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Court of Appeals  
Division III  
State of Washington

NO. 30521-0-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAMON GONZALEZ,

Appellant.

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BRIEF OF RESPONDENT

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## I. ASSIGNMENTS OF ERROR

### A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The Court erred when it entered findings of fact 1.7.
2. The Court erred when it entered findings of fact 1.10
3. The Court improperly admitted child hearsay statements.
4. Counsel was ineffective for stipulating to child hearsay.
5. There was insufficient evidence to convict Gonzalez.
6. The introduction of child hearsay violated Appellant's right to confrontation.
7. Cumulative error denied Appellant a fair trial.

### B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was a factual basis for findings of fact 1.7 therefore there was no error in the entry of this finding.
2. There was a factual basis for findings of fact 1.10 therefore there was no error in the entry of this finding.
3. Appellant stipulated to the admission of child hearsay, therefore this error was not preserved.
4. Counsel was not ineffective.
5. There was sufficient evidence to support the conviction.
6. The right to confrontation was not violated.
7. There was no cumulative error.

## II. STATEMENT OF THE CASE

The testimony in this case was from two very divergent perspectives. The testimony regarding the actual molestation was presented to the bench through the victim who was nine at the time she testified but was six at the time of the crime. The victim BP was

examined by the State and cross-examined by counsel for Mr. Gonzalez. The victim is the niece of Mr. Gonzalez. The other testimony that pertained to the crime came in through the victim's mother and a forensic interviewer for the State, Amy Gallardo.

The victim came to her mother and father and indicated that she had been molested at a family gathering the day after the molestation occurred. (RP 31, 39, 40, 51-2, 67) On the witness stand the victim stated "my dad's uncle called me to a room." When asked if she who this was she responded "Ramon." She was not able to identify that the person who had touched her was in the courtroom. (RP 26-7) She testified that Ramon had "touched her in the wrong part" and that he took her pants down. (RP 28-9, 47) When the State attempted to clarify what "private part" meant the defense stated that "...we'll agree that private satisfied that aspect of the element." (RP 29)

The defense asked the victim if when her mother spoke to her about this case if she asked the victim "what Ramon did, right? She asked you what did he do or words like that." The victim's response was "No, I just told her." (RP 34) Appellant attempted to get the victim BP to admit she would get in trouble with her parents if she did not get her uncle Ramon in trouble. Her answer to that is "No." When asked if the "movie

in your brain” was clear as to what happened she stated, “I can see the pictures clearly but I don’t remember some stuff, only some.” (RP 42-3)

On recross the following exchange occurred;

Q There’s two different stories, huh? And they were told within a day of each other. They weren’t the same. This really didn’t happen, did it? This really didn’t happen. This is the time to tell the truth now.

A It did. (Inaudible) She just of have just probably forgot. I don’t know. I did tell her the truth. I did tell everybody.

The victim’s Mother, Mrs. Pinion, testified that she was told by her daughter that she had been called into a bedroom by her uncle. That it was “the guy that they went to—with the boat.” (RP 53) Mrs. Pinion testified the only uncle they went to the boat with was Ramon Gonzalez. (RP 53) The mother explains that BP loves the water so she remembers the boat. (RP 54) Mrs. Pinion did not tell anyone or report this to the police for about one year. (RP 56) She asked BP a couple more times if this molestation actually occurred and each time BP told the same story. (RP 57) It was after these occasions that Mrs. Pinion showed a group picture of the uncles to BP. (RP 57-62) Mrs. Pinion testified that one of the reasons she showed the picture to BP was she was hoping, BP, would make Mrs. Pinion doubt this had happened but BP instead had identified Ramon. (RP 62-3) Mrs. Pinion only came forward with the accusation after she was informed that other family members had been molested by Gonzalez. (RP 64-5) At a later occasion at the house where the

molestation occurred Mrs. Pinion questioned BP about where the physical act occurred and BP confirmed to her mother that it took place in a bedroom. (RP 80)

Ms. Gallardo testified regarding her interview with the victim and confirmed that the victim did in fact identify her uncle as the person who had touched her. BP also once again was able to identify the location where the act occurred. This was all taped and the video of that was played for the court. (RP 83-96, 140-56) Ms Gallardo testified that it was her opinion based on what BP had told her that someone had in fact touched the BP. The entire interview video was watched by the court. (RP 156)

The State called two ER 404(b) witnesses who testified they too had been touched by Ramon Gonzalez. Both Nancy Pinion and Maria Campos testified that when they were young they had been inappropriately touched by Ramon Gonzalez. They described touching that was very similar to that described by BP. (RP 101-35)

There were eleven witnesses who testified for the Appellant. Appellant's sister Lily the owner of the home where the molestation occurred testified that she did not know when Appellant came to her home or left, that there were about 50 people at the party, that appellant left while it was light out and she specifically went through the house several

times to make sure the young children were safe and on the one occasion that the Appellant went into the home she just happened to see him standing waiting to use the bathroom. (RP 165-174) She testified Appellant and his brother Martin were standing together waiting for the bathroom. She did not know how long Appellant was in the house. (RP 176-77) She testified she never saw Appellant in her home any other time at this party. (RP 179) On cross she stated that she did not see people in the bedrooms because “the bedrooms were closed.” (RP 185) She stated she knew Ramon well but she did not know he had other criminal charges. She did know one other brother had been charged with possession of child pornography. (RP 187-8) She also had to admit that she did not know at all times where Ramon was. (RP 187)

Manuel Perez, husband of Appellant’s sister and owner of the home where the molestation occurred never saw Ramon in the home, he also said he knew him well but did he too did not know that he had plead guilty of rape of a child.

Miriam Gonzalez daughter of Appellant did not know that her father had pleaded guilty to rape of a child, she has three children. (RP 199, 201) She stated that Appellant left about 8:00 PM. (RP 210) Once again this witness too stated that she would have known if her father had gone in the house. (RP 208, 210-11)

Martin Gonzalez brother of Appellant testified that he was pretty much with Appellant every second of the party. RP 227-28, 234-6, 238 That he was with Appellant the one time he went into the house and that he waited and watched the area near the bathrooms as Appellant used the bathroom. (RP 221-24, 226) He testified that he saw one young child hug the Appellant (RP 225) Once again this witness did not know of his brother's prior conviction for third degree rape. (RP 232)

Javier Perez is not a blood relative of Appellant. (RP 243) He too was able to recall seeing Appellant only go into the house one time although he did admit that he did not know what Appellant did inside the home. (RP 246, 247) He knew this even though he testified that there were more than fifty people at the party. (RP 245) He testified he thought that Appellant was in the house ten minutes. (RP 248-9) This witness also did not know of Appellants prior rape conviction. He did have to admit that Appellant could have gone into the house numerous times. (RP 249)

Importantly this witness did testify that he saw people in the bedrooms, all except the one where the molestation occurred. (RP 251-2)

The defendant took the stand and testified that he had merely hugged the victim and that he was with his brother the entire time that he had been in the residence and that through the entire party that was really

they only occasion that he had been in the home. He testified he had had a relationship with the fourteen year old girl, which was the basis for his plea to rape of a child charges but that he only kissed her and that he only pleaded guilty because his lawyer told him that way it would be over with fast and he would be able to continue with picking season. He was on supervision for three years and the sentence was a SSOSA (Special Sexual Offender Sentencing Alternative.) This entailed his going through counseling and having very strict supervision. (RP 319-71)

### III. ARGUMENT.

#### **RESPONSE TO ALLEGATION ‘A’ REGARDING FINDINGS 1.7 AND 1.10.**

There are seven assignments of error and eight issues pertaining to those assignments. The issues are designated “A-F” and “1-8” in portions of the Appellant’s brief. However in the body of the brief they are designated “A-F” with numerical subheadings. For clarity the State will respond using the “A-F” designators. The State will respond to seven issues, combining the response for issues five and six which are both sufficiency issues, even though in the brief there are only six designated headings “A-F” referring to the issues raised.

