to her during their forensic interviews. In March 2016, E.G.A. was five and T.N.A. was nine. 8/3/17 RP 21, 93. During the forensic interview, Villa asked E.G.A. who he had gone to visit at the apartment where Whitfield lived. 8/13/17 RP 33-34. E.G.A. responded by asking, "Can I tell you

something that's very, very appropriate?" 8/3/17 RP 17. E.G.A. then stated "Any – Anthony just stuck his – stuck my finger in his butt – in my butt, actually. 8/13/17 RP 17. Villa responded, "stuck his finger in your butt?" 8/13/17 RP 17. E.G.A. told Villa the incident happened at his grandpa's house behind the couch and Whitfield stopped when his grandpa [Halaboeji] saw Whitfield touching him. 8/3/17 RP 19-20. E.G.A. indicated that the abuse occurred one time. 8/3/17 RP 18. Later in the interview, E.G.A. stated that Whitfield touches him a lot. Then he again stated that the abuse occurred in one day. 8/3/17 RP 40.

E.G.A. said that when Whitfield was done he "kepted on doing it" and "He kepted on punching me..." 8/3/17 RP 41. E.G.A. also referred to Whitfield giving him a big hug so hard that he cried. 8/3/17 RP 41-42.

E.G.A. said he saw Whitfield touching T.N.A., but T.N.A. said no one was around when Whitfield touched him. 8/3/17 RP 42-43, 62-63. When Villa asked E.G.A. whether he talked to T.N.A. about what he witnessed, E.G.A. said he did. When Villa asked what they said to each other, E.G.A. said they kept punching Whitfield "for owies to us." 8/3/17 RP 43-44. Then E.G.A talked about the big hug

again – that it felt like a trap he could not get out of. 8/3/17 RP 45. E.G.A. told Villa that somebody told him what to say to her, but he forgot what that person said. 8/3/17 RP 45.

During T.N.A.'s forensic interview, he said he was there to talk about the crime that Whitfield committed. 8/3/17 RP 50. When Villa asked him to describe the incident, T.N.A. said that Whitfield tackled him to the ground and started "humping" him. 8/3/17 RP 52. When he was asked to further describe the scenario, T.N.A. stated that Whitfield lifted his legs up and Whitfield was standing at T.N.A.'s feet. 8/3/17 RP 52. T.N.A. then said Whitfield was kneeling, but he did not specify what, if any, part of Whitfield's body was touching him. 8/3/17 RP 53.

T.N.A. described another incident that he said occurred two years prior, where Whitfield tackled him behind a tree. 8/3/17 RP 53. At first, T.N.A. said that Whitfield pulled him behind the tree, then he restated that he went behind the tree on his own. 8/3/17 RP 54. T.N.A. alleged that Whitfield touched his penis behind the tree. 8/3/17 RP 55-56. At first, T.N.A. said that Whitfield pulled T.N.A.'s pants down, but then he stated that he pulled his own pants down. RP 56.

When Villa asked how long this had gone on, T.N.A. stated, "For two years, and then, finally, I was like, 'That's enough, I'm just going to tell.'" 8/3/17 RP 56. However, T.N.A. did not tell his father, or anyone, about any of these incidents until he heard E.G.A. "tell" and Aguilar asked him if Whitfield had done anything to him. 8/13/17 RP 104-05. In his live testimony at the child hearsay hearing, T.N.A. said that he only told someone about these incidents "when they found out." 8/3/17 RP 99.

In his forensic interview, T.N.A. said Whitfield touched him with his hand every day he went to his grandmother's house. 8/3/17 RP 56-57. T.N.A. expressed that when Whitfield asked T.N.A. to touch him, T.N.A. was unsure whether this incident would involve the "cops or anything." 8/3/17 RP 58. Villa asked T.N.A. what he wanted to happen and he said he wanted Whitfield to stop doing it for life. 8/3/17 RP 58.

T.N.A. told Villa that he saw Whitfield stick his finger in E.G.A.'s rectum. 8/3/17 RP 72. Then he changed his statement and said that he did not see it, but E.G.A. had told their father about it. 8/3/17 RP 75.

