

NO. 34925-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

EASTON CHARLES YALLUP,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00121-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. There was sufficient evidence to support the Appellant's conviction for both counts of Rape of a Child in the First Degree.
2. The absence of Findings of Fact and Conclusions of Law has been addressed.
3. Defense counsel was not ineffective for failing to request a comparability analysis for a prior federal conviction which affected the Appellant's offender score.
4. Appellant's restitution issue is moot.
5. Appellate costs should not be considered at this time.

B. STATEMENT OF THE CASE

On April 17, 2015 Klickitat County Sherriff's Office Deputy Melissa Wykes contacted Goldendale Police Department's Deputy Leo Lucatero, regarding an allegation of sexual abuse. RP 16-17. Due to the crime being alleged to have occurred mainly in the city of Goldendale, it was decided that the Klickitat County Sheriff's Office would not take the lead on the investigation. RP 17-18. Wykes told Lucatero that Lila Jack, a mother of a juvenile child, had learned of alleged abuse and contacted her to report it. RP 17, 21.

At trial M.V. (DOB 8-3-2002) described disclosing incidents of sexual assault to her mom, Lily Jack, and described numerous incidents of sexual abuse where the Appellant would perform oral sex on her. RP 62, 64-65. M.V. Also testified to the Appellant making M.V. place her hand on his penis. RP 67. M.V. disclosed the first incident occurred when she

was ten, at the end of her fourth grade year and the last incident occurred when she was eleven. RP 65-67. The incidents happened more than ten but less than fifteen times. RP. 66, 82.

A bench trial was held on October 5, 2016, the Honorable Judge Altman, presiding. RP 10. Witnesses included Lucatero, Wykes, and M.V. RP 10. After the testimony Mike Thompson, attorney for Appellant, moved for an acquittal based on the concern of the dates of the abuse – January 1, 2010 to December 31, 2013. RP 104. Thompson based his request on the fact that the disclosure of abuse to law enforcement was in April, 2015, where M.V. made some statements at trial supporting that she disclosed the abuse just two days after the Appellant left Jack and M.V.'s home, several years prior. RP 104. Judge Altman, presiding, denied the motion. RP 105. The Appellant was then convicted of two counts of Rape of a Child in the First Degree, RCW 9A.44.073. RP 116.

At sentencing the Appellant's criminal history was discussed, including prior crimes in Oregon and Washington. RP 121. Based on the history, the prosecuting attorney requested 318 months on both counts to run concurrent, with community custody upon his release. RP 122. Regarding legal financials, it was requested that the Appellant pay the felony assessment, court costs, the DNA fee, and restitution to be set in the future. RP 122-23. Although a lower sentence was requested by both Thompson and the Appellant, Judge Altman sentenced the Appellant to

318 months and the rest of the sentence requested by the prosecuting attorney. RP 125.

C. ARGUMENT

1. There was sufficient evidence to support the Appellant's conviction for both counts of Rape of a Child in the First Degree following his bench trial.

In a criminal case, the State must provide sufficient evidence to prove each element of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

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. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). 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. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd 95 Wn.2d 385, 622 P.2d 1240 (1980.) *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. A defendant challenging a trial court's finding of fact bears

the burden of demonstrating that the finding is not supported by substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). A challenge to the sufficiency of evidence in support of a conviction admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). In evaluating the sufficiency of evidence supporting a conviction, "circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A defendant may not be convicted for a crime with which he or she was not charged. *City of Auburn v. Brooke*, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992). But where time is not a material element of the charged crime, the language "on or about" is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi. *State v. Osborne*, 39 Wash. 548, 81 P. 1096 (1905) (prosecution for rape where evidence at trial established that the rape occurred a week or two weeks prior to the date alleged in the information); *State v. Oberg*, 187 Wash. 429, 432, 60 P.2d 66 (1936) (prosecution for sodomy where the State alleged that the act occurred "on or about April 3," but the victim testified that the act occurred on June 20, over two months later); *State v. Thomas*, 8 Wn.2d 573, 586, 113 P.2d 73 (1941). *See also* RCW 10.37.050(5), (7) (an information is sufficient if it indicates that the crime

was committed before the information was filed and within the statute of limitation, and the crime is stated with enough certainty for the court to pronounce judgment upon conviction). Moreover, the charging period is not a statutory element of Rape of a Child in the First Degree. See RCW 9A.44.073

