

FILED
October 21, 2015
Court of Appeals
Division III
State of Washington

NO. 32902-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VALENTIN MENDOZA,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>ARGUMENT</u>	1
<u>RESPONSE TO ISSUE ONE- CONFRONTATION CLAUSE</u>	4
<u>RESPONSE TO ISSUE THREE- SUFFICIENCY OF FINDINGS</u> ...	4
<u>RESPONSE TO ISSUE TWO-FINDING 1.23</u>	20
IV. <u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

PAGE

Cases

In re Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975) 3

In re Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979)..... 3

State v. Alvarez, 128 Wn.2d 1, 904 P.2d 754 (1995) 17

State v. Banks, 149 Wn.2d 38, 65 P.3d 1198 (2003)..... 17

State v. Brooks, 45 Wn.App. 824, 727 P.2d 988 (1986) 5

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002)..... 18

State v. Bynum, 76 Wn.App. 262, 884 P.2d 10 (1994) 20

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 6

State v. Carlin, 40 Wn.App. 698, 700 P.2d 323 (1985)..... 2

State v. Carlson, 27 Wn.App. 387, 618 P.2d 531 (1980),
review denied, 95 Wn.2d 1001 (1981)..... 3

State v. Dejarlais, 88 Wash.App. 297, 944 P.2d 1110 (1997),
aff'd, 136 Wash.2d 939, 969 P.2d 90 (1998)..... 6

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 5

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999)..... 7

State v. Gatewood, 163 Wn.2d 534, 182 P.3d 426 (2008) 5, 21

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 5

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)..... 4, 8

State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998) 17

TABLE OF AUTHORITIES (continued)

PAGE

State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974)..... 6

State v. Jefferson, 74 Wn.2d 787, 446 P.2d 971 (1968) 3

State v. Longuskie, 59 Wn.App. 838, 801 P.2d 1004 (1990) 6

State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006)..... 9-10, 12-13

State v. Robertson, 88 Wn.App. 836, 947 P.2d 765 (1997)..... 19

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992) 5

State v. Stevenson, 128 Wn.App. 179, 114 P.3d 699 (2005)..... 4, 5, 21

State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003) 4, 21

Federal Cases

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781,
61 L.Ed.2d 560 (1979)..... 5

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827,
144 L.Ed.2d 35 (1999)..... 18

Rules

CrR 6.1(d) 17

JuCR 7.11 15, 16, 20

JuCR 7.11(c) 16

RAP.10.3(b) 1

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 in admitting AEG's statements to the forensic interviewer into evidence.
2. The court erred when it entered Finding of Fact 1.23.
3. The evidence was insufficient to support the conviction.
4. The court erred in failing to enter legally sufficient findings.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The child hearsay statements were properly admitted.
2. Finding of Fact 1.23 was not objected to in the trial court, it conforms to the testimony at trial.
3. The evidence presented from the victim alone was sufficient to support the one count found by the court, this was further supported by the additional testimony that was properly admitted.
4. The mistrial was properly denied.
5. The court entered legally sufficient findings which support the conclusions entered.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed.

III. ARGUMENT

This was a juvenile case and was tried to the bench. There were

four counts charged against the defendant, counts one and two – Rape of a Child in the First Degree, counts three and four- First Degree Child Molestation. (CP 6-7) All four counts covered the same period of time January 1, 2010 through November 12, 2012. At the close of its case the State conceded that it had not presented sufficient evidence to sustain convictions on Counts three and four, the State agreed that those two counts must be dismissed. (RP 371.) The court, in this bench trial, then considered the totality of the evidence presented and found that only count one was had been proven beyond a reasonable doubt entering a guilty verdict against Mendoza on count one and acquitting him on count two. The court set forth a very long and specific oral ruling. (RP 504-26)

Therefore the only count before this court for review is amended Count I which states as follows;

On, about, during or between January 1, 2010 through November 12, 2012, in the State of Washington, you engaged in sexual intercourse with and you were at least 24 months older than the victim, A.E.G., a person who was less than 12 years old and not married to you and was not in a state registered domestic partnership with you. (CP 6)

