

No. 34925-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

EASTON C. YALLUP

Appellant.

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

The Honorable Judge Brian Altman

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Appellant Easton Yallup accepts this opportunity to reply to the State's Brief, filed in this Court on August 25, 2017. Mr. Yallup requests this Court refer to his opening brief for issues not addressed in this reply.

B. ARGUMENT IN REPLY

1. The trial court's findings of fact are not supported by substantial evidence.

After the Appellant filed his opening brief, the trial court entered written findings and conclusions of law pertaining to Mr. Yallup's underlying conviction. But the court's findings of fact are not supported by substantial evidence and, thus, the conviction on at least one count of first degree rape of a child must be reversed. Additionally, contrary to the State's suggestion, the trial court's decision on a *Knapstad*¹ (*Green*) motion does not direct this Court's decision-making on Mr. Yallup's appeal challenging the sufficiency of the evidence produced at trial.

First, as a threshold matter, Mr. Yallup incorporates his challenge to the trial court's written findings and conclusions into his related and previously made assignments of error to the court's oral findings at page two of his Opening Brief, specifically assigning error to the following newly entered written findings of fact:

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

[FF IV:] M.M.V. (DOB 8-3-2002) testified that the defendant had sexual intercourse with her, as defined by Washington Law, at least ten times and fewer than fifteen times during the charging period. The incidents of sexual intercourse ended when M.M.V.'s mother, [L.J.], kicked the defendant out of the residence where he had been staying for at least a couple years.

[FF VI:] These acts occurred between January 1, 2010 and December 31, 2013.

[FF VII:] There were at least two separate violations of [RCW] 9a.44.073.

Supp. CP _____. Mr. Yallup also incorporates his challenge to the court's written conclusions of law (specifically CL II, III and IV) into his previous assignments of error relating to the court's oral ruling on the same subject matter. *See* Appellant's Opening Brief, page 2.

Mr. Yallup relies on the sufficiency argument made in his opening argument, with the following additional analysis. The law is well settled that, “[f]ollowing a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Disney*, 199 Wn. App. 422, 398 P.3d 1218, 1222 (2017) (*quoting State v. Homan*, 181 Wash.2d 102, 105-06, 330 P.3d 182 (2014) (*citing State v. Stevenson*, 128 Wash.App. 179, 193, 114 P.3d 699 (2005))). Ultimately, the question this Court must answer is whether the evidence produced at trial permits a rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. *State v. Richards*, 109 Wn. App. 648, 653, 36 P.3d 1119 (2001).

Here, the evidence did not meet the requisite threshold to affirm two separate counts of rape of a child during the charging period. The court found M.V. “testified that the defendant had sexual intercourse with her, as defined by Washington Law, at least ten times and fewer than fifteen times during the charging period.” Supp. CP ___, FF IV. This finding is not supported by any evidence, let alone is it supported by the required substantial evidence. M.V. never testified the defendant engaged in sexual intercourse with her, nor did she testify that such intercourse occurred at least 10 times but fewer than 15 times during the charging period. Instead, she testified to a variety of sexual contacts, including touching of genitalia and licking of genitalia, with one specific instance occurring in the spring when she was 10-years-old (i.e. spring of 2013). RP 64-69. She then said that various sexual contacts (RP 64-69) occurred between ten to 15 times. RP 66. But she never said specifically that the oral-to-genital sexual contact, or any other form of sexual intercourse, occurred more than the one time in the spring of 2013. She only specifically testified to one instance of conduct during the charging period that could be considered sexual intercourse. Neither the specific nor the generic testimony of

sexual contact in this case is sufficient to prove two separate instances of sexual intercourse (oral-genital contact).

Furthermore, M.V. never testified that 10 to 15 sexual contacts (at least two of which must have been oral-sexual contact or other form of sexual intercourse) occurred prior to December 31, 2013, the outer date in the charging document. Of great significance, M.V. did not testify that at least *two* instances of oral-sexual contact occurred prior to December 31, 2013. Instead, she testified that the last instance of some form of sexual contact (it is unclear whether the last incident would constitute molestation or rape) occurred the following spring when she was 11-years-old (i.e. June 2014). RP 56, 60, 67, 71-72. The trial court's newly entered written finding of fact VI, which state that two acts of sexual intercourse occurred between January 1, 2010 and December 31, 2013, is not supported by substantial evidence. As argued in the Appellant's Opening Brief at pages 12 to 25, which has been largely unaddressed by the State's Response, there is not sufficient evidence through either specific or generic testimony that two separate instances of sexual intercourse (oral-genital sexual contact) occurred between January 1, 2010, and December 31, 2013.

Finally, contrary to the State's suggestion in its Response Brief at pages 5-6, a trial court's decision on a *Knapstad (Green)* motion to dismiss does not control or guide appellate review on a sufficiency of the

evidence challenge. *See e.g., Richards*, 109 Wn. App. at 653. Frankly, the trial court’s decision on a “half-time” motion to dismiss is of no moment to this Court’s review. To the extent the trial court accepted M.V.’s vague references to time periods and lack of specificity of the number of oral-genital sexual contact, and ignored the lack of specific or generic testimony to establish two separate instances of sexual intercourse during the charging period, the trial court erred (RP 104).

