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SEP 24, 2015

Court of Appeals
Division III
State of Washington

No. 33049-4-III

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

STATE OF WASHINGTON,

Respondent,

v.

TANNER FUSTON,

Appellant.

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

The Honorable Court Commissioner Joseph Schneider

APPELLANT'S **AMENDED** OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State charged Tanner Fuston with two counts of first degree child molestation, one count against C.B. and one count against A.B. The trial court imposed a sexual assault protection order for C.B. and A.B.

Mr. Fuston entered a 24-month stipulated order of continuance on the charges. The order was revoked after the trial court found Mr. Fuston failed to comply with its conditions.

The State amended the information to charge one count of first degree child molestation, against C.B. The trial court found Mr. Fuston guilty of this charge following a stipulated facts bench trial. The trial court entered written findings of fact and conclusions of law, which do not include a finding of sexual gratification. At sentencing, defense counsel did not move the trial court to vacate the sexual assault protection order for A.B.

Mr. Fuston now appeals, challenging the trial court's failure to enter a finding of fact regarding sexual gratification, and defense counsel's failure to move to vacate the sexual assault protection order for A.B.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in entering conclusion of law 1:

   > Mr. Fuston had sexual contact with C.B., a child who was less than twelve years old, who was not married to and who was more than thirty-six months younger than Mr. Fuston.

   (CP 54).

2. The trial court erred in entering conclusion of law 2:

   > Mr. Fuston is guilty beyond a reasonable doubt of Count I, Child Molestation in the First Degree, as charged in the First Amended Information.

   (CP 54).

3. The written findings of fact, lacking a finding of sexual gratification, do not satisfy the requirements of JuCR 7.11(d) and do not support the guilty verdict for first degree child molestation.

4. Mr. Fuston was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to move the trial court to vacate the sexual assault protection order for A.B.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the written findings of fact, lacking a finding of sexual gratification, do not satisfy the requirements of JuCR 7.11(d) and do not support the guilty verdict for first degree child molestation.

Issue 2: Whether Mr. Fuston was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to move the trial court to vacate the sexual assault protection order for A.B.

D. STATEMENT OF THE CASE

Twelve-year-old Tanner Fuston lived with his father, his older brother, and his father's girlfriend and her two children, five year old C.B. and three year old A.B. (CP 21, 24, 26-27, 31). C.B. told his mother "[Mr. Fuston] bent him over the bed and tried to put his penis in his butt." (CP 24). The next day, A.B. told her grandmother "[Mr. Fuston] had 'sniffed' her 'Woo-Woo' which is what she calls her vagina according to [her mother], with his lips." (CP 26, 30).

The State charged Mr. Fuston with two counts of first degree child molestation, one count against C.B. and one count against A.B. (CP 1-2). Mr. Fuston entered a 24-month stipulated order of continuance on the charges. (CP 12-14, 17-19; RP 23-28, 37-40). Mr. Fuston entered an original stipulated order of continuance, followed by a first amended stipulated order of continuance. (CP 12-14, 17-19; RP 23-28, 37-40). In both orders, Mr. Fuston stipulated that "[u]pon any revocation, a stipulated facts trial will be held on the police reports and a finding of guilt or innocence will be made by the Court based on those reports." (CP 13, 18; RP 26).

Prior to the disposition in the case, the trial court imposed a sexual assault protection order for C.B. and A.B. (CP 15-16). The order expires on February 7, 2016. (CP 15).

Prior to the disposition in the case, the State amended the information to charge one count of first degree child molestation, against C.B., thereby dismissing the charge against A.B. (CP 32-33).

After finding that Mr. Fuston did not comply with all of its conditions, the trial court revoked the stipulated order of continuance. (RP 46-50). The case proceeded to a stipulated facts bench trial. (RP 52-59). After reviewing the police reports, the trial court found Mr. Fuston guilty of first degree child molestation against C.B., as charged in the amended information. (CP 20-31, 41-51; RP 56-58). In its oral ruling, the trial court did not discuss the elements of the charged crime. (RP 56-58). The trial court entered written findings of fact and conclusions of law. (CP 53-54).

At sentencing, defense counsel did not request the trial court vacate the sexual assault protection order for A.B. (RP 62-64). Sentencing took place on January 7, 2015. (RP 61-64).

Mr. Fuston timely appealed. (CP 52).