Findings 1.7 and 1.10 are clearly supported by the record. These findings are set forth in total below:

1.7 B.P. identified the defendant through State's Exhibit 5. There was some question as to whether this was an appropriate exhibit. The Court would agree with the defendant and defense counsel that had this been done by law enforcement it probably would not have been admitted. Nevertheless it was done by a lay person in a way the Court finds was not leading, and did not infer what the answer should be. The Court accepts Miriam Pinon's testimony that she did not specifically point at the defendant here, but pointed at the picture and asked the child to identify the defendant, which B.P. did. There is also testimony that B.P. remembered the defendant from the trip on the boat. It is clear to the Court that the identification is acceptable and reliable. The Court accepts the testimony.

1.10 The Court did consider that B.P.'s physical description of the perpetrator is different than the defendant's actual physical appearance; however, based upon the oral description B.P. gave to her mother and Ms. Gallardo the Court finds that is the substantial item that the Court basis it's decision.

**Finding 1.7 is supported by the record.**

With regard to findings the standard of review for this court with regard to Findings of Fact was set out in State v. King, 78 Wn. App. 391, 396-7, 897 P.2d 380 (1995);

Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings support the conclusions of law. Evidence is substantial if it is sufficient to persuade a fair minded person of the truth of a declared premise. Ridgeview Properties v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

This court must look to the totality of the testimony and read it in context. The victim identified the man who molested her as “my daddy’s

uncle” and stated “It’s the uncle from the boat.” (RP 53) This line of questioning continues:

Q Who was the man with the boat?

A Ramon Gonzalez.

Q Okay.

A There was only one uncle and that’s how we call everyone, your uncle, your aunt.

Q So she had some recollection of who this person was?

A Yeah, because we went on the boat. Brisa loves the water. I mean, she loves the water and anytime we’re going to go to the water, she’s like yes, so she remembers the boat. (RP 53-4)

This testimony alone was sufficient to identify the Appellant as the individual who molested the victim. There was only one uncle who had taken the victim and her family out on a boat and that was the Appellant.

The proof then turns to a picture the victim’s mother had obtained. The victim was shown this picture. The testimony of the process whereby the picture was obtained and how it was shown to the victim covers numerous pages of testimony. The record pertaining to this picture was done and clarified by Appellant’s attorney and is in the record as a portion of the “voir dire” that defense counsel was allowed to conduct. The mother of the victim at one point states the reason she continued to look for ways to address this molestation with her daughter was that she “was looking for something to make me believe, no, it’s not true.” (RP 56) It was after this the victim’s mother describes how she obtained the picture admitted as States Exhibit ‘5’ and how the process progressed from

obtaining the photograph to the victim identifying that the person who had molested her was in that photograph and finally the determination that that person was the defendant. (RP 56-64) While defenses counsel did his best to confuse the victim's mother and to make it sound as if she had picked the defendant out of the photograph it is clear that did not occur.

What is clear is that the victim was shown a picture that had five persons in it and that several of those people were similar in appearance and were in fact all brothers and all her father's uncles. It is clear that the victim's mother did not point out the person in the photograph who was the defendant/appellant. The victim independently pointed to Appellant.

This picture was identified by the mother as the one she used, what the victim's mother was unsure about was not that this was the same image but whether this actual picture, the object in the hand of the deputy prosecutor, was the same picture that she had had in her hand when she showed it to her daughter. What Ms. Pinion was addressing is not what is alleged in this appeal or was stated by defense counsel at trial; that the picture she used was some other pictures altogether or that the mother had pointed out the defendant and then asked the victim if in fact the person being pointed to was the one who had molested her.

There may have been some doubt on the part of the victim's mother as to how the picture was presented and the exact words she used but it was very clear that the victim identified the Appellant.

Q So how did you show that picture?

A Well, I don't remember exactly the words. I said, hey, look at this and may I could have said, is he there. Do you know who Ramon Gonzalez is? I don't remember but she did pointed her hand at one point but I don't remember exactly the words that I used.

Q Okay. And now had you focused your questioning on one person in that picture?

A I mean, maybe I could have said is he there. If that's mean focusing, yeah, if he's there.

Q But did you point at anyone?

A No, I didn't.

Q And you showed -- why did you show her the picture again. Can you explain that to us.

A I guess I was really mad and I don't know. When something like that happens and (inaudible) I don't know. I just -- I really don't know.

Q You earlier said that you wanted to be sure.

A Uhm-hm.

Q In your mind (inaudible) you want to be sure.

A Uhm-hm.

Q And you want this to be true, but you want to make sure, is that correct?

A Yes.

Q Is that a fair statement?

A Uhm-hm, or I guess I was hoping for her like, no, you know, maybe I was -- I mean, I don't know.

Q Well, say that -- so you're hoping her not to identify anybody?

A Yeah, kind of, like, you know, make me confused, make me doubt.

Q But she didn't. She in fact identified Ramon as the person that had done this to (inaudible) --

A Yeah. (RP 62)

There was no doubt that the victim identified appellant from the picture. The appellant is completely mischaracterizing what was testified

to and placing a “slant” on that testimony that simply does not exist in the record. It is obvious that the victim is not indicating she remembers the barbeque. The trial court sitting and listening to the testimony as the trier of fact found that the victim was presented with the picture(s) in a manner that while it would not suffice if done by an officer was not improper given the fact that it was done by the victim’s mother and done in a manner that minimized the chance that the mother lead the victim to a conclusion. Appellant conveniently leaves out the fact that the victim stated that she was molested the following day.

The trial court had a sufficient record to make finding 1.7 and that that if “the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings...” and in this instance substantial evidence does support this finding. State v. Short, 12 Wn. App. 125, 129, 528 P.2d 480 (1974) “Even if we agreed with Short's interpretation of the above quoted statement, and we do not, the determination by the trial court of a factual issue will be upheld on appeal if it is supported by substantial evidence. Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959).”

The identification along with the testimony of the victim herself was more than sufficient to identify the Appellant as the man who molested the victim beyond a reasonable doubt.

Q And your uncle -- and Ramon touching you on your private part, that's the truth?

A Yes.  
(RP 47)

**Finding 1.10. – Is supported by the record.**

1.10 The Court did consider that B.P.'s physical description of the perpetrator is different than the defendant's actual physical appearance; however, based upon the oral description B.P. gave to her mother and Ms. Gallardo the Court finds that is the substantial item that the Court basis its decision.

State v. Hovig, 149 Wn.App. 1, 8, 202 P.3d 318, review denied, 166 Wn.2d 1020 (2009);

We review a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. (Citations omitted.)