Appellant's sufficiency arguments rests on testimony that one of the incidences of rape happened when she was 'eleven right before I turned twelve.' RP 67. However, MV testified that she was born on August 3, 2002, that she was eight when the Appellant came into her life as her mother's boyfriend, that her mother and the Appellant broke up and he was out of the house when she was eleven, and the incidents of the Appellant raping her ended when she was 11 years old. RP 52, 59, 60, 72. Finally, that the incidence of rape happened more than ten times but less than fifteen. RP 72.

The question of sufficiency of the evidence and the charging period was specifically addressed by the trial court during the trial of this matter – after the State had rested trial counsel brought a “half-time,” also known as a “Green” motion to dismiss for lack of sufficient proof. PR 104. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). In denying the motion the court found that:

[v]iewing the evidence in a light most favorable to the State, a reasonable fact finder could find beyond a reasonable doubt that he is guilty of these charges and all that would have to occur would be

for the fact finder to believe [M.V.] and irregardless of the problem with the dates and so forth, that would be sufficient for a Green motion to fail. So, that motion is denied.

RP 104-105. Immediately after the court's ruling on the motion to dismiss, the Appellant rested without presenting a case. RP 105. Following the parties closing arguments, the court, in fact, found beyond a reasonable doubt that at least two incidents of rape occurred during the charging period, resulting in the Appellant being found guilty. RP 116.

Looking at this evidence in a light most favorable to the State, a reasonable finder of fact could, and did, find that at least two of the incidents of rape happened within the charging period. The fact that this was a bench trial only reinforces the fact that sufficient evidence supports the Appellant's convictions. In this case the finder of fact was an experienced and knowledgeable jurist, well aware of the need for sufficient evidence before making a finding of guilty as charged.

2. The absence of Findings of Fact and Conclusions of Law has been addressed.

The Findings of Fact and Conclusions of Law have been filed in this case after being signed off on by both Appellant's trial counsel and Judge Altman.¹

¹ As Appellant's attorney indicated in the footnote on page 32 of Appellant's brief, there were no Findings and Conclusions originally filed in this matter. The absence of Findings and Conclusions was pointed out to undersigned counsel who immediately prepared proposed Findings and Conclusion. Unfortunately, by the time they were prepared Appellant's trial counsel was no longer taking felony appointments and Judge Altman had retired to parts unknown. It was rumored that Judge Altman was actually sailing a

Both CrR 3.6(b) and CrR 6.1(d) require the trial court to enter written Findings of Fact and Conclusions of Law. CrR 3.6(b), 6.1(d). *See also, State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). Typically, "the failure to enter written findings of fact and conclusions of law... requires remand for entry of written Findings and Conclusions." *Head*, 136 Wn.2d at 624. Because the trial court eventually entered written Findings of Fact and Conclusions of Law, remand is unnecessary here.

Although the practice of submitting late Findings of Fact and Conclusions of Law is disfavored, Findings and Conclusions may be submitted and entered even while an appeal is pending if the defendant is not prejudiced by the belated entry of findings. *State v. McGary*, 37 Wn.App. 856, 861, 683 P.2d 1125 (1984). "We will not infer prejudice ... from delay in entry of written findings of fact and conclusions of law." *Head*, 136 Wn.2d at 625. Rather, "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." *Head*. 136 Wn.2d at 624-25.

Appellant claims that he would be prejudiced by the entry of Findings and Conclusions by any successor judge. Fortunately, the Court Administrator was able to locate Judge Altman who signed off on the

boat around the world. It was only after obtaining trial counsel's signature and the Court Administrator's hard work that Judge Altman's signature was obtained.

Findings, which had already been agreed to by both trial attorneys. While late, the trial court's Finding and Conclusions have been signed and filed by the Judge who presided over the Bench Trial, making the issue raised by the Appellant moot.

3. Defense counsel was not ineffective for failing to request a comparability analysis for a prior federal conviction which affected the Appellant's offender score.