E. ARGUMENT

Issue 1: Whether the written findings of fact, lacking a finding of sexual gratification, do not satisfy the requirements of JuCR 7.11(d) and do not support the guilty verdict for first degree child molestation.

Review of a juvenile court adjudication requires the appellate court to determine whether substantial evidence supports the trial court's findings of fact, and whether the findings of fact support the conclusions of law. *State v. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007). Unchallenged findings of fact are verities on appeal. *Id*. Conclusions of law are reviewed de novo. *State v. A.M.*, 163 Wn. App. 414, 419, 260 P.3d 229 (2011).

"A stipulated facts trial is still a trial of the defendant's guilt or innocence." *State v. Mierz*, 127 Wn.2d 460, 469, 901 P.2d 286 (1995). The State has the burden of proof, and the defendant retains the right to appeal. *Id*. "'[B]y the stipulation, [the defendant merely] agrees that what the State presents is what the witnesses would say.'" *Id*. (alterations in original) (quoting *State v. Johnson*, 104 Wn.2d 338, 342, 705 P.2d 773 (1985)). The Juvenile Court Rules (JuCR) require, in relevant part:

> 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.*

JuCR 7.11(d) (emphasis added).

Ultimate facts are defined as:

> [T] hose which are necessary to determine issues in case, as distinguished from evidentiary facts supporting them. The logical conclusions deduced from certain primary evidentiary facts. Final facts required to establish plaintiff's cause of action or defendant's defense.

State v. Roggenkamp, 115 Wn. App. 927, 948-49, 64 P.3d 92 (2003) *aff'd*, 153 Wn.2d 614, 106 P.3d 196 (2005) (internal quotation marks omitted) (quoting *State v. Alvarez*, 128 Wn.2d 1, 15 n.15, 904 P.2d 754 (1995)).

For the crime of first degree child molestation, a person is guilty when:

> [T]he person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1).

"'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). "'[S]exual gratification' is not an essential element of first degree child molestation." *State v. Lorenz*, 152 Wn.2d 22, 35, 93 P.3d 133 (2004). However, sexual gratification must be established by the State in order to prove sexual contact. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

In *State v. B.J.S.*, a juvenile was convicted, following a bench trial, of two counts of first degree child molestation. *State v. B.J.S.*, 72 Wn. App. 368, 369-70, 864 P.2d 432 (1994), *abrogated on other grounds by Lorenz*, 152 Wn.2d at 32, 35. The trial court entered written findings of fact and conclusions of law. *Id*. at 370-71. The written findings of fact included the age of the juvenile, the ages of the victims, and the fact that the victims engage in oral sex at the direction of the juvenile. *Id*. at 371 n.2, 372.

On appeal, the juvenile argued the written findings of fact did not satisfy JuCR 7.11(d) and did not support the guilty verdict, because they did not address the elements of the crime. *Id*. at 369, 371. The court agreed, finding "the facts found by the trial court do not constitute criminal conduct[,]" and holding "the judgment was not supported by the findings of fact[.]" *Id*. at 373. It then reversed the juvenile's convictions and dismissed the case. *Id*.

In reaching this conclusion, the court reasoned "[t]he facts set forth in the findings fail to address whether the acts were done for the purpose of gratifying sexual desire." *Id*. at 372. The court stated "a finding that the touching was done for the purposes of sexual gratification is a crucial element." *Id*. The court found that although "[b]ased on the nature of the contact in this case, it may be reasonable to assume, even highly probable,

that the acts were done for sexual gratification[,] . . . [a]dequate written findings are essential to permit meaningful appellate review." *Id*. at 372-73. The court stated that "while 'this court can read the testimony, it cannot weigh the evidence nor enter findings of fact.'" *Id*. at 372 (quoting *State v. Fellers*, 37 Wn. App. 613, 616, 683 P.2d 209 (1984)). The court further found the trial court's oral findings did not address all of the elements of the crimes. *Id*. at 372 n.4.

In *Lorenz*, when holding that "'sexual gratification' is not an essential element of first degree child molestation[,]" our Supreme Court upheld the result in *B.J.S.* *Lorenz*, 152 Wn.2d at 32, 35. The Court stated "[t]he result of *BJS* is not in error as it was appropriate to require the finding of sexual gratification because it was an ultimate fact as to the essential element of sexual contact." *Id*. at 32.