The State can not dispute that the verbiage in this finding is strained or inartfully draw. However, it is the State's position that the Finding must be read literally. The terminology is an "oral description" is different than a "physical description." There was an oral description by the victim of the uncle. She told both her mother and Ms. Gallardo that it was her uncle. The oral description to her mother included her orally saying it was the uncle from the boat. With Ms. Gallardo the victim gave

a physical description that the court has indicated does not match the defendant. While that may be what the court stated the State would suggest that this is the description of a then six year old, nine at the time of the interview, who was describing an adult that whom she had only seen one other time.

In this third iteration of Appellant's brief, Appellant states the State will likely argue that there is a difference between oral and physical. The State did argue this in the Motion on the Merits and renews that now. While the State appreciates Appellant describing for this Court what the State will argue the facts still remain what they were.

This is a child sex case. Because of the very nature of the offense and its impact on the victim, as well as the nature of the mind and memory of a victim of such tender years, variations recitation of the event from one person to the next or in a trial is expected and in almost every occasion occurs. It would be far more troubling and there might be some basis to a claim that this act was implanted in the mind of the victim the victim were to repeat, rote, the same story on each and every occasion. There was nothing in the testimony that was suspicious nor was Appellant able to prove there some action on the part of the mother to implant anything. This is a small child remembering a very traumatic, harrowing event the way she remembered it. This court must remember that the victim's

mother testified this allegation lay fallow for a considerable period because the mother of the victim did not want to believe something like this could have occurred or that the person accused could have done it. The mother was not on some mission to accuse and convict the appellant, a man she had almost no relation with of such a heinous crime. There is no “fatal defect” in the trial court’s reasoning so there is no need to “save” anything.

Appellant confuses an oral statement regarding the perpetrator and an oral or verbal description of the physical appearance of the appellant. Therefore the finding of fact does comport with the facts which were presented to the court on that date.

It is apparent that this is the reason the Court states “the Court finds that is the substantial item that the Court basis it's decision...” This description includes all of the information which was “orally” given to the victim’s mother as well as Ms. Gallardo. This includes the positive identification of the defendant in the picture of the five uncles as well as the oral description of the reasons that the victim knew this specific uncle. All of which were corroborated by outside individuals. The only thing that was not corroborated by another witness was the actual touching, a touching which was revealed the next day.

The allegation that the physical description of the Appellant by the victim was not sufficient or consistent enough to identify Appellant as the perpetrator ignores the fact that this victim picked Appellant from a photograph and told her mother that the person who molested her was her Father's uncle who was at the party and who's boat they had ridden in. There was only one uncle who fits these criteria. Once again this was a six year old who was telling the court, the interviewer and her mother what the man who had sexually touched her as she tried to get away, how tall this person was or the color of his eyes or the length of his hair. While this photograph was not a true "montage" it was, as this court can see by looking at the exhibit, an excellent photo array.

The facts in the record before the court including the testimony of the victim's mother, Ms. Gallardo and, the video of the interview of the victim, taken together were more than sufficient to allow the trial court to find as it did in Finding of Fact 1.10. Inadequate findings also may be supplemented by the trial court's oral decision or statements in the record. In re LaBelle, 107 Wash.2d 196, 219, 728 P.2d 138 (1986)

The record of the trial itself and the testimony therein are the true basis of this conviction. The fact remains that even if this court were to strike Finding 1.10 there was a trial and the testimony taken at that trial was more than sufficient to support a conviction beyond a reasonable

doubt. The trial court specifically found that it did not believe the testimony of Appellant's brother, Martin. Who testified that for all intent and purpose with was with his brother ever second of the party.

It is fascinating to note that the evidence, according to Appellant, is sufficient to convict one of his brothers but not him. (Apps brief at 23)

Appellant claims that because the trial judge is now retired there is no other option but to dismiss this case because "remand is not an option."

Even if a Judge did not or can not finalize findings the law does not mandate a dismissal it requires that another judge review what was pending and determine if the new judge can complete the case. If not then the new judge may order a new trial, DGHI Enters. v. Pacific Cities, Inc., 137 Wn.2d 933, 939-40,977 P.2d 1231 (1999);

Under RCW 2.28.030(2) a judge "shall not act" as a judge "when [the judge] was not present and sitting as a member of the court at the hearing of a matter submitted for its decision." A limited exception to this prohibition is contained in CR 63(b) which states: (b) Disability of a Judge. If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial. (Footnote omitted.)

See also, In re Marriage of Crosetto, 101 Wn. App. 89, 1 P.3d 1180 (2000).

Trial counsel for Gonzalez raised this question and the trial court explained that it would still be able to work on the case. The trial court directly addressed this question as follows;

MR. SANDLIN: That's correct and I agree with counsel that's correct. Before we go into the proposed Judgment and Sentence, I need a little guidance from you, Your Honor, will you be taking the bench at all after the New Year?

THE COURT: You know, we looked at that, Mr. Sandlin, actually Mr. -- Judge Gavin educated me on it. I can appear as Judge Pro Tem to finish up unfinished matters and the appearance as Judge Pro Tem does not need to be approved by either counsel, it just happens. So if we don't finish by the 31st, I can come back as a Judge Pro Tem and finish this case up if that's necessary.

MR. SANDLIN: Well, you're thinking way ahead of me then because you know exactly what I intended to do. And so I presume then that Judge Gavin and you took a look at the Constitution to determine whether or not if there were subject matter jurisdiction. Okay. Well, if you have an opportunity, I'd sure like some guidance here so that I don't waste your time because obviously -- although I loathe the Constitutional amendment for obvious reasons. I'll certainly take advantage of it for my client.

THE COURT: I understand. (RP 12.20.2011, Sentencing pg. 7)

Case law in this State strongly supports remand even if there were no findings and conclusions entered. That is not the case here, even for purpose of argument that State were to agree that the challenged findings needed to be clarified that would not require a reversal of the conviction and dismissal as alleged by Gonzalez.

State v. Head, 136 Wn.2d 619, 624-5, 964 P.2d 1187 (1998).

We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

We note the possibility that reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. For example, a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been "tailored" to meet issues raised on appeal. The burden of proving any such prejudice will be on the defendant. Cf. *State v. Royal*, 122 Wn.2d 413, 423, 858 P.2d 259 (1993) (burden of proving prejudice resulting from late entry of written findings and conclusions on defendant; concerning JuCR 7.11(d)). (Footnote omitted.)

#### **RESPONSE TO ALLEGATION 'B' – CHILD HEARSAY.**

The appellant has no basis to raise this claim on appeal. He stipulated to the admissibility of these statements and therefore he can not now raise them as an error. This issue was not preserved at the trial court level and it should not be considered by this court. It is clear from a reading of the transcript that one of the main trial strategies by Appellant was to convince the court that the reason for these claims was some sort of bad blood amongst the members of this extended family.

As this court is well aware ER 404(b) prohibits the use of evidence of other bad acts to prove a person has a propensity to commit such acts.

State v. Pogue, 104 Wn.App. 981, 985, 17 P.3d 1272 (2001). However such evidence may be admissible for other purposes such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b); Pogue, 104 Wn.App. at 985.

There was ER 404(b) information which admitted in this trial. Appellant's attorney challenged the introduction of this information. The State notes this because it highlights that State's position that Appellant agreed to and specifically did not challenge the admission of the child hearsay testimony. Those areas of the case which trial counsel did not believe would assist his presentation of this case he worked diligently to restrict. In the case of the child hearsay that was not done because he, trial counsel with 30 plus years of experience felt that the best strategy would be to present this information and be able to show the court what it believe to be bias and inconsistencies of the "story" of the victim and her mother.