During his forensic interview, T.N.A. said that he and

Whitfield both liked violence. RP 64.

Both children testified at the child hearsay hearing. E.G.A. remembered speaking with Villa, but could not remember what he told her. 8/3/17 RP 85. T.N.A. remembered talking to Villa. 8/3/17 RP 100. He testified that Whitfield touched his penis, but he could not remember how many times. 8/3/17 RP 99. T.N.A. did not remember telling his father about these incidents. 8/3/17 RP 99.

Aguilar testified that when E.G.A. first told him Whitfield put his finger in E.G.A.'s butt, Aguilar asked T.N.A. if Whitfield had ever done that to him. RP 105-06. T.N.A. said "yeah, he did it last week." RP 106. However, T.N.A. never alleged in his forensic interview or in his live testimony that Whitfield put his finger in T.N.A.'s butt.

After the hearing, the trial court entered the findings of fact including the following:

FF No. 2. The reporting party, Steve Aguilar, stated that his sons E.G.A. and T.N.A. reported that respondent, Anthony Whitfield, had put a finger in E.G.A.'s rectum while the boys were playing at their grandparent's house.

FF No. 4. During E.G.A.'s forensic interview he disclosed that the respondent had put his finger up E.G.A.'s butt. E.G.A. stated that this had happened at his grandparent's house behind the couch.

FF. No. 12. Steven Aguilar observed and treated an injury to E.G.A.'s rectum at the time of the disclosure.

FF No. 13. Ms. Villa's forensic interview was not conducted primarily for the purpose of a criminal investigation but also for the purpose of providing medical attention.

FF No. 23. T.N.A.'s statement though in response to his father's question was also spontaneous in the sense that the details were provided by the child and not suggested by his father's question.

CP 50-53.

The trial court concluded that the children's statements were admissible. CP 53.

b. Facts elicited at trial

The word anus was only used twice during the trial, both times by the prosecutor. RP 124, 381. When E.G.A. referenced the incident, both during the forensic interview and in his live testimony, he talked about a finger in his butt. RP 53. When the prosecutor asked whether Whitfield touched the outside or inside of his bottom, E.G.A. said it was the inside. RP 160. Aguilar testified that E.G.A. said Whitfield touched his butt in the middle and pointed to his rectum. RP 112. E.G.A. testified that Whitfield touched the inside of his bottom. RP 160. Aguilar testified that a nurse practitioner at Monarch examined both boys. RP 116. However, the state provided no medical evidence or any expert opinion that penetration had occurred.

The property manager, Tonya Miller, testified that she could see the neighborhood children from her window if they played near there. RP 215. And the children liked to play behind her office. RP 276. Whitfield's mother frequently checked on the children when they were outside and she testified that she had never seen a time when there were children outside without adult supervision. RP 272. Amber Herrera also testified that she regularly watched the children from the complex play outside. RP 191. None of these witnesses saw Whitfield touch T.N.A.

D. ARGUMENT

1. THE STATE FAILED TO PROVE THAT WHITFIELD COMMITTED RAPE OF A CHILD BEYOND A REASONABLE DOUBT.

When a defendant challenges the sufficiency of the evidence after a bench trial, review is limited to determining whether substantial evidence supports the trial court's findings of fact and whether those findings support its conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014); *State v. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007). Unchallenged findings of fact are verities on appeal. *Homan*, 181 Wn.2d at 106. This Court reviews the trial court's conclusions of law de novo.

Homan, 181 Wn.2d at 106.

When arguing insufficient evidence on appeal, the defendant admits the truth of the state's evidence and all reasonable inferences that may be drawn from it. *Homan*, 181 Wn.2d at 106 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1069 (1992)). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

To find Whitfield guilty of rape of a child in the first degree, the state had to prove beyond a reasonable doubt that Whitfield: (1) had sexual intercourse with another (2) who is less than twelve years old (3) and not married to him and (4) that he is at least twenty-four months older than the victim. RCW 9A.44.073.