Here, in conclusion of law 1, the trial court concluded, in relevant part: "Mr. Fuston had sexual contact with C.B. . . . ." (CP 54). Although labeled as a conclusion of law, this is a finding of fact. *See State v. T.E.H.*, 91 Wn. App. 908, 915, 960 P.2d 441 (1998) (finding that a conclusion of law that the juvenile had sexual contact with the victim should have been labeled as a finding of fact). Therefore, it should be reviewed as a finding of fact. *See Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (reviewing courts may review findings of fact

erroneously labeled conclusions of law as findings of fact). Conclusion of law 1 is the only finding addressing the element of sexual contact. (CP 53-54).

Like *B.J.S.*, the findings of fact here do not address whether Mr. Fuston's acts were done for the purpose of sexual gratification. (CP 53-54); *see also B.J.S.*, 72 Wn. App. at 372. As in *B.J.S.*, the oral ruling here is also devoid of any discussion of the elements of the crime. (RP 56-58); *see also B.J.S.*, 72 Wn. App. at 372 n.4; *cf. T.E.H.*, 91 Wn. App. at 915-17 (juvenile argued there was no findings made to support the trial court's conclusion that he acted for the purposes of sexual gratification; in concluding that the findings of fact and conclusions of law were sufficient, the court found the trial court clarified its reasoning in its oral decision).

Even if it is reasonable to assume, based upon the nature of Mr. Fuston's contact with C.B., that his acts were done for the purpose of sexual gratification, this Court cannot enter findings of fact. *See B.J.S.*, 72 Wn. App. at 372-373; *see also State v. Parker*, 81 Wn. App. 731, 737-38, 915 P.2d 1174 (2004).

The written findings of fact, lacking a finding of sexual gratification, do not satisfy the requirements of JuCR 7.11(d). The written findings of fact must "state the ultimate facts as to each element of the crime . . . ." JuCR 7.11(d). For the crime of first degree child

molestation, sexual gratification is "an ultimate fact as to the essential element of sexual contact." *Lorenz*, 152 Wn.2d at 32. In addition, the written findings of fact, lacking a finding of sexual gratification, do not support the guilty verdict for first degree child molestation. In order to prove sexual contact, the State had to establish sexual gratification. *Stevens*, 158 Wn.2d at 309-10; *see also* RCW 9A.44.083(1) (defining first degree child molestation); RCW 9A.44.010(2) (defining sexual contact). Therefore, Mr. Fuston's conviction should be reversed and dismissed. *See B.J.S.*, 72 Wn. App. at 373 (the lack of a finding of sexual gratification results in reversal and dismissal); *see also State v. Mewes*, 84 Wn. App. 620, 621-23, 929 P.2d 5050 (1997) (reversing and dismissing a second degree kidnapping conviction where the trial court made no findings on the ultimate facts).

Should this Court decline to dismiss Mr. Fuston's conviction, at a minimum, the case should be remanded to the trial court to consider the evidence and enter findings of fact addressing the ultimate facts as to each element of the crime, including whether the act was done for the purpose of sexual gratification. *See* JuCR 7.11(d); *Alvarez*, 128 Wn.2d at 18-20 (setting forth this remedy). On remand, the trial court should be limited to the evidence presented at the stipulated facts bench trial; no additional

evidence should be permitted. *See State v. Hescock*, 98 Wn. App. 600, 607, 989 P.2d 1951 (1999).

Issue 2: Whether Mr. Fuston was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to move the trial court to vacate the sexual assault protection order for A.B.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

RCW 7.90.150 authorizes the trial court to issue a sexual assault protection order in conjunction with criminal charges under the following circumstances:

> When any person charged with or arrested for a sex offense as defined in RCW 9.94A.030 . . . is released from custody before arraignment or trial on bail or personal recognizance, the court authorizing the release may prohibit that person from having any contact with the victim. The jurisdiction authorizing the release shall determine whether that person should be prohibited from having any contact with the victim. If there is no outstanding restraining or protective order prohibiting that person from having contact with the victim, the court authorizing release may issue, by telephone, a sexual assault protection order prohibiting the person charged or arrested from having contact with the victim or from knowingly coming within, or knowingly remaining within, a specified distance of a location.

RCW 7.90.150(1)(a).

The statute further provides:

> A sexual assault protection order issued by the court in conjunction with criminal charges *shall terminate if the defendant is acquitted or the charges are dismissed*, unless the victim files an independent action for a sexual assault protection order. If the victim files an independent action for a sexual assault protection order, the order may be continued by the court until a full hearing is conducted pursuant to RCW 7.90.050.