The defense attorney wanted to be able to cross-examine the mother of the victim, Miriam Pinon and Ms. Gallardo as well as the victim about the alleged statements. Contained in Appendix 'A' are several pages of the verbatim report of proceedings from the preliminary hearings in this case. It is clear from this transcript there was agreement that these statements would come in. There was only a question as to the "tiers" of that hearsay;

THE COURT: Well, again, those are things the Court has to do unless counsel agree that we can proceed. Let's begin. I'm not going to get into that. That's up to both counsel.

MR. SANDLIN: I think -- she was competent when I listened to her.

MR. BOSWELL: I guess the issue is not whether -- I guess if she's not competent, the statements can still come in if there's the reliability as I (inaudible) on the *Ryan* factors but even if she is competent, the statements can still come in.

THE COURT: Right.

MR. BOSWELL: Okay, okay.

THE COURT: That's my understanding.

MR. BOSWELL: Does that make sense? I think Mr. Sandlin -- the impression I'm getting from Mr. Sandlin is that if she testifies, the statements don't come in because she's testifying.

MR. SANDLIN: Well, we'll want them to come in anyway for impeachment purposes.

MR. BOSWELL: Okay, okay.

THE COURT: Okay, so am I safe to say that there's not a problem here?

MR. SANDLIN: Doesn't seem to me that there's a problem here.

THE COURT: Okay.

MR. SANDLIN: However, how many hearsay statements are we going to admit? Are we going to have three tiers of hearsay statements, what she said to mom, what she said to dad later, what she said to the sexual assault victim later, you know. There's gotta be an end to this at some point.

MR. BOSWELL: It's -- my understanding it's just the two levels. It's just the immediate disclosure to the mother which was the day after the incident and then a year later when she talked with Amy Gallardo of our Victim Witness Unit. It's my understanding she's never spoken to the father about this.

MR. SANDLIN: Well, she has, but whatever.  
(Emphasis mine.)

It would appear from the record that the court also believed that the defense had agreed to this too;

THE COURT: I think what I'm hearing from Mr. Sandlin allays my concern here. I mean, the defense has agreed to a number of things, if I understand correctly, that would make a continuation not necessary. I think we can go, and I -- you know, that's a -- these things have a habit of kind of morphing. We'll just have to

deal with it if we start the trial. (RP 19)

This court does not need to interpret what was agreed to here.

There is no doubt that Gonzalez wanted to have these statements admitted.

This is clear when taken in context with the ER 404(b) discussion and argument that flows and follows directly after the court states that there appears to be agreement when they finish the discussion about child hearsay. (RP 19-24)

State v. Rock, 65 Wn. App. 654, 658-60, 829 P.2d 232 (1992):

It is well established that, other than in a few narrow exceptions, a defendant may not appeal issues or assert arguments that were not raised in the court below.

...

The whole purpose of requiring all arguments to be addressed to the trial judge before a ruling is to give him the opportunity to correct or avoid any potential error. This case illustrates dramatically the importance of the rule.

See also, State v. Applegate, 39 Or. App. 17, 21, 591 P.2d 371, 373 (1979);

There are many rationales for the raise-or-waive rule: that it is a necessary corollary of our adversary system in which issues are framed by the litigants and presented to the court; that fairness to all parties requires a litigant to advance his contentions at a time when there is an opportunity to respond to them factually, if his opponent chooses to; that the rule promotes efficient trial proceedings; that reversing for error not preserved permits the losing side to second-guess its tactical decisions after they do not produce the desired result; and that there is something unseemly about telling a lower court it was wrong when it never was presented with the opportunity to be right.

Appellant has not indicated to this court a valid basis to allow this issue to be raised for the first time on appeal under RAP 2.5. The general rule is that an appellate court will not review issues raised for the first time on appeal. That rule is set forth in State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995):

As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). As we recognized in Scott, constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. Scott, 110 Wn.2d at 686-87. On the other hand, "permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts". Lynn, 67 Wn. App. at 344.

The finding of the court in State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005) are applicable herein, "This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms."

Even if this court were to determine there was some sort of error here it is invited error. As was set forth in State v. Barnett, 104 Wn.App. 191, 200, 16 P.3d 74 (Div. 3 2001) “The doctrine of invited error precludes review of Mr. Barnett's assigned error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. A potential error is deemed waived "if the party asserting such error materially contributed thereto.” (Citations omitted.)

The courts of this State have indicated that this type of error must be something that the defendant brought upon himself, In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) “In these invited error doctrine cases, the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine.” The record makes it clear that Gonzalez wanted this testimony, that he wanted his chance to examine these hearsay witnesses.

This was a trial tactic, State v. Manthie, 39 Wn. App. 815, 825, 696 P.2d 33 (1985) “...the defense allowed the admission of this evidence as a trial tactic tending to divert the blame to Rose for the murder. We find no error here. As to Rose's testimony, the error, if any, is self-invited and

is not subject to appellate review, even if a constitutional right is involved.”

As was so aptly stated in State v. Craig, 82 Wn.2d 777, 786, 514 P.2d 151 (Wash. 1973) “At the trial, the appellant stipulated that his blood type was Group B. It is not claimed that the stipulation was coerced. Where a party participates in the introduction of evidence and does not object, he cannot complain later of its admission. State v. Benson, 58 Wash.2d 490, 364 P.2d 220 (1961).”

As can be seen from the discussion amongst the parties and the court there was briefing supplied to the court and to trial counsel covered the requirements of State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984). Defense counsel stated that he had not responded because the briefing was so complete. It was after this discussion that Appellant agreed to allow the “child hearsay” information in. It can also be seen from the extremely vigorous cross-examination of the two child hearsay witnesses and the questions asked that counsel indeed wanted these two witnesses to testify so that he could elicit testimony that he believed would demonstrate that his client was not guilty.

It is also clear from the findings and conclusions and the review of this issue by the trial court, its reference the briefing on the subject and Appellant’s trial attorneys admission that the State had fully briefed this

issue, that the statements were in fact admissible pursuant to Ryan, supra. The trial court so found in Conclusion of Law 2.3 which was not challenged at the trial court nor has it been challenged in this appeal and therefore it is in fact a verity. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 808, 828 P.2d 549 (1992).

**RESPONSE TO ALLEGATION ‘C’ – FINDINGS AND CONCLUSIONS, WAIVER REGARDING CHILD HEARSAY.**

Appellant combines several arguments under this heading. The State’s response is that there was a “waiver” of the right to challenge the admission of the child hearsay statements because Appellant’s trial counsel agreed to the admission of these statements and Appellant can not now claim error. The State has addressed this above but will address the allegation in part again.

Just as Appellant can not absolve himself as he attempted to do in his testimony regarding his previous rape conviction as having been done by his attorney and to just get it over with, he can not now come back to this court and argue that it was error to allow the admission of these statements even though he wanted the information in during his trial in order to demonstrate that the statements were false, were coached, were the product of bias and jealousy. A major portion of the defense to these allegations was that victim’s side of the family had been and was jealous

of the Appellant and the Mother of the victim having seen an innocent hug and knowing the prior criminal history of the Appellant fabricated this story to gain some advantage. To that end the Appellant wanted and even needed to have these hearsay statements in the record to support his defense.

