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Division III
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No.360016-III

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

STATE OF WASHINGTON

Plaintiff,

v.

JUAN JOSE HUEZO LUNA,

Appellant.

APPEAL FROM THE BENTON COUNTY
SUPERIOR COURT

BRIEF OF APPELLANT

CARNEY & MARCHI, P.S.

Nicholas Marchi
Attorney for Petitioner

Office and Post Office Address:
108 S. Washington Street, Suite 406
Seattle, WA 98104
Telephone : (206) 224-0909

APPELLANT'S OPENING BRIEF - 1

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I. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR

1. The trial court erred when it allowed the witness to provide written responses to the State's questions before the jury.
2. The trial court erred when it excluded the appellant's request to present evidence of moral decency.
3. There was insufficient evidence to convict the appellant as charged in the Amended Information.

B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Did the trial court err when it allowed the witness to provide written responses to the jury?
2. Did the trial court err when it granted the state's request for a motion in *limine* preventing the appellant from calling witnesses to testify regarding his moral decency?
3. Was there sufficient evidence to convict the appellant as charged in the Amended Information?

II. STATEMENT OF THE CASE

A. Statement of Proceedings

Mr. Huezo was charged with Rape of a Child in the First Degree; and two counts of Child Molestation in the First Degree. (CP 31-34) All three counts alleged aggravating circumstances of Patter of Sexual Abuse and Position of Trust. (31-34) On January 30, 2018, the jury returned verdicts of guilty to the three counts and found that the enhancements applied. (CP 245-246) On March 29, 2018, the trial court sentenced him on Count One to 300 months; Count Two 216 months and on Count Three to 180 months; to run concurrently. (CP 251) The time imposed by the trial court was the minimum sentence with a maximum of life. (CP 251) Notice of Appeal was timely filed.

At the start of the trial, the State moved to preclude the defense from presenting any evidence of a moral decency. (CP 39) The defense wanted to present Nancy Morales; Alexis Huezo; Laura Martinez and Niashia Morales who would testify regarding the reputation of Mr. Huezo for sexual morality and decency. (RP12) Mr. Huezo requested that the trial court defer any decision until and offer of proof was made regarding those witnesses. (RP 12)

At the conclusion of the offers of proof for Ms. Martinez, the trial court excluded the testimony of Ms. Martinez, finding that it was not relevant and that reputation was not established. (RP 293) The trial court also excluded the testimony of Nancy Morales. (RP 306) The trial court allowed the testimony of Alexis Huezo but limited the testimony to her time with the family during the charged relevant time frames. (RP 318) Finally, the trial

court allowed limited testimony from Niashia Morales, she could not testify about Mr. Huezo's reputation but could testify to what she observed. (RP 341-342)

B. Facts

On February 8, 2017, eleven-year-old T.O. told friends at school that she was being sexually assaulted by her stepfather, Mr. Huezo. (RP 25) Based on this information, school counselors contacted the Kennewick Police Department and T.O and her ten year old sister, B.O. were placed in to CPS custody. (RP 46) After interviewing T.O and B.O., police arrested Mr. Huezo and he was charged with the charges stated herein. (RP 49)

B.O testified at the trial of Mr. Huezo. At the time of her testimony, she was eleven years old. (RP 217) She testified that Mr. Huezo was her stepfather and that she called him Tia Juan. (RP 222) When asked if she was ever touched by him in an uncomfortable manner, she responded she could not remember. (RP 223) She further testified that she did not see him do anything to T.O at the aunt's house. (RP224) The State then inquired if B.O. would feel more comfortable writing down what happened with Mr. Huezo. (RP 225) B.O was non responsive. (RP 225) When questioned again, B.O. testified that she thought something uncomfortable might have happened on the couch. (RP 226) B.O. was unresponsive on how she was touched. ((RP 226) The State then moved to introduce a diagram of two children. (RP 227) Mr. Huezo objected. (RP 228) B.O. was then allowed to use a pen to circle where she was touched by Mr. Huezo over the objection of Mr. Huezo. (RP 230)

The State then gave B.O a piece of paper and pen and instructed B.O. to write out why she did not tell her mother what had happen. (RP 232) Mr. Huezo objected and was

overruled. (RP233) The State was allowed to present what B.O. had written to the jury. (RP 235)

B.O. then testified to observing Mr. Huezo touching T.O. at the Steptoe residence. (RP 235) She observed Mr. Huezo touching T.O.'s private part and T.O. crying. (RP 236) When asked why she did not tell her mother about T.O. crying and what had happen, B.O. was again allowed to write out her response. (RP 241) Mr. Huezo's objection was overruled. (RP 242)

T.O testified that she was twelve years old. (RP 245) Mr. Huezo was here stepdad. (RP 250) She testified that Mr. Huezo would touch her private parts. (RP 252) T.O. was also allowed to write out her testimony in the same manner that B.O testified. (RP 263) The objection was noted. (RP 264) T.O also described other sexual contact with Mr. Huezo. (RP 265-266) T.O also disclosed that B.O. had disclosed the same type of incidents with Mr. Huezo. (RP 271) T.O testified that it happened to her 58 times and about 30 times her mother was present in the house. (RP 273)

Dr. Shannon Phillips testified that she conducted a physical examination of T.O. (RP 142) T.O described what had happened between her and Mr. Huezo. (RP 148-149) She further testified that she performed a physical examination but did not see any physical injuries to the hymen. (RP 152)

Mr. Huezo testified that he did not have any inappropriate contact with either T.O. or B.O.