The evidence presented was more than sufficient to support the charges against Appellant. This case was tried to the bench, State v. Carlin, 40 Wn. App. 698, 700 P.2d 323 (1985) “...in a bench trial a trial judge is presumed to have considered only the evidence properly before

the court. In re Wilson, 91 Wn.2d 487, 490, 588 P.2d 1161 (1979); State v. Carlson, 27 Wn. App. 387, 390, 618 P.2d 531 (1980), review denied, 95 Wn.2d 1001 (1981).” In re Wilson, 91 Wn.2d 487, 490, 588 P.2d 1161 (1979) “Since this was a trial to the court, we assume the court disregarded that which was hearsay and considered only the evidence properly before the court. In re Harbert, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975).” State v. Carlson, 27 Wn. App. 387, 390, 618 P.2d 531 (1980) “Judges routinely rule on evidentiary matters in bench trials and are not found "prejudiced" by the exposure to inadmissible evidence. Trial judges are presumed to have considered only the evidence properly before the court and for proper reasons. In re Harbert, 85 Wn.2d 719, 538 P.2d 1212 (1975); State v. Jefferson, 74 Wn.2d 787, 446 P.2d 971 (1968).”

This was acknowledged by trial counsel for Appellant and the trial court;

MR. SCOTT: I -- I think that the Court can sort it all out and -- and make a decision and --

THE COURT: Yeah.

MR. SCOTT: -- I'm being facetious Your Honor.

THE COURT: No, I -- I -- and actually Mr. Scott I know you are **and it's a good point and yet really at the end of the day it's true. I mean, if we went forward with argument and again, if it wasn't supported by what I felt like the case law was in this area I -- I would disregard it.** But at any rate let's do that. We will reconvene in the morning. (RP 393)

As is stated below even if this court were to find that the admission

of the statement to the forensic interviewer were improperly admitted there is no prejudice to Appellant and the error is harmless. State v. Guloy, 104 Wn.2d 412, 425-26,705 P.2d 1182 (1985) erroneous admission is harmless error if the untainted evidence is so overwhelming a reasonable jury would have reached the same result absent the admission.

RESPONSE TO ISSUE ONE – CONFRONTATION CLAUSE.

RESPONSE TO ISSUE THREE – SUFFICIENCY OF FINDINGS.

Respondent shall address issues one and three in the same section of the Respondent’s brief because the admission of the statements and the evidence from the victim are clearly and closely interrelated.

It must initially be noted that the Appellant has not challenged the actual findings, except 1.23. The allegation is that the “written findings are insufficient for appellate review”. (Appellant’s brief at 15)

Therefore to determine whether sufficient evidence supports an adjudication, this court will view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the crime’s elements beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). Specifically, following a bench trial, review is limited to determining whether substantial evidence supports the challenged findings of fact and, if so, whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179,

193, 114 P.3d 699 (2005). In particular this court will treat unchallenged findings of facts as verities on appeal. Stevenson, 128 Wn. App. at 193.

Mendoza only assigns error to one of the juvenile court's findings of fact. Therefore, this court will look only to see whether the juvenile court's findings of fact support its conclusions of law. This court will review challenges to a trial court's conclusions of law de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

Appellant challenges the sufficiency of the evidence to support his one conviction for First Degree Rape of a Child. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). 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); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. 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).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). In this case the judge on numerous occasions made it clear on the record that she found the testimony of the witnesses whose testimony supported the charges to be credible including the six year old victim.

State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence.

The trial court stated as follows just after the State conceded on counts III and IV;

THE COURT: Alright. Then I will grant dismissal of

those motions at this juncture by the State's concession. So I'm focused on Counts 1 and 2, which I do believe, taking the evidence in the light most favorable to the State at this point the State has met their burden. And actually based upon the child's testimony alone, certainly for one of the counts regarding -- her stating at four years of age and her grandmother's house that the respondent had her lick his penis. She also -- however, testified to the second incident and that's really where I differentiate a lot of the testimony that I've heard up to this point, that there was -- she was clear in this Court's mind as to four years-old and six years-old.

The four year-old incident, when she was four years of age, excuse me, incident occurring at her grandmother's house shortly after they had moved up from California before they got their own apartment. And that there was a second incident that occurred at the apartment the last of which she was six years of age.