It is obvious defense counsel did in fact agree, stipulate, to the admission of these statements and therefore Appellant has waived this as an issue on appeal. In the instance of the child hearsay statements counsel for Appellant stated that the State's brief covered the law and that he specifically states that he did not respond. Thereafter there is a discussion, wherein the parties and the court determined and agreed that based on the age of the victim and interviews that she was capable and competent to testify. The discussion then goes on to determine what and to what extent statements from other persons regarding the statements of the victim will be allowed. The notice was given to defense counsel that the statements were to be admitted and yet by the end of the discussion between court and counsel there was agreement as to what would come in and there was no need for any further hearings regarding the admissibility of hearsay statements.

If there was objection to the use of this testimony trial counsel would obviously have filed a response to the State's memorandum. That

Appellant in fact did agree, stipulation, is further evidenced by the fact that the Appellant did challenge the use of ER 404(b) information at the trial court level trial counsel briefed this issue and it was argued.

There is no better method to for this court to see that Appellant agreed to this then to use the words of the parties at the time the admission of these statements was discussed:

MR. BOSWELL: Does that make sense? I think Mr. Sandlin -- the impression I'm getting from Mr. Sandlin is that if she testifies, the statements don't come in because she's testifying.

**MR. SANDLIN: Well, we'll want them to come in anyway for impeachment purposes.**

MR. BOSWELL: Okay, okay.

THE COURT: Okay, so am I safe to say that there's not a problem here?

MR. SANDLIN: Doesn't seem to me that there's a problem here.

THE COURT: Okay.

MR. SANDLIN: However, how many hearsay statements are we going to admit? Are we going to have three tiers of hearsay statements, what she said to mom, what she said to dad later, what she said to the sexual assault victim later, you know. There's gotta be an end to this at some point.

MR. BOSWELL: It's -- my understanding it's just the two levels. It's just the immediate disclosure to the mother which was the day after the incident and then a year later when she talked with Amy Gallardo of our Victim Witness Unit. It's my understanding she's never spoken to the father about this.

MR. SANDLIN: Well, she has, but whatever.

THE COURT: Okay.

(RP 09.19.11 Pretrial pg 16, Emphasis mine)

In this discussion there is no mention or discussion wherein the word "objection" is used. Further during the actual trial when the victim's

Mother and Ms. Gallardo testified there was no objection on the record, no motion to strike or any memorialization of any previous objection or of a continuing objection to the admission of this information.

The attempt by Appellant to parse trial counsels words such that the only meaning was that they wanted the testimony for impeachment only is absurd when the colloquy between the court and counsel is read in totality.

Once again the finding that these statements where admissible at the time of trial in finding 2.3 was not challenged at the trial court level and there has not been a specific challenge of that finding in this court.

The State shall briefly address the claim by Appellant that because the State presented the Findings and Conclusions that this somehow excuses the failure of trial counsel to object and in fact the record is clear that there was a stipulation to the admission of the statements. The findings and conclusions are the product of the trial court. CrR 6.1 states;

(d) Trial Without Jury. In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties. (Emphasis mine.)

The State's argument that the Appellant waived his right to challenge this admission of the child hearsay is not "merely a technical argument" it is the law. If a party agrees or stipulates to something in trail

that party can not later assert that it was an error for them to admit it that is the very definition of invited error. The State is confident that trial counsel did not set this challenge in motion at the trial court level in order to allow it to be raised on appeal. It is clear from the record that Appellant and his counsel wanted the testimony of these witnesses admitted so that they could take that information apart and support their defense that this molestation charge was somehow planted in the mind of the victim and the defendant was totally innocent.

The record reflects that the State did submit the proposed Findings and Conclusions. They were adopted by the court after lengthy discussion between the attorneys and the court. The findings and conclusion while presented by the State were addressed in open court and Appellant had occasion to object. After hearing from both side regarding those findings the court made some alterations and then they were adopted as the courts. This document then becomes the word of the court.

State v. Portomene, 79 Wn. App. 863, 905 P.2d 1234 (1995).

While the State as prevailing party has the primary obligation of presenting findings which accurately reflect the trial court's oral ruling, we also believe that the rule imposes upon the trial court some responsibility in ensuring that the record is complete. /2 At sentencing, the trial court should ensure that the findings are entered, or that - at the least - a hearing is set to resolve the findings soon thereafter. With the parties and the court working in concert to ensure that findings are

properly entered, we can hope that our overworked court system will operate more efficiently in the future.

Further as stated by trial counsel “Now, I have gone over the Findings of Fact, Conclusions of Law and I have reviewed your oral decision.” (RP 12.16, 20,27.2011 pg 4) Counsel had significant input and had been presented these findings prior to the initial hearing held on December 16, 2011. It is obvious from his interaction with the court that Mr. Sandlin had taken great care to address what was contained in those findings and conclusions. To now attempt to argue that because the State proposed them or that because the State had asked that there be a finding on the record regarding anything in a trial does not somehow negate the fact that counsel for Appellant clearly wanted to have the testimony of the “child hearsay” witnesses included so that he could present his case, his defense, which was this Mother had issues with the Gonzalez family and this false allegation was her means of seeing the vendetta to fruition.

Given the written findings of facts that the trial court did enter, there is no probability that the outcome of the bench trial would differ had the trial court entered additional express findings of fact separately addressing each element of the charged offenses. See State v. Banks, 149 Wash.2d 38, 45-46, 65 P.3d 1198 (2003)(court's failure to enter finding on essential element following bench trial was harmless error).

Therefore, even if this court were to determine there was error it should hold that the trial court's failure to enter such additional findings was harmless error.

The defense here was not that this molestation did not occur, even Gonzalez's own attorney in his closing stated that he believed that the victim had been molested, but it was not his client it was the brother who had been charged with possession of child pornography. (RP 398-9, 404) The defense was that the Pinion family picked this particular Gonzalez uncle because of the family conflict possibly based on some alleged improper relationship between Appellant's daughter and the victim's father. (RP 400-1)

**RESPONSE TO ALLEGATION 'D' – INEFFECTIVE ASSISTANCE.**

State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982):

Defendant next claims he was deprived of a fair trial because his trial counsel was ineffective. The test in Washington is whether "[a]fter considering the 'entire record', can it be said that the accused was afforded an 'effective representation' and a 'fair' and 'impartial' trial". This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. (Citations omitted.)

This Court will review a challenge to effective assistance of counsel de novo. State v. White, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). A defendant possesses the right to effective assistance of counsel

in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This court will presume counsel was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove ineffective assistance of counsel, Appellant must show (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness; and (2) the deficient performance prejudiced her. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). As to the first prong, a deficient performance claim cannot be based on matters of trial strategy or tactics. State v. Weber, 137 Wn.App. 852, 858, 155 P.3d 947 (2007) (citing State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001)). "The defendant must therefore show an absence of legitimate strategic reasons to support the challenged conduct." State v. Alvarado, 89 Wn.App. 543, 548, 949 P.2d 831 (1998).

If an ineffective assistance claim can be resolved on one prong of this test, the court need not address the other prong. State v. Staten, 60 Wn.App. 163, 171, 802 P.2d 1384 (1991). Accordingly, this Court need not address the allegation the prejudice prong.