2. Mr. Yallup was prejudiced by the untimely entry of tailored findings of fact after his opening brief was filed.

The State argues in its Response brief that Mr. Yallup’s argument asking for dismissal of one count due to the lack of written findings is now moot, because the trial court did enter written findings three-and-a-half months after the Appellant’s opening brief was filed. State’s Response Brief pgs. 7-8; Supp. CP ___. Mr. Yallup respectively disagrees. Mr. Yallup did argue it would have been unlawful and prejudicial for a new judge to sign the written findings if that judge had not presided over the trial. And, this particular sub-issue was indeed remedied by the State bringing Judge Altman out of retirement to sign the written findings and conclusions. However, the “different judge” argument is not the only prejudice argument Mr. Yallup raised on appeal with regard to the written findings. Mr. Yallup argued, and maintains herein, that he is prejudiced by the trial court entering written findings of fact and conclusions of law

that were clearly tailored to those issues he raised on appeal. The argument about the written findings being tailored has remained unaddressed by the State.

As warned by the Supreme Court in *State v. Head, infra*, there is always the possibility that a conviction must be reversed where a trial court enters untimely findings that are specifically tailored to discharge those issues raised by a defendant on appeal. Reversal is required where the defendant can show actual prejudice resulting from findings being tailored to those issues raised on appeal. *State v. Head*, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998) (prejudice may be found to exist where there is a strong indication the findings were “tailored” to meet the issues raised on appeal. *Accord State v. Taylor*, 69 Wn. App. 474, 477, 849 P.2d 692 (1993) (citing cases).

Here, the trial court did not enter any written findings as to what particular type(s) of sexual contact(s) occurred, when they occurred, or any of the surrounding details of any of the events. The trial court did not enter findings of fact as to when the incidences occurred with any supporting or surrounding details, such as the grade M.V. was in, who lived at her home at the time, or the age she testified to when the sexual incidences occurred. The trial court’s findings do not address any particular evidence in this case so that this Court can effectively make the

legal conclusion as to whether sexual intercourse occurred twice during the charging period (as opposed to perhaps one instance of sexual intercourse and other instances of child molestation at some unclear time).

Instead, in a very conclusory fashion, the trial court entered written findings of fact that were directed at the Appellant's arguments on appeal about the lack of sufficient evidence for two incidences of sexual intercourse during the charging period. Rather than summarize any evidence, the trial court simply found that M.V. had testified to 10 to 15 instances of sexual intercourse with the defendant during the charging period (this conclusory finding was made despite the fact that M.V. never said anything about "sexual intercourse" – let alone 10 to 15 instances of it "during the charging period.").

Findings of Fact IV, VI and VII are not actually findings of fact at all, but conclusions of law. The trial court's "findings" do not aid this Court's review of the sufficiency of the evidence issue, which is the entire purpose for requiring written findings of fact. *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). Instead, the findings in this case demonstrate how your Appellant was prejudiced when the trial court attempted to tailor its findings of fact to those issues raised on appeal, which requires dismissal of one count against Mr. Yallup in this case. *Head*, 136 Wn.2d at 624 (setting forth this remedy).

3. This Court should disregard the State's unproven references to matters outside the record when determining whether a comparability analysis was required.

In its response to the argument that a comparability analysis was required prior to including a federal conviction in Mr. Yallup's offender score, the State attempts to communicate information to this Court that is outside the record. Specifically, the State argues trial counsel did not ask for a comparability analysis because of the following off-record discussions and/or exchange of documents:

The State provided trial counsel with copies of both the Judgment and Sentence and the statement of facts which justified Appellant's plea and is confident that it is factually comparable to the crime of Indecent Liberties, a sex offense, which would have scored as three points for his current conviction.

State's Response Brief pgs. 9-10 fn.2.

It is well settled that this Court's review of arguments is limited to the existing appellate record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). *C.f.*, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (in the context of trial, it is improper for a prosecutor to refer to matters outside the record).

The State does not refer to any judgment and sentence or plea agreement that is actually in the appellate record to demonstrate why a comparability analysis was not pursued in this case. Instead, the State reassures this Court that the issue will not be successful, because

documents outside the record apparently may exist that show the federal crime was comparable to this state's crime of indecent liberties.

It is inappropriate for the State to attempt to engage in ex parte communications regarding matters outside the record, particularly in order to resolve the very issue raised by the Appellant in this appeal. If, in fact, such documentation does exist to demonstrate how the federal conviction is comparable to a Washington offense, this information should be provided to the trial court at resentencing when it conducts a comparability analysis.

The State is correct that the existing appellate record makes it impossible to conclusively decide this issue. The Appellant acknowledged the same in his opening brief, asking this Court to remand for the required comparability analysis that is now impossible for this Court to conduct on the existing record. See Appellant's Opening Brief at pgs. 38-39. But the State then argues the Appellant's argument must fail because the Appellant has not proven his federal conviction is not comparable to a Washington offense. State's Response Brief pg. 10 ("Appellant is merely speculating that maybe there could be such an error.")