I think, again, if you take a look at the evidence and all reasonable inferences in a light most favorable to the State as I must at this point there is a basis to allow Counts 1 and 2 to proceed forward at this point. (Emphasis added.)

As the trial court so accurately stated it needed nothing more than the testimony of the victim to find that count one had been committed. Therefore the claims raised by Mendoza regarding hearsay had no effect on the trial judge, the trier of fact, in her determination of Mendoza's guilt as to count one. The State could have according to this ruling placed no additional evidence before the court and it would have still found the defendant guilty. Any claimed errors in the admission of hearsay are harmless if they even occurred, which the State disputes. State v. Finch, 137 Wn.2d 792, 859, 975 P.2d 967 (1999);

Generally, an error that violates a constitutional right of the accused is presumed to be prejudicial. See State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980). The appellate court determines whether the State has overcome the presumption from an examination of the record, from which it must affirmatively appear the error is harmless beyond a reasonable doubt. See State v. Belmarez, 101 Wn.2d 212, 676 P.2d 492 (1984) (error in instruction on deadly weapon was of constitutional magnitude and not harmless). The rule is occasionally stated in its approximate converse, i.e., that the error is harmless if the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985).

This is not a case where the defendant was found guilty of additional counts and an argument could be made that the trier of fact was swayed or took into consideration additional information upon which the added convictions might have been based. Nor was this a case tried to a jury where there could be an allegation that the hearsay swayed the vote on other counts. This is a case where the court sitting as the trier of fact dismissed all other charges or acquitted the defendant. The only remaining charge was one that the court stated was proven with nothing more than the testimony of the victim. And as alleged later in this brief that information that was admitted as hearsay was properly allowed pursuant to the test set forth in Price, supra, a case cited and used by the trial court in this present case.

State v. Guloy, 104 Wn.2d 412, 425-26,705 P.2d 1182 (1985)

erroneous admission is harmless error if the untainted evidence is so overwhelming a reasonable jury would have reached the same result absent the admission.

Here the statements of the victim were unequivocal. She and she alone supplied sufficient evidence to convict the Appellant of count one. She was able to indicate how old she was at the time of the rape, her birthdate, the location where the rape was committed, not only the familial connection but the actual city and she stated that her uncle made her lick his penis. Nothing more needed to be presented to the court in order for it to determine guilt.

Because the court dismissed two counts that the State placed before the court and the court, sitting as the finder of fact acquitted on count two that was presented through the hearsay witnesses was to a great extent cumulative. It was however admissible. The court requested that counsel review "State v. Price at 158 Wn.2d 630" which the trial court pointed out discussed "Rohrich... Clark... Crawford and Personal Restraint Petition of Vincent Grasso at 151 Wn.2d 1." (RP 392)

It is important to note that there is not a challenge in this court of victim A.E.G's competency. The trial court made it very clear that the court believed that the victim was competent to testify. The statements by the victim from the time of the initial revelation that this crime had been

committed on her, through the discussion with her brother and her mother and the eventual statement to the State's advocate varies, as is to be expected, to some degree. What did not every vary were the statements that the crime was committed against the victim when she was four years old; that she knew and testified what her birthdate was; that it was committed while she was at her grandmother's home a home located in the State of Washington, her grandmother being the mother of the Appellant; that the Appellant was the perpetrator and, that the act in question was that the Appellant had commanded the victim to lick his penis. The victims description included the description that it, his penis, was comparable to the udder of a cow, that stuff came out of his penis and that is tasted gross, "like you know, chocolate milk mixed with cow poo" it smelled like "dog's when they are dirty" RP 243

The trial court conducted its own researched so that it could address the child hearsay issue. After finding Price the court stated that "...it may or may not be as compelling as I think it is..." The trial court was correct. State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006) clearly supports the admission of the very limited statements in this case. The second paragraph of Price at 653-3 is applicable to this case, it states:

At trial, R.T. indicated that she could not remember the relevant events or her disclosures to her mother and the detective. Relying on *Crawford v. Washington*, Price argues

that R.T.'s inability to remember rendered her unavailable for purposes of the confrontation clause, and thus, admission of her prior statements was improper because Price had no prior opportunity to cross-examine R.T. about them. We conclude that the questions the prosecutor asked on direct examination and R.T.'s answers constitute sufficient testimony to satisfy the confrontation clause. Because R.T. was available and testified at trial, *Crawford* is not implicated. We affirm the Court of Appeals.
(Footnote omitted.)