Appellant has not and can not demonstrate to this court that the actions taken in this trial were not sound tactical actions on the part of his attorney. As indicated in this brief if this case had proceeded without the hearsay witnesses the only thing the trial court would have heard was

testimony from the victim who testified and was cross examined and stuck with her statement that she was molested, the testimony of the mother that her daughter had picked Gonzalez out of a picture as the person who had molested her – an identification while not to the standards of a police officer was none the less admissible and the testimony of the two prior victims who’s prior molestation at the hands of Gonzalez was very similar in nature as that described by the victim.

Allowing the Mother and Ms. Gallardo into this trial gave Appellant a chance to set up what he obviously used as his defense. That the mother of the victim had orchestrated this entire affair and enlisted her relatives who where also part of the Pinion family, the family that was disrespected by and who had “bad blood” with the Gonzalez family.

The Appellant argues that the statements of the victim, the mother and Ms. Gallardo are unreliable and that they indicate a pattern showing that the victims Mother had a preconceived bias towards the Appellant and that without these false statements there would be no conviction.

Likewise Appellant argues that the statements made to Ms. Gallardo clearly show contradictions between what the victim initially stated, what was “allegedly” stated by the victim to her mother and the facts which were presented at the trial regarding the actions of the defendant at the party.

The admission of these statements was a tactical decision made by the trial attorney to demonstrate to the judge that this whole story was some conflated matter done because of bad blood or that just did not occur or were actually an act committed by Appellant's brother the man who had been charged with possession of child pornography and who had been attempting to get into the priesthood. (The references to the priesthood combined with the allegation that he had been charged with possession of child pornography were an obvious attempt to paint the other brother as a molester because of the ongoing sexual abuse litigation involving priests.)

It is clear that the tactic was to bring in all of the conflicting statements along with the information about the other brother in an attempt to convince the trial court not that there was doubt that someone did this act but that there was doubt that it was committed by this brother. This could not have been done without the testimony of the Mother, Ms. Gallardo and the victim which clearly throughout the proceeding Appellant argued was contradictory.

This court must read the closing arguments of trial counsel for Mr. Gonzalez. This lengthy closing sets out the entire defense; it also further supports the fact that Appellant wanted the testimony of the two "hearsay" witnesses, the victim's mother and the forensic interviewer from the Prosecutors Office, Amy Gallardo. RP 394-414

Appellant argues that the case would not have been provable without the “child hearsay” information. This is a baseless assumption. It is the State’s position that given the testimony of the victim along with the information gathered by the Mother about the identity of the molester which was not “hearsay” and the ER 404(b) testimony that the charges here would have been found beyond a reasonable doubt.

Appellant now says that if his trial attorney would have objected that the testimony should have been excluded. This contradicts the record where the court specifically found in Conclusion 2.3 that the hearsay was admissible under the Ryan factors. This is supported by the discussion on the record about this testimony.

Appellant has set forth nothing that would support his claim that his trial counsel was ineffective. The facts are clear that this seasoned attorney and Mr. Gonzalez determined what the strategy would be in this trial. The testimony of Mr. Gonzalez supports this position. He got on the stand and supported this strategy by continuing the claim that basically everyone was against him, that he had never done anything but perhaps kiss one fourteen year old girl, that the “bad blood” was at the center of this allegation and that the other women who testified to almost identical previous molestations were all just simply liars. It is clear from the trial that this was the strategy, the plan, and the defense throughout.

## **RESPONSE TO ALLEGATION 'E' – CONFRONTATION.**

Once again for the first time on appeal and in the third iteration of his brief, Appellant now claims that whether he agreed to allow the introduction of the child hearsay, which obviously he did from a review of the record, or if he did properly object does not matter. Child hearsay evidence violates his right to confrontation under the reliability prong.

Appellant does not explain to this court the legal basis that would allow him to raise this issue for the first time on appeal. RAP 2.5(a) provides that this court "may refuse to review any claim of error which was not raised in the trial court." Further it is clear that defense counsel specifically acknowledged that Appellant wanted this information admitted. This is supported by the fact that there was never a child hearsay hearing requested by Appellant.

State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044, 1046:

Although not raised at trial, Kirwin may submit for review a "'manifest error affecting a constitutional right.'" State v. McFarland, 127 Wash.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3)). Kirwin must "identify a constitutional error and show how, in the context of the trial, the alleged error actually affected [his] rights." *Id.* (citing State v. Scott, 110 Wash.2d 682, 688, 757 P.2d 492 (1988)). It is proper to "preview" the merits of the constitutional argument to determine whether it is likely to succeed. State v. Walsh, 143 Wash.2d 1, 8, 17 P.3d 591 (2001) (citing State v. WWJ Corp., 138 Wash.2d 595, 603, 980 P.2d 1257 (1999)).

To overcome RAP 2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate the error is "truly of constitutional dimension." State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). This Court will not assume an error is of constitutional magnitude. *Id.* at 98. Rather Appellant must identify the constitutional error. *Id.* (citing State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). Even if a claimed error is of constitutional magnitude, an appellate court must then determine whether the error was manifest. *Id.* at 99. "'Manifest' in RAP 2.5(a)(3) requires a showing of actual prejudice." ... "To demonstrate actual prejudice there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case."

There was no child hearsay hearing conducted in this case because Appellant agreed that this testimony should be allowed in. There was no need to set forth with particularity the basis for allowing the testimony pursuant to the factors set forth in Ryan and all of the case that have come after because this agreement.

**RESPONSE TO ALLEGATION '6' – INSUFFICIENT EVIDENCE.**

Appellant challenges the sufficiency of the evidence to support the conviction. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is

sufficient evidence to support the determination that each element of the crime was proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A reviewing court will consider the evidence in a light most favorable to the prosecution. Green, 94 Wn.2d at 221. Reviewing courts also must defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874.

State v. Hovig, 149 Wn.App. 1, 8, 202 P.3d 318, review denied, 166 Wn.2d 1020 (2009);

We review a trial court's decision following a bench trial to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. A claim of insufficiency admits the truth of the State's

evidence and all inferences that reasonably can be drawn therefrom. (Citations Omitted.)

Evidence is sufficient to support a conviction if it permits a reasonable fact finder to find each element of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), see also State v Teal, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

This court does not have to decide if it believes that the evidence establishes guilt beyond a reasonable doubt, but rather you must decide if any rational trier of fact could find guilt. State v. Kilburn, 151 Wn.2d 36, 57, 84 P.3d 1215 (2004).

This Court will review findings of fact for substantial supporting evidence. Evidence is substantial if it allows a rational fair-minded person to find the disputed fact. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Conclusions of law must flow from the findings of fact. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999).

A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) and the elements of that crime can be established by both direct and circumstantial

evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986)  
Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wash.2d 939, 969 P.2d 90 (1998).

The facts that were presented at trial were clearly more than sufficient to allow the court to find the defendant guilty beyond a reasonable doubt. The victim identified Appellant from a picture that contained five other men who looked very similar. She was able to describe to both her mother and the Ms. Gallardo that she had been touch on her private parts. She was able to tell Ms. Gallardo what her private parts were and testified at trial and was cross-examined by appellant.