The law does not require the Appellant to prove on appeal that his federal conviction is not comparable before ordering a remand. Where a comparability analysis was not performed below and the record is

insufficient to demonstrate comparability to the reviewing court, the remedy is to remand for resentencing. *State v. Thieffault*, 160 Wn.2d 409, 417, 420, 158 P.3d 580 (2007) (held, although the record on remand may eventually prove factual comparability, it is “equally as likely that such documentation may not have provided facts sufficient to find... [comparability...]”, such that remand was the appropriate remedy.) *See also State v. Navarette*, No. 31823-1-III, 2014 WL 4723168, at *1 (Wash. Ct. App. Sept. 23, 2014) (remanded where record was not sufficient for the appellate court to conduct either a legal or factual comparability analysis).²

Contrary to the State’s argument, the Appellant need not prove conclusively that his federal conviction does not count toward his offender score. Instead, the Appellant must prove that a comparability analysis was never conducted, and that the record is insufficient for the appellate court to conduct such an analysis. The Appellant has carried his burden of doing so. The State’s reference to matters outside the record is an improper response that should be disregarded by this Court at this time. The only fair and appropriate remedy at this time is to remand for proof of the details of the federal conviction, and for a comparability analysis.

² “Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.” GR 14.1. This case is cited as persuasive authority only.

4. When a community condition is unlawful, as here, the offending condition must be stricken, regardless of the State's good faith promise on behalf of the Department of Corrections not to seek restitution.

The trial court imposed community custody conditions "AS SET BY DOC." CP 103. The court then signed off on additional community placement/custody conditions on DOC's template form that required the defendant to "(17) Pay restitution for counseling obtained by victim." CP 111. The State does not contest that this is an unlawful community custody condition. State's Response Brief pgs. 10-11; *State v. Land*, 172 Wn. App. 593, 604, 295 P.3d 782 (2013) (remanding to strike restitution as unlawful condition of community custody); *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (remanding to strike unlawful community custody condition).

Instead, the State argues the issue is moot because it did not seek restitution within the 180 days required by RCW 9.94A.753, and apparently does not intend to seek restitution in the future. See State's Response Brief pgs. 10-11. While the State's apparent decision to forgo restitution appears to be in good faith (State's Response Brief pg. 11, pointing out any attempt to seek restitution at this time would be time-barred in any event pursuant to RCW 9.94A.753), it is no substitute for the legal remedy to which Mr. Yallup is entitled. Just as in *State v. Land*, *supra*, more than 180 days had passed from the time the defendant was

initially sentenced in May of 2011 to the time a decision was made on appeal in January 2013. *Land*, 172 Wn. App. at 598. Nonetheless, the proper remedy was to remand and strike the unlawful community custody condition. *Id.* at 604.

Remanding to strike the unlawful restitution condition is a sound solution, particularly since there will be another state government agency besides the prosecutor's office (i.e., DOC) reviewing the conditions and seeking Mr. Yallup's compliance in the future. Rather than leave the matter subject to confusion, unlawfully delegate authority to DOC that does not exist, or require Mr. Yallup to raise legal challenges to the condition or the timeliness of restitution at a later time, this Court should correct the obvious error by ordering that the unlawful restitution community custody condition be stricken.

Furthermore, while the State argues that restitution cannot be sought at this time or in the future, this argument is contrary to the language of the statute. It is true that restitution must typically be determined within 180 days of sentencing. RCW 9.94A.753(1). However, this 180-day period may be enlarged "for good cause." *Id.* There are also exceptions that allow restitution to be awarded in certain circumstances regardless of the provisions of RCW 9.94A.753(1). RCW 9.94A.753(7).

Rather than maintain an unlawful community custody condition, particularly where that condition could mistakenly be enforced by DOC at a later time, this Court is respectfully requested to follow existing precedent and remand to strike the offending condition from Mr. Yallup's judgment and sentence.

C. CONCLUSION

For all issues not specifically addressed herein, Mr. Yallup relies on his opening brief. For the reasons set forth above and in Mr. Yallup's opening brief, the Appellant requests this Court reverse and dismiss one count of rape of a child in the first degree, with prejudice, and order the matter be resentenced.

Respectfully submitted this 11th day of September, 2017.

/s/ Kristina M. Nichols

Kristina M. Nichols, WSBA #35918

Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 34925-0-III
vs.) Klickitat County No. 15-1-00121-5
)
EASTON CHARLES YALLUP) PROOF OF SERVICE
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on September 11, 2017, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

Easton Charles Yallup, DOC #343551
T-A-64
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-2049

Having obtained prior permission, I also served a true and correct copy of the same document on the Respondent at paappeals@klickitatcounty.org and davidw@klickitatcounty.org using Division III's e-service feature.

Dated this 11th day of September, 2017.

/s/ Kristina M. Nichols
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