A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient; and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance prejudices a defendant if there is a "reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

A court's scrutiny of counsel's performance is highly deferential and strongly presumes reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining

counsel's performance. *Grier*, 111 Wn.2d at 33. Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Appellant's claim that his trial counsel was ineffective for failure to object to inclusion of his federal conviction for Abusive Sexual Contact is without merit. Appellant's reliance upon *State v. Thieffault*, 160 Wn.2nd 409, 158 P.3rd 580 (2007), and the unpublished case of *State v. Navarette*, No. 31823-1-III, 2014 WL 4723168, at *1 (Wash. Ct. App. Sept. 23, 2014) is misplaced. *Thieffault* addresses the misapplication of the law where a court actually performed a comparability analysis and *Navarette* involved a scrivener's error which improperly misidentified a crime. Here the crime was identified, used in calculating the appellant's offender score, and was included without objection. Moreover, the Judgment and Sentence, which included the federal conviction, was signed by trial counsel and the Appellant.

While the State agrees with Appellant regarding the law governing comparability of out-of-jurisdiction convictions, that there must be legal or factual comparability, the State does not agree that a failure to request a comparability analysis, as present in this case, automatically means there was ineffective assistance.² The State has been unable to locate any

² 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

authority to support the proposition that trial counsel must demand a comparability analysis be performed or risk being found ineffective. In fact, it is equally likely that trial counsel determined there was not a good faith basis in law or fact to object to the inclusion of an out-of-jurisdiction conviction and, accordingly, did not object.

Appellant has not claimed that his federal conviction is not compatible, rather he claims his lawyer was ineffective for not objecting and requiring a compatibility hearing. While a challenge to the classification of out-of-state convictions, like other sentencing errors resulting in unlawful sentences, may be raised for the first time on appeal, there has been no showing of a sentencing error in this case. *See State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999). Appellant is merely speculating that maybe there could be such an error. To agree with Appellant that trial counsel was ineffective for failure to request a comparability hearing would result in finding that any sentence, even agreed sentences, which include an out-of-jurisdiction conviction, must require a compatibility hearing or face remand. Such a circumstance would be unduly burdensome and is not supported by the law.

4. Appellant's Restitution Issue is Moot.

There has been no restitution order or restitution hearing in this

comparable to the crime of Indecent Liberties, a sex offense, which would have scored as three points for his current conviction.

case and any request for restitution at this point would be time barred.

The defendant was sentenced on November 21, 2016 and the Judgment and Sentence reflects that any restitution would be set by the Prosecuting Attorney, and that the defendant waived his presence at any future restitution hearing. Despite what the clerks papers may, or may not, reflect the Judgment and Sentence is the final order controlling any restitution amount. Despite repeated contact and requests neither M.V. nor her family have responded to requests for proof of potential restitution amounts.

RCW 9.94A.753(1), which controls the timing of requests for restitution, provides that when restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within one hundred eighty days. The defendant was sentenced on November 21, 2016 and there was no request, hearing, or Order of Restitution within the 180 day window provided. A Restitution Order in this case, after the expiration of 180 days, would be time barred making this issue moot.

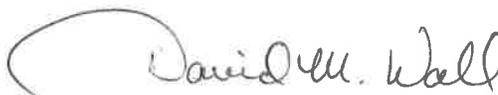
5. Appellate Costs should not be considered at this time.

The Appellant asks this Court to refrain from awarding appellate costs if the State seeks them. The Court should decline to consider this issue. The proper procedure would be for a Commissioner of this Court to consider whether to award appellate costs under RAP 14.2, if the State decides to file a cost bill and if Appellant objects to that cost bill.

D. CONCLUSION

The Appellant was found guilty at a bench trial of two counts of Rape of a Child in the First Degree during the period of January 1, 2010 and December 31, 2013. There were sufficient facts to support the court's determination of guilt. Finding of Facts and Conclusions of Law have been entered. Trial counsel was not ineffective. The issue of restitution is moot. The issue of appellate costs is not properly before this court. The conviction should be affirmed and this appeal dismissed.

Respectfully submitted this 25th day of August, 2017.

A handwritten signature in cursive script that reads "David M. Wall". The signature is written in black ink and is positioned above the printed name and title.

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August 25, 2017 - 4:38 PM

Transmittal Information

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