This court need only look to the evidence presented. The thirty pages of testimony by the victim, followed by thirty pages of testimony from the victim's mother were more than sufficient to support this charge. (RP 16-82) However the State also had the additional facts that were presented to the trial court judge in the form of the picture, exhibit 5, as well as the lengthy taped interview of the victim along with the testimony of Ms. Gallardo who conducted that interview.

This testimony and these exhibits in conjunction with the unbelievable story that was told by Appellant and his witnesses were more than sufficient to support the conviction. Appellant's witnesses were not

believed by the court to such and extent that the trial judge included that in the findings of fact, Finding 1.8 and 1.9. (CP 48) These are unchallenged and therefore verities. These witnesses testified to the court that except for one brief time when appellant was in the bathroom the members of the family were with him each and every second during the party. The information that was allowed regarding his past acts presented the trial court with additional information it was legally allowed to consider prior to rendering its verdict.

Throughout the interview with Ms. Gallardo the victim was consistent in her statements that she was touched. She was uncertain about certain facts and did not remember others. This once again was a child of six years of age who at the time of the trial was nine, in other words one third of her life had passed from the time she was touched to the time of this interview and the subsequent trial. The position of the Appellant would be akin to asking a sixty year old person what they had done when they were forty and then expect that person to remember the exact description of that person so that it could be used in an interview or a trial.

The simple truth is that the very next day after she was touched she stated that it was her Father's uncle and at the same time stated to her mother that it was the uncle who took them on his boat. (RP 51-53), that

after that she was shown a picture of the uncles at the party and she did not pick out the “other” uncle, the one who like child pornography, she picked the Appellant. At the same time telling her mother and later Amy Gallardo and the court just exactly what had happened to her, how she had been touched on her “private parts.”

Appellant seems also to forget his own testimony that he had a relationship that involved kissing and conversation about marriage with a fourteen year old girl. His testimony was that he only kissed this child however he pleaded guilty to raping her. (RP 329-33, 345-4) Appellant’s story regarding that past plea of guilty was that he just went along with it to get it over and that he really did not know what was going on. (RP 347-9) He claimed that he did not know what the plea was all about and yet he testified that he had “three years of probation and three year of SOSA program where I will go and they will tell me all my (inaudible) and all of these and restrictions that I had. Yes, sir, I was very close supervised.” (RP 350) He also had to register as a sex offender. (RP 349)

Appellant testified that while he was waiting for a chance to use the bathroom a small child came up to him and hugged him and greeted him as “Tio.” Appellant claims he did not know who this child was. (RP 353-355, 356, 365-66)

Appellant's story is that the victim's mother had seen him hugging her daughter, the victim, and that was the basis for this false allegation. (RP 369-70) He testified that it was his brother that went into the bathroom that was in a bedroom and he went to another just after he saw the kids in the house. (RP 336, 369-71)

One of the claims by Appellant was that he was always wearing a big hat during the party and that the victim did not say that her abuser was wearing a hat at the time of the molestation and yet Appellant himself admits that while in the house on this one occasion, but just for pictures, he had his hat off. (RP 337-8, 369)

Appellant also seems to have forgotten that there was extensive testimony from two other female relatives who testified that when they were younger they too had been molested by Appellant. (RP 101-35.) These two individuals came forward when they found out that the Appellant was still molesting young girls. These two witnesses were written off by the defense because one had gotten out of an assault by claiming the defendant has molested her and "Both of them had motive to say these lies from the pit of hell." (RP 407-408)

The testimony of Nancy Pinion describing the method that her uncle, Mr. Gonzalez, would molest is nearly identical to that described by the victim in this case. Appellant would isolate the victim and even

though there was another person near he would come up behind her and put his arms around her and put his hands down her pants. (RP 103) This is nearly word for word the description of how Appellant molested the victim in this present case. Nancy Pinion states in her testimony that one of the reasons that she came forward was;

A Because he did something to my niece and he -- when him and I had a conversation alongside of his car he said that I was lying. He said that we were all lying, and the reason I'm doing this is because we're not lying.

Q Okay. So then you decided to do this because you felt like if you didn't do this, he wouldn't be stopped or words like that, is that correct?

A I don't think I've said that.

Q Well, I know you didn't say that but isn't that what you intend?

A I intend for it to show that it's a pattern and not something that he says is just a one time thing or not at all.

The cross examination of this witness by trial counsel clearly sets out the defense strategy which was to show that all of the statements that were being made were due to "bad blood between Miriam Pinon, the mother of Brisa, and the Gonzalez family, Ramon Gonzalez's family" (RP 113) Trial counsel also makes it clear that the reason that Ms. Nancy Pinion came forward was because the Appellant had called the police after Ms. Pinion had punched him in the face when he called her a liar after she confronted him with the fact that he had molested her and her sister. (RP 113-5)

The testimony of Maria Campos also mirrors that of her sister and the victim. She was about the same age as the present victim. (RP 118) She too describes a situation where her uncle came up behind her and touched her, she states that Gonzalez had her face to the wall and pulled her pants down and he would touch her vagina with his hand. Even in when she was molested in Gonzalez's truck he would have her face away from him. She also indicates that her pants were still on, just pulled down. (RP 118-21) Once again on cross examination trial counsel attempts to get the witness to agree that there is "bad blood" between the Pinon and the Gonzalez families. (RP 126-7) The testimony from this witness is that there was some "gossip" about the mother of the victim but nothing more than that. (RP 127-8)

A very important piece of testimony by this witness is when she testified that when she was told by the victim's Mother that there had been an "incident with your uncle" Mrs. Campos testified she was not told which uncle that was involved in the "incident." The following is her testimony:

A ...She pretty much said there was an incident a while back with your uncle and it was one of your uncles and I said, oh, Ramon? And she wasn't expecting me to know that because she had never told anyone, so then I told her why I kind of connected those two.

Q You told her what?

A I told her why I connected those two things.

Q And so you disclosed as early as summer of 2009 that Ramon

Gonzalez had done these things to you?

A Not in detail, but yes.

Q And you disclosed that to Miriam Pinon --

A Yes.

Q -- over two years ago?

A Yes, but like I said not in detail. (RP 128)

The trial attorney attempts to paint these other victims as having entered into this case only because the case was weak. This too is refuted by this witness. She flat out states that she did not, does not have any knowledge of "how much evidence you need to convict someone." Here too the defense is that this was done because of "bad blood" and an attempt to convict this innocent man. The testimony from Mrs. Campos is very telling. She states that she knew that Gonzalez had a sex crime in his past but stands behind her testimony that she was not coming forward because Gonzalez "hadn't been held accountable." (RP 131-3) The defense attempts here too to get Mrs. Campos to state that she had in effect agreed to testify in order to "make sure that Ramon Gonzalez is convicted..." Mrs. Campos flatly denies that occurred and that "there's no way that I could do that. (RP 132-3)

It must be noted that there is no indication that these two sisters ever spoke to the victim of the present molestation. The testimony of these two witnesses was the very reason that ER 404(b) is used.

In this instance the claim by the Appellant is that this was a mistaken identity or perhaps an insidious plot against him. Therefore the introduction of the testimony of the two other female relative who had been molested by Appellant as well as his introduction of the prior conviction for rape is of great importance.

These facts are without a doubt sufficient to meet the test set forth in, State v. Bucknell, 144 Wn.App. 524, 183 P.3d 1078 (2008);

In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. State v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). (Emphasis mine.)