The term "sexual intercourse," for purposes of RCW chapter 9A.44 (sex offenses), "has its ordinary meaning and occurs upon any penetration, however slight." RCW 9A.44.010(1)(a). The state must prove penetration of the anus, and not merely the buttocks. *State v. A.M.*, 163 Wn. App. 414, 421, 260 P.3d 229 (2011).

In *A.M.*, the child, R.D., testified that A.M. "stuck his wiener in

my poop – butt.” *A.M.*, 163 Wn. App. at 417. But, when the prosecutor asked for specifics, R.D. did not say A.M.’s “wiener” went inside his body. From the testimony it was clear that A.M.’s “wiener” went inside R.D.’s butt, but it was not clear it actually penetrated his anus. *A.M.* 163 Wn. App. at 417. The Court of Appeals reversed A.M.’s conviction for first degree child rape because the state did not establish the element of sexual intercourse. *A.M.*, 163 Wn. App. at 416.

Only the prosecutor used the word “anus”. Aguilar testified that E.G.A.’s initial allegation was that Whitfield touched his butt. When Aguilar asked where, E.G.A. pointed to his rectum. At his forensic interview, E.G.A. only stated that Whitfield put his finger in E.G.A.’s butt. There was no forensic evidence to indicate actual penetration.

Here, just as in *A.M.*, it is not clear whether Whitfield’s finger actually penetrated E.G.A.’s anus because E.G.A. only used the word butt. When the prosecutor asked whether Whitfield touched the outside or inside of his bottom, E.G.A. said it was the inside. RP 160. However the inside of his bottom could have been the inside of his butt cheeks.

E.G.A.’s statement does not prove beyond a reasonable doubt

that his anus was penetrated. Therefore, the trial court's finding that Whitfield penetrated E.G.A.'s anus, was not supported by E.G.A.'s testimony and under *A.M.*, penetration of the buttocks is insufficient to prove rape of a child. Because the findings of fact do not support rape in the first degree, this Court must reverse and remand for dismissal with prejudice. *Homan*, 181 Wn.2d at 106; *B.J.S.*, 140 Wn. App. at 97; *State v. Crediford*, 130 Wn.2d 747, 761, 927 P.2d 1129 (1996) (Where there is insufficient evidence as a matter of law to support a conviction, the defendant is entitled to dismissal with prejudice). Here, Whitfield is entitled to dismissal with prejudice.

2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED E.G.A.'S AND T.N.A.'S HEARSAY STATEMENTS.

a. Standard of Review

This Court reviews the trial court's decision to admit child hearsay evidence under an abuse of discretion standard. *State v. Moses*, 193 Wn. App. 341, 361–62, 372 P.3d 147 (2016). “A trial court abuses its discretion ‘only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.’” *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006).

“A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices considering the facts and applicable legal standard” or if it is “based on untenable grounds if the factual findings are not supported by the record” or if it “is based on applies an incorrect standard or the facts do not meet the requirements of the correct standard.” *Matter of L.H.*, 198 Wn. App. 190, 194, 391 P.3d 490 (2016) (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)).

Under a *de novo* review, findings of fact that are not supported by substantial evidence must be vacated. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006); *B.J.S.*, 140 Wn. App. at 97. Findings that do not support the conclusions are insufficient as a matter of law. *Crediford*, 130 Wn.2d at 761.

b. Child Hearsay

The Sixth Amendment to the U.S. Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” U.S. Const. Amend. VI. This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065 (1965); U.S. Const.

Amend. XIV. *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354 (2004). If the declarant appears for cross-examination at trial, the Confrontation Clause is not implicated. *Crawford*, 541 U.S. 59, n. 9.

Hearsay statements of a child under the age of 10 are admissible in a criminal case when the statements describe sexual or physical abuse of the child, the court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability, and the child testifies at the proceedings. RCW 9A.44.120.

To determine whether a child's statements have sufficient indicia of reliability, the trial court considers the following nine factors:

1. Whether there is an apparent motive to lie;
2. The general character of the declarant;
3. Whether more than one person heard the statements;
4. Whether the statements were made spontaneously;
5. The timing and relationship between the declarant and the witness;
6. Whether the statement contained assertions about past fact—if not, it carries on its face a warning to the jury not to give the statement undue weight;

7. Whether cross-examination could establish that the declarant was not in a position of personal knowledge to make the statement;
8. How likely is it that the statement was founded on faulty recollection; and
9. Whether the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) (citing *Dutton v. Evans*, 400 U.S. 74, 91 S.Ct. 210 (1970)).