Price is on point and addresses a factual scenario which if very similar to that confronted by this case.

The court in its determination of guilt stated that it had considered the information supplied as hearsay in only determining the allegation set forth in count one;

It is also not intentional on this Court's part, in -- in one sense; but I think leads also to some of the further argument that was made earlier eliminating the challenge by defense under the *Price* case because I am only using this, the child hearsay, as it goes to support Count 1, which I believe the child has testified to. That wasn't my only reason for doing it; but it certainly is an outcome of it.

RP 519

...

Because of these circumstances, specifically when we have a child's testimony being the major piece of evidence against the respondent, it is important to look at the totality of the evidence which provides the context of the use of it and that. I -- I wanted to discuss the pronoun argument for a moment.

RP 522-3

The trial court appreciated that the ruling would negate most arguments regarding the admission and use of the child hearsay

information. The court's finding of guilt only as to count one, the count that the victim specifically identified and that count only, conformed the actions in the trial and the use of the hearsay information to the standards set out in Price, supra. The court stated, "[a]lthough I certainly think the biggest legal issue, because of the way I have decided this case, perhaps had some wind taken out of its sails; but that will be for an appellate court at a later time to decide." (RP 527) That finding of guilt to only the one count did not take the wind out of sail of the argument it completely negates that allegation.

The edicts of Price were followed in this case. There was full discussion of the issue and the trial court judge sitting as the finder of fact limited the use of the child hearsay information. The trial court spent an enormous amount of time during this trial insuring that it was complying with the rule set out in Price.

Appellant conceded in the trial court that child hearsay to Ms. Gallardo would be admissible with regard to count one;

So this is the kind of thing that she was talking about here and that's the kind of thing that she was talking about with Amy; but she didn't ask the question did you tell Amy something else or something different. That description, unfortunately, I would like to keep that *out but I think that that probably does come in* on her interview with Amy. I think that discussion about sensory comes in. (RP 423, Emphasis mine.)

The discussion in this section of the trial makes it clear that trial counsel was still attempting to argue that nothing could come in but when the court referred both counsel to Price that argument had to change to a certain extent to allow for the fact that Price specifically allows for the admission of child hearsay when the record is similar to the one presented to the court in this case. Counsel admits throughout that there was specific examination and testimony from the victim regarding count one.

Here the victim did take the stand, she was competent, she was examined and cross examined about the incidents and was able to clearly, beyond a reasonable doubt, testify that the defendant had on occasions when the victim was four to six years old made her lick his penis. That is occurred in the grandmother's home, whether it was while the victim was living there or just visiting was weighed by the court. The victim was able to state when her birthday occurred and where her grandmother lived. All that was confirmed by the victim's mother in direct testimony, testimony that was not child hearsay related. The court made it clear in its ruling that the testimony of the victim was the main basis of the finding of guilt. The testimony from the other witness was essential, but in many instances the court was using those facts less for the actual proof they supplied then it was using it to confirm what had been testified to by the victim. The additional testimony was used to corroborate the place, time and match

those facts, from others who were knowledgeable of the victim's life, with the actual testimony of the victim.

This court must also presume that there was no objection to the Findings of Fact and Conclusions of Law when they were entered in the trial court. There is no indication that there was a hearing held to dispute any of the findings, there are no alterations in the findings and conclusions that were filed. They indicate that trial counsel "Approved (them) as to form" and they were signed by and adopted by the trial court on January 9, 2015. There were forty-five findings of fact covering eight pages entered by the trial court and from those facts the court made six conclusions of law. (CP 144-151)

Appellant now specifically challenges only one finding 1.23 and generally, apparently, all of the sufficiency of the other findings and conclusions:

The court's written findings in the present case fail to resolve conflicting evidence and issues of fact relevant to the court's ultimate findings as to the elements of the offense.... Most of the court's written findings merely summarize portions of the witnesses' statements. The court's findings fail to indicate whether the testimony summarized therein is adopted as fact by the court. (Appellant's brief at 16)

Appellant states that the court has failed to "adopt" the findings however in the first paragraph it states "the court now enters the

following”, (CP 144) further, these findings were signed by the trial court judge and at CP 150 it states “Having entered the above finding of fact, the Court now reaches the following:” What then follows are the conclusions of law. The court states the findings were entered by it, the order that sets forth the courts findings and conclusions is captioned “FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO VERDICT”

The only party that can enter a finding of guilt is a court or the jury and in this case the trial court sat as the finder of fact, this allegation is an exercise in semantics’. A court cannot “enter” something as a final order without “adopting” the language in the order.