RCW 7.90.150(2)(b) (emphasis added).

The statute took effect on June 6, 2006. Laws of 2006, ch. 138, § 16.

Here, prior to the disposition in the case, the trial court imposed a sexual assault protection order for C.B. and A.B. (CP 15-16). The order expires on February 7, 2016. (CP 15). At sentencing, defense counsel did not request the trial court vacate the sexual assault protection order for A.B. (RP 62-64).

The trial court was authorized to enter the sexual assault protection order for C.B. and A.B. at the time it was entered, because Mr. Fuston was charged with a sex offense against both individuals. *See* RCW 7.90.150(1)(a) (authorizing a sexual assault protection order under these circumstances); RCW 9.94A.030(47) (defining "sex offense."). However, once the charge against A.B. was dismissed by the State's filing of the amended information charging Mr. Fuston with a sex offense against C.B. only, the order for A.B. "shall terminate." RCW 7.90.150(2)(b); *see also* CP 32-33.

"Trial counsel owe several responsibilities to their clients, including the duty to research relevant law." *State v. Brown*, 159 Wn. App. 366, 371, 245 P.3d 776 (2011) (citing *Kyllo*, 166 Wn.2d at 862). Here, the sexual assault protection order statute at issue took effect on June 6, 2006. *See* RCW 7.90.150; Laws of 2006, ch. 138, § 16. Sentencing did not take place until January 7, 2015. (RP 61-64).

Therefore, the sexual assault protection order statute was relevant law at the time of sentencing. *Cf. Brown*, 159 Wn. App. at 373-74 (defense counsel had no responsibility to seek out a pending United States Supreme Court decision). Thus, defense counsel's failure to move the trial court to vacate the sexual assault protection order for A.B. was deficient performance. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26) (setting forth the two-part test for ineffective assistance of counsel).

Furthermore, defense counsel's failure to move the trial court to vacate the sexual assault protection order for A.B. prejudiced Mr. Fuston. Had trial counsel moved the court to vacate this order, the request would have been granted. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). RCW 7.90.150(2)(b) provides that the sexual assault protection order for A.B. "shall terminate" once the criminal charge against A.B. was dismissed. *See* RCW 7.90.150(2)(b).

Defense counsel's failure to move to vacate the sexual assault protection order for A.B. was not tactical. *See Grier*, 171 Wn.2d at 33. It was detrimental to Mr. Fuston to keep the sexual assault protection order for A.B. is in effect. The order is in effective until February 7, 2016, and a knowing violation of the order is a criminal offense. *See* RCW 7.90.150(7); *see also* CP 15-16.

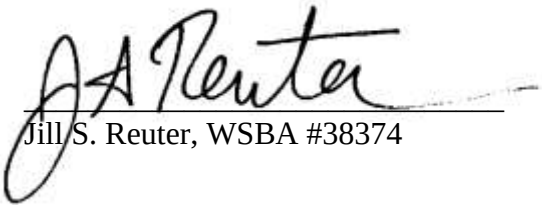
Mr. Fuston has proved the two-prong test for ineffective assistance of counsel. The case should be remanded to the trial court to vacate the sexual assault protection order for A.B., effective at the time the charge against A.B. was dismissed.

F. CONCLUSION

Because the written findings of fact lack a finding on the ultimate fact of sexual gratification, Mr. Fuston's conviction for first degree child molestation should be reversed and dismissed. In the alternative, the case should be remanded to the trial court to consider the evidence and enter findings of fact addressing the ultimate facts as to each element of the crime.

In addition, because Mr. Fuston was denied his Sixth Amendment right to effective assistance of counsel, the case should be remanded to the trial court to vacate the sexual assault protection order for A.B.

Respectfully submitted this 24th day of September, 2015.



Jill S. Reuter, WSBA #38374

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 33049-4-III
vs.	)	
	)	
TANNER FUSTON	)	
	)	PROOF OF SERVICE
Defendant/Appellant	)	
	)	

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on September 24, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's amended opening brief to:

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Having obtained prior permission from the Benton County Prosecutor's Office, I also served the Respondent State of Washington at prosecuting@co.benton.wa.us using Division III's e-service feature.

Dated this 24th day of September, 2015.

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