The hearsay statements in this case were not spontaneous and not reliable and therefore do not meet the *Ryan* criteria. *Ryan*, 103 Wn.2d at 175-76.

In *Ryan*, a young boy, M., brought some candy to his aunt's house. When M.'s aunt questioned the source of the candy, he first told her a person across the street gave it to him. Later M. told his aunt the defendant gave him the candy in exchange for permitting certain sexual acts. *Ryan*, 103 Wn.2d at 168. M.'s mother told J.'s mother. When J.'s mother questioned him about the candy, he said he received the candy for his birthday, but later told her substantially what M. had told his mother. *Ryan*, 103 Wn.2d at 168-69.

In applying the facts to the factors set out in *Ryan*, the

Supreme Court found the boys' statements were not sufficiently trustworthy to deprive the defendant of his right to confrontation. *Ryan*, 103 Wn.2d at 168, 176. Although *Ryan* dealt with two child witnesses who did not testify at trial, the Supreme Court's analysis regarding the reliability of the statements is applicable and illustrative.

The Supreme Court found the children had a motive to lie because they did not want to get in trouble for possessing candy. M.'s mother had forbidden M. to accept candy. *Ryan*, 103 Wn.2d at 168, 176. Although the subsequent repetitions were heard by others, the children's initial statements were made to one person. *Ryan*, 103 Wn.2d at 176. The children's statements were not spontaneous, but were made in response to questioning. Importantly, both mothers were informed of the likelihood the defendant committed indecent liberties on the children before the mothers questioned the children. *Ryan*, 103 Wn.2d at 176. The Court found this indicated the mothers may have been predisposed to confirm their suspicions. The very nature of their relationship with their children made their objectivity questionable. *Ryan*, 103 Wn.2d at 176.

Similar to the boys in *Ryan*, T.N.A. and E.G.A. had a motive to lie because the boys perceived that Whitfield was violent and had given them “owies.” 8/13/17 RP 41-42, 43-44, 52, 64. T.N.A. thought he may be in trouble for the incident behind the tree. He was worried it may involve the cops. 8/3/17 RP 58. The initial utterance by E.G.A. was only heard by his father. T.N.A.’s allegation was not spontaneous, but was made in response to his father’s questioning. After Aguilar heard E.G.A.’s statement, he looked to T.N.A. to confirm E.G.A.’s allegation. T.N.A. did not provide any further information after he said it had happened the week prior. Contrary to finding of fact number 23, T.N.A. did not provide any details about any abuse until after the investigation started.

The very nature of this father son relationship makes Aguilar’s objectivity questionable. Just as in *Ryan*, when the facts are viewed in light of these factors, the children’s statements were not reliable. Therefore, the trial court abused its discretion when it admitted them.

Without the children’s hearsay statements there was insufficient evidence to convict Whitfield of first degree rape of a

child or child molestation because there was no evidence that his anus was penetrated because it was Villa who first mentioned Whitfield putting his finger in E.G.A.'s butt. T.N.A. testified at trial that Whitfield touched him behind a tree that was outside the apartment complex. He also testified that Whitfield touched him a lot behind this tree over a two year period. Despite the property manager watching out for all the children, Whitfield's mother frequently checking on the children, and Herrera checking on the children, no one saw anything occur in two years. RP 191, 215, 272.

In this case, there was no physical evidence, the child hearsay was not spontaneous and not reliable and accordingly did not fit the *Ryan* criteria. Accordingly, the trial court abused its discretion by admitting inadmissible child hearsay. *L.H.*, 198 Wn. App. at 194.

c. Findings of Fact Numbers 2, 4, 12, 13, 16, 23 Are Not Supported By The Record

There was insufficient evidence to support findings of fact: 2, 4, 12, 13, 16, 23, and consequently insufficient evidence to establish the crimes charged beyond a reasonable doubt.