While each fact entered by the court does not then state that, that specific fact supports a specific portion of the court finding of guilt it is clear what facts support the specific findings and as read in totality they support the finding of guilt. The oral ruling was extremely clear and is supported by these findings. The court’s finding of guilt for the one remaining count covers twenty-three pages of the verbatim report of proceedings. (RP 504-27) The findings were clearly adopted by the court. JuCR 7.11 does not state that the court must indicate within the findings and conclusion that it “adopted” them as the record. It is not reasonable to believe that the court and the parties would go to the effort to adopt and

agree on forty-five separate “facts” and enter them as the basis for the finding of guilt in a class A criminal case and not by that very act “adopt” those findings. The findings and conclusions comport with JuCR 7.11(c) Decision on the Record.

The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

(d) Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

This written findings and conclusions in conjunction with the oral ruling by the trial court more than satisfy both rule and case law. There is no need to remand this case to the trial court for entry of anything. Neither this court nor Appellant have to search the record for the basis of the conviction, it is clearly set forth fact by fact by fact and summarized in the conclusions as well as being set forth in far more detail in the oral ruling, an oral ruling that is also mandated by JuCR 7.11.

While the findings of fact are far more detailed than what was probably needed to set forth the elements of the crime and the facts that supported those elements this court can not fault the trial court for setting

forth the legal basis for its decision in greater detail than needed. The evidentiary basis for the finding of guilt could not be clearer when the oral and written findings are looked at in totality.

The cases cited by Appellant refer to similar rules such as CrR 6.1(d) which requires entry of written findings of fact and conclusions of law following a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The purpose for requiring findings and conclusions is to "enable an appellate court to review the questions raised on appeal." Id. at 622. Each element must be addressed individually, setting out the factual basis for each conclusion of law. Id. at 623; State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Each finding must also specifically state that an element has been met. Banks, 149 Wn.2d at 43 (citing State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)). Absent prejudice to a defendant from the failure to enter the findings and conclusions, the proper remedy is remand to the trial court for entry of findings. Head, 136 Wn.2d at 624.

The courts have ruled that remand is not required if the failure to comply with CrR 6.1(d) is harmless, however. Banks, 149 Wn.2d at 43-44. In order to determine whether an error is harmless, this court will examine ""whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."" Id. at 44

(quoting State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)

(quoting Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999))).

When the trial court set forth in the written conclusions all of the elements of the crime with facts from the testimony that supported the finding of guilt;

- 2.1 The Court concludes beyond a reasonable doubt that the respondent had sexual intercourse with A.E.G.;
- 2.2 The Court concludes that the sexual intercourse occurred between January 0, 2010 and November 12, 2010;
- 2.3 The Court concludes that A.E.G. was less than twelve years old at the time of the sexual intercourse;
- 2.4 The Court concludes that the respondent and A.E.G. were not married or in a State registered domestic partnership at the time of the sexual intercourse;
- 2.5 The Court concludes that A.E.G. was at least twenty-four months younger than respondent Mendoza; and
- 2.6 This took place in Yakima County, Washington.

In its oral ruling the Court states in part;

Arlett was very specific as to the incident at - at what I'm calling at grandma's. The timeframe may be questionable based upon what Angelica said because again, Arlett, if -- if there is a weak spot in the evidence, that would be the only weak spot in this Court's mind, from the standpoint that Arlett said that they were living with her grandmother after moving up from California when she was four years old. Angelica actually doesn't support that; but what she does support is that Arlett would frequently visit her grandmother in 2010 in Granger for overnights, and again, that the respondent would be present and -- and there during those times as living with his mother at those times. It is further -- evidence -- is further supported by the descriptions that I have stated. It is also not intentional on this Court's part, in -- in one sense; but I think leads also to

some of the further argument that was made earlier eliminating the challenge by defense under the *Price* case because I am only using this, the child hearsay, as it goes to support Count 1, which I believe the child has testified to. That wasn't my only reason for doing it; but it certainly is an outcome of it.