## **RESPONSE TO ALLEGATION ‘F’ CUMULATIVE ERROR.**

Appellant merely asserts that the while there might not be a single error the errors combined are sufficient to allow for this court to reverse this conviction. Appellant does not state what those errors are so the State must assume that this is a catchall allegation aggregating the issues set forth in Appellant’s brief. As the court stated in State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000):

We do not believe the cumulative error doctrine warrants reversal in this case. The application of that doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. See, e.g., State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)

...

Here, we are not dealing with the accumulation of several errors. Rather, we are confronted with two errors that had little or no effect on the outcome at trial. We are satisfied, therefore, that the cumulative effect of these insignificant errors did not deprive Greiff of a fair trial.

1) The trial court did not err when it entered findings 1.7 and 1.10 they are supported by the record. 2) Appellant wanted the child hearsay admitted in his trial, there is no error in this action, it was a trial tactic. 3) Counsel was not ineffective by agreeing to allow the admission of the hearsay statements; once again this was clearly done as a part of the trial strategy in this case. 4) There was sufficient evidence presented to support the charge against Appellant. In context with this allegation this

court should note that the Appellant has not mentioned the statements which were admitted by other relative of Appellant indicating they too were molested. Allegations that while they can not be used to show that Appellant acted in the same manner with this victim they are and where allowed into evidence to show “lack of mistake or error” in the identification of the perpetrator that Appellant now so vigorously challenges. 5) The victim properly identified Appellant as the person who molested her. 6) There was no violation of Mr. Gonzalez’s right to confrontation. The standards set forth in State. Ryan, supra, have been upheld on numerous occasions and this case does not warrant a change in the standards set forth therein.

#### IV. CONCLUSION

For the reasons set forth above this court should deny allegation. The actions of the trial court should be upheld, the verdict should stand and this appeal should be dismissed.

Respectfully submitted this 12<sup>th</sup> day of August 2013,

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# APPENDIX A

MR. SANDLIN: What is the problem with the child hearsay rule? If he's going to put the child on, that's fine. We want the child on so we can examine her.

MR. BOSWELL: And it's the State's intent to call her, planning on calling the child as a witness. The child hearsay rule is just even with the child testifying we can still, depending upon what she testifies to --

THE COURT: Do we need a competency hearing. Are you saying she can testify?

MR. BOSWELL: She's nine now. She's competent.

MR. SANDLIN: Of course she is, yeah.

THE COURT: Well, if you agree on that, that takes care of that problem.

MR. SANDLIN: Then there's no child hearsay, that's the problem.

THE COURT: Well, it would be hearsay because she made statements at the time when she was underage.

MR. BOSWELL: Yes, under the age of ten.

THE COURT: Uhm-hm.

MR. BOSWELL: And I know the State provided briefing to that

but I don't think Mr. Sandlin ever did, at least I didn't see any.

THE COURT: That was Ms. Rosborough's briefing, wasn't it?

MR. SANDLIN: That was in her briefing, yes.

MR. BOSWELL: It's separate from the 10.58.090 --

THE COURT: Yeah.

MR. BOSWELL: -- but it's -- so there's two different briefs.

MR. SANDLIN: Well, the rule is clear, if it's under nine but the issue is was she competent and if she's competent why are we restating what she's saying?

...

(Pretrial 15-16)

MR. BOSWELL: What's your Hawaii witness (inaudible) talk about a stipulation of what he would testify to for a future trial (inaudible -- can't hear him) briefing.

MR. SANDLIN: Oh, he was with Mr. Gonzalez. It's his brother. They went into the house one time. He was with him. He watched him go into the bathroom. He watched him when the little girl said, hi uncle, and came up and gave him a hug and then he went into the bathroom. That's it. And the little girl said that this happened inside of a bedroom when they were alone.

THE COURT: The young child is competent to testify -- I'm

quoting now from Ms. Rosborough's brief on page 5 of 10. The young child is competent to testify as a witness at trial if that child has, one, an understanding of the obligations to speak the truth on the witness stand. Two, the mental capacity at the time of occurrence to receive an accurate impression of the matter about which the witness is to testify, a memory sufficient to retain an independent recollection of the occurrence, the capacity to express in words the witness's memory of the occurrence and the capacity to understand simple questions about it. Now, either the Court, based upon a hearing, makes those determinations unless both parties agree that she qualifies. That's up to both counsel. So long as the child can demonstrate some independent recollection of the events and question the ability to describe them and understands the obligation to speak the truth in Court, the child's equivocation or inability to recall details regarding the weight of testimony will not render the child incompetent to testify.

MR. SANDLIN: Which seems rather fundamentally logical.

THE COURT: It really is.

MR. BOSWELL: It's my understanding that Mr. Sandlin has had an opportunity to interview her.

MR. SANDLIN: Yeah.

THE COURT: *State v. C.J.* directs trial courts to the *Ryan* factors

as useful to determining reliability. I have to -- I gotta compliment Ms. Rosborough in this brief. I think she did --

MR. SANDLIN: Yeah, I think it was very good.

THE COURT: Yeah.

MR. SANDLIN: Well, that's the reason I didn't respond to the brief. She put all the law in there.

THE COURT: Well, again, those are things the Court has to do unless counsel agree that we can proceed. Let's begin. I'm not going to get into that. That's up to both counsel.

MR. SANDLIN: I think -- she was competent when I listened to her.

MR. BOSWELL: I guess the issue is not whether -- I guess if she's not competent, the statements can still come in if there's the reliability as I (inaudible) on the *Ryan* factors but even if she is competent, the statements can still come in.

THE COURT: Right.

MR. BOSWELL: Okay, okay.

THE COURT: That's my understanding.

MR. BOSWELL: Does that make sense? I think Mr. Sandlin -- the impression I'm getting from Mr. Sandlin is that if she testifies, the statements don't come in because she's testifying.

MR. SANDLIN: Well, we'll want them to come in anyway for impeachment purposes.

MR. BOSWELL: Okay, okay.

THE COURT: Okay, so am I safe to say that there's not a problem here?

MR. SANDLIN: Doesn't seem to me that there's a problem here.

THE COURT: Okay.

MR. SANDLIN: However, how many hearsay statements are we going to admit? Are we going to have three tiers of hearsay statements, what she said to mom, what she said to dad later, what she said to the sexual assault victim later, you know. There's gotta be an end to this at some point.

MR. BOSWELL: It's -- my understanding it's just the two levels. It's just the immediate disclosure to the mother which was the day after the incident and then a year later when she talked with Amy Gallardo of our Victim Witness Unit. It's my understanding she's never spoken to the father about this.

MR. SANDLIN: Well, she has, but whatever.

THE COURT: Okay.

MR. BOSWELL: I guess I'm a little confused where we're going. It seemed like 15 minutes ago we're talking about this not being for trial

and defense waived --

MR. SANDLIN: We're going to go to trial. That's what I'm hearing from the Judge.

MR. BOSWELL: We're briefing all these other -- the 404(b), 10.58.090 witnesses.

THE COURT: I think what I'm hearing from Mr. Sandlin allays my concern here. I mean, the defense has agreed to a number of things, if I understand correctly, that would make a continuation not necessary. I think we can go, and I -- you know, that's a -- these things have a habit of kind of morphing. We'll just have to deal with it if we start the trial.

(Pretrial 16-19)