The trial court found that Steve Aguilar, stated that his sons

E.G.A. and T.N.A. reported that respondent, Anthony Whitfield, had put a finger in E.G.A.'s rectum while the boys were playing at their grandparent's house. CP 50, FF No. 2. Contrary to this finding, T.N.A. never told Aguilar that Whitfield put his finger in E.G.A.'s butt. T.N.A. did not witness this incident. Aguilar testified at the hearing that T.N.A. said Whitfield did the same thing to him last week and then Aguilar did not ask him any more questions. RP 105-06. No testimony was elicited about T.N.A. reporting the incident with E.G.A. 8/13/17 RP 17.

During the forensic interview, it was Villa and not E.G.A. who first said that Whitfield put his finger in E.G.A.'s butt. 8/3/17 RP 17. E.G.A.'s statement was that Whitfield had put E.G.A.'s finger up his own butt. 8/3/17 RP 17. E.G.A.'s own statement contradicts the court's finding that "during E.G.A.'s forensic interview he disclosed that the respondent had put his finger up E.G.A.'s butt." CP 51, FF No. 4.

Although Aguilar testified that E.G.A.'s rectum was a little red, it was cleared up by the next day. The state did not present any evidence E.G.A. was injured. Aguilar put some Vaseline on E.G.A.'s rectum, but he was not examined by a doctor. There was

no evidence to support the court finding that “Aguilar observed and treated an injury to E.G.A.’s rectum at the time of the disclosure.” CP 51, FF No. 12.

Villa did not testify the forensic interview was also conducted to provide medical attention. There was no mention of any medical exam or medical attention in the hearing. The children were interviewed in an interview room and not in a doctor’s office or examination room. RP 13-14. Villa’s testimony does not support the trial court’s finding that one of the purposes of the forensic interview was to provide medical attention. CP 51, FF No. 13.

T.N.A. did not provide a spontaneous or more detailed account of Whitfield touching his penis behind a tree and “humping” him at his grandparents’ apartment until prompted by Villa at his forensic interview. CP 51, FF No. 23. See *State v. Swan*, 114 Wn.2d 613, 649, 790 P.2d 610 (1990) (statements spontaneous where open-ended questions and most of statements were not in response to questions); *State v. Madison*, 53 Wn. App. 754, 756, 759, 770 P.2d 662 (1989) (statements spontaneous where foster mother asked child, while sharing book on human reproduction, if anyone had touched her; details of event and defendant's identity

not suggested).

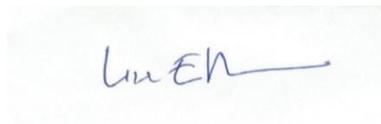
These findings are not supported by substantial evidence and in turn do not support the conclusions of law. Accordingly, the trial court abused its discretion by entering findings not supported by the record and in making conclusions not supported by the findings. *Crediford*, 130 Wn.2d at 761. The remedy is to vacate the convictions and remand for dismissal with prejudice. *Id.*

E. CONCLUSION

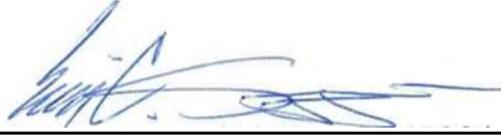
Whitfield respectfully requests this Court reverse his convictions for insufficient evidence. The state did not prove first degree rape of a child or first degree child molestation beyond a reasonable doubt. Therefore, this court should reverse Whitfield's convictions and remand for dismissal with prejudice.

DATED this 8th day of February 2018.

Respectfully submitted,

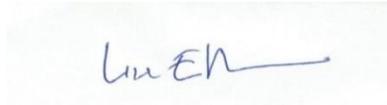
A handwritten signature in blue ink, appearing to read "Lise Ellner", is written on a light-colored rectangular background.

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I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurston.wa.us and jacksj@co.thurston.wa.us and Anthony Whitfield, c/o Green Hill School, 375 SW 11th Street, Chehalis, WA 98532 a true copy of the document to which this certificate is affixed on February 8, 2018. Service was made by electronically to the prosecutor and Anthony Whitfield by depositing in the mails of the United States of America, properly stamped and addressed.



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