..
Because of these circumstances, specifically when we have a child's testimony being the major piece of evidence against the respondent,

...
Again, these cases involved evaluating all of the surrounding factors. The problem I have with Count 2 is again because -- do I -- do I think it was possible? Yes. I think it was possible based upon Marcus's observations, the statements to her mother. But I am cognizant of the proof beyond a reasonable doubt in my findings today, as Mr. Scott has -- has cautioned me to be. You know, because these bench trials are hard; not at juvenile because they happen all of the time; but adult court I get to sit up here and make some legal rulings and sit back because then I've got twelve other people who bear the consequences of evaluating the evidence and making the decision. So it's not one that I've taken lightly.

RP 519-525

Where a trial court's written findings are incomplete or inadequate, this court may look to the oral findings to aid our review. State v. Robertson, 88 Wn.App. 836, 843, 947 P.2d 765 (1997). If this court takes into consideration the detailed written findings of fact and the court's lengthy and detailed oral findings where the court found Appellant guilty of one count and not guilty on the second account in conjunction with the court's acknowledgment that the State would need to prepare findings and conclusions and review with trial counsel those findings and conclusions

as well as the complete lack of dispute in the entry of those findings, clearly this court has a more than sufficient understanding of the trial court's reasoning and decision for this court to review the questions on appeal. See also State v. Bynum, 76 Wn. App. 262, 884 P.2d 10 (1994) where this court, on an agreed record that the trial court had failed to comply with JuCR 7.11 ruled as follows;

While the parties agree the court failed to comply with JuCR 7.11(d), they disagree regarding the appropriate remedy. Bynum argues the convictions should be reversed and dismissed. The State, relying on State v. Souza, 60 Wn. App. 534, 805 P.2d 237, review denied, 116 Wn.2d 1026 (1991), argues the case should be remanded for entry of the omitted findings. We agree with the State that reversal and dismissal is appropriate only in those instances in which the record is devoid of evidence to support the omitted finding. See State v. Austin, 65 Wn. App. 759, 761-62, 831 P.2d 747 (1992). However, in light of the court's comprehensive oral ruling, we conclude it is unnecessary even to remand this matter to the trial court.

The evidence presented proved beyond a reasonable doubt that Appellant forced a child, his niece, to “lick” his penis. That this occurred numerous times from the time the victim was four until she was six. Further, it is based on the totality of the written findings and the oral ruling it is unnecessary to remand for additional findings.

RESPONSE TO ISSUE TWO – FINDING 1.23

As stated above, to determine whether sufficient evidence supports

an adjudication, this court will view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the crime's elements beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). As here when there has been a trial, review is limited to determining whether substantial evidence supports the challenged findings of fact and, if so, whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). This court will treat unchallenged findings of facts as verities on appeal. Stevenson, 128 Wn. App. at 193.

Mendoza has only assigned error to this one finding of fact. The court will review challenges to a trial court's conclusions of law de novo. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

This finding states;

1.23 Benitez-Rivera confirmed that Grandma Delfina Benitez lived in Granger during this time and that A.E.G. would frequently stay overnight at her grandmother's. Respondent Mendoza was living with Delfina at this time.

The time period in count one is "On, about, during January 1, 2010 through November 12, 2012." (CP 6) The mother of the victim testified that when asked the location of her mother's residence at the time of rape Appellant was convicted of;

Q. Okay. And so your mom lives in Granger?

A. No, my mother lives right now in Grandview.

Q. Oh. Did she live in Granger?

A. She lived in Granger.

Q. Oh, and that was in 2007/8?

A. Yes.

Q. Okay. And how long has she been living in Grandview?

A. She moved in last year, or wait, this year. I don't remember when she moved in but she didn't -- she -- I don't remember when she exactly moved in -- into the apartment she's living in right now. But -- I don't remember when she moved in. I filled out her paperwork. (Emphasis mine.)

RP 168

On cross-examination the victim's mother's testimony refutes this allegation that;

But Ms. Rivera did not testify that AEG frequently stayed overnight at her grandmother's during this time. A review of the record suggests neither Ms. Rivera nor any other witness testified that AEG ever visited her grandmother after the family returned to Washington in 2009.

The victim's mother testified as follows when questioned by trial counsel for Mendoza;

A. I -- I -- I believe she still lived in Granger, I don't know.

Q. But you did not live with her?

A. No, we did not live together, no.

Q. And the kids did not live there with her?

A. No. But they would go visit. They would spend nights.

Q. Your mother, Delfina, had both -- Valentin, as well as Juan living with her correct?

A. Yes (RP 189) (Emphasis mine.)

While there is some equivocation by the victim's mother the essence of this challenged finding is supported by the trial court's finding. The testimony from the victim's mother and brother was that the revelation of the rape took place in October of 2012. The victim's brother had been informed months before that. His testimony was that he was told of the rape by his sister, then later he had his first conversation with the Appellant and the second conversation months after that and he thought that it possibly occurred in October. (RP 138) It was confirmed that the Appellant moved to his father's home in 2012. (RP 191-2) Therefore the record supports the court finding that the act occurred during the charged period.

The victim was four years old until just two months before the first date of charged period. She testified that she was four when she stated the rapes started. The rapes continued and she stated the last time they occurred was when she was six. (RP 79-80, 106, 110, 85, 88, 114-15, 120-21) The victim's mother and brother testified that the revelations occurred when the victim was six. (RP 147-48, 185, 191) The victim was six from November 15, 2010 through November 15th of 2011. The mother and brother stated that the Appellant moved out in late 2012. Therefore even if this court were to find that finding 1.23 was not fully

supported by the record the evidence presented to the trial court establish that the rape or rapes occurred during the charged period.

It is very noteworthy that the victim's mother, sister of the Appellant, daughter of Mrs. Benitez, the victims grandmother, and the person discussed in finding 1.23 testified that there were only two locations that her mother lived, Granger and Grandview and her testimony was that the grandmother had only moved in the last year. The trial occurred on March 5, 2014 which would place her mother still living in Granger during the charged period. (RP 7)

Further, the fact remains that Appellant has not challenged the other forty-four findings of fact which when taken as a whole support the conclusion that the Appellant raped the victim during the period of time charged in the information.

The critical statement from the mother of the victim is that the victim was staying overnight on a regular basis at her mother's home, the residence of the Appellant during the charged period. The physical location of that home is of no great importance other than as is almost always a found in child sex cases it is a problem determining a specific date and this use of event or physical location in child sex cases allows the parties to use some "way-point" to determine when events happen. This is the same reason that charges in this type of case are almost

universally charged as a period. Due to the memory issues of the young rape victims and the common issue of late reporting it is difficult at best to pin point one specific date on which the rape occurred.

IV. CONCLUSION

For the reasons set forth above this court should deny allegations set forth in Mendoza's appeal. This type of case is, as the attorneys and trial court discussed, the most difficult to try, for both sides and for the court. The standards used when questioning a child victim and those who heard the victims statements are in many ways foreign to the trial practice we are all used to and comfortable with. The mere questioning of a victim of tender years regarding sexual acts that a practitioner would be uncomfortable discussing with an adult and having that discussion in an open, public courtroom adds to the difficulty.

This is layered on top of the mere fact that children's memories are such that often as a litigator you are forced to use "landmarks" in child's life to narrow down the time and place these often unspeakable acts occurred. This makes these cases the most challenging for the victims, witnesses, litigators as well as the courts that must rule over evidentiary issues that are also often foreign to the courts normal practice and procedure.

In this case the State met the burden of proof regarding one count.

The allegation set forth in this appeal have not been proven. There is no basis to remand, retry or dismiss any portion of this case.

This court must deny these allegation and dismiss this appeal.

Respectfully submitted this 21st day of October 2015,

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DECLARATION OF SERVICE

I, David B. Trefry state that on October 21, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Ms. Jan Gemberling at admin@gemberlaw.com

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

DATED this 21st day of October, 2015 at Spokane, Washington.

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