III. ARGUMENT

A. Standard of review

A trial court's rulings on evidentiary issues are reviewed under the abuse of discretion standard. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Evidence admitted without objection may be properly considered. *In re Dependency of Penelope B.*, 104 Wn.2d 643, 659-60, 709 P.2d 1185 (1985).

The sufficiency of the evidence is a question of constitutional law that the court applies a de novo review. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).; *State v. Rich*, 184 Wash. 2d 897, 903, 365 P.3d 746, 749 (2016)

B. Did the trial court err in allowing the child witness to testify via use of writings done in front of the jury when the State had not established, the witness was unavailable thus denying the Appellant his right to cross examination?

Under the Sixth Amendment to the United States Constitution, U.S. CONST. amend. VI, a criminal defendant has the right to confront his accuser in court by cross-examining the witness on the witness stand. *Ohio v. Roberts*, 448 U.S. 56, 63, 100 S. Ct. 2531, 2537, 65 L. Ed. 2d 597, (1980) Exceptions to this rule include nonhearsay evidence such as excited utterances. *See White v. Illinois*, 502 U.S. 346, 355-57, 112 S. Ct. 736, 742-43, 116 L. Ed. 2d 848 (1992); *See also United States v. Inadi*, 475 U.S. 387, 106 S. Ct. 1121, 89L. Ed. 2d 390 (1986); *State v. Smith*, 108 Wash. App. 581, 599, 31 P.3d 1222, 1232 (2001)

The Washington state constitution provides a more stringent confrontation right than does the federal constitution. An accused has a constitutional right "to meet the witnesses against him *face to face*." CONST. art. I, § 22.; *State v. Foster*, 135 Wn.2d 441, 957 P.2d 712 (1998) "Where cross examination would serve to expose untrustworthiness

or inaccuracy, denial of confrontation 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" *Ryan*, 103 Wn.2d at 175(quoting *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

In the case at bar, the State was allowed to present evidence via written form after the witness became nonresponsive. Mr. Huezo maintains that this was in error. Because the witnesses were allowed to write their responses to the State's question, this denied Mr. Huezo his right to confrontation by limiting his scope of cross examination. See, *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). At the very least the trial court should have made a finding that the witness was unavailable and then allowed the State to use the paper and pen. By allowing the State to elicit the testimony in this matter, it was in violation of both Washington law and the Constitution. As such the conviction should be overturned.

C. Did the trial court err when it precluded the Appellant from presenting his witnesses and testimony?

Evidence of a person's character generally is inadmissible, but a criminal defendant may present evidence of a "pertinent trait of character." ER 404(a)(1). We have held that sexual morality is a pertinent character trait in cases involving sexual offenses. *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000); *State v. Woods*, 117 Wash. App. 278, 280, 70 P.3d 976, 977 (2003)

In the case at bar, Mr. Huezo moved to admit evidence through four witness regarding his sexual morality or decency. The trial court excluded the testimony and most of the witnesses. The trial court erred as it applied the wrong analysis. Both *Wood and Griswold* indicate that the focus should be on whether the trait is pertinent to the underlying crime. Here the trial court focused on reputation. This was incorrect. The trial court failed

to properly analyze the issue.

The State maintained that pursuant to *State v. Gregory*, 158 Wn2d 759, 147 P.2d 1201 (2006) the defense must show that the suspect reputation is based on perceptions in the community. Pursuant to *Woods and Griswold* this was not a requirement for the introduction of evidence of moral decency. Neither of these cases addressed or requires a foundation for community perception. The trial court erred when it precluded the defendant from presenting the witnesses who would have testified about moral decency.

D. Was there sufficient evidence to convict Mr. Huezo of the crimes charged in the Amended Information?

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3. To determine if sufficient evidence supports a conviction, the Court considers “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime *beyond* a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 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)). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A “modicum” of evidence does not meet this standard. *Jackson*, 443 U.S. at 320. *State v. Rich*, 184 Wash. 2d 897, 903, 365 P.3d 746, 749 (2016)

Mr. Huezo would maintain that there was insufficient evidence to convict him as charged. First, there were conflicting statements from T.O. and B.O. T.O testified that it happened at the house and for over 30 times and that her mother was present. However, there was no evidence that supported these statements. Secondly, both T.O and B.O

testified that they could not remember what happened or that nothing happened. Finally, Dr. Phillips testified that she found no physical evidence in her examination of T.O. that supported the allegations. Given these facts, Mr. Huezo maintains there was insufficient evidence to convict him of all counts.

IV. CONCLUSION

For the reasons stated herein it is respectfully requested that the Judgment and Sentence in this matter be vacated and that the matter be remanded for a new trial.

DATED this 30th day of January 2020.

Respectfully Submitted,

S/ Nicholas W. Marchi
Nicholas Marchi, WSBA 19982
CARNEY & MARCHI, P.S.
Attorneys for Appellant
Juan Jose Huezo Luna

CERTIFICATE OF SERVICE BY MAIL

I, Nicholas Marchi, Attorney for the Appellant, hereby certify that I have mailed, on 01/30/2020, via postage prepaid, a true copy of the Brief of the Appellant attached hereto to the following individuals:

Juan Jose Huezo Luna Doc. No. 405454
Washington State Department of Corrections
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001-1899

Anita Petra, DPA
Benton County Prosecuting Attorney Office
7122 W. Okanogan Place
Kennewick, WA 99336

DATED this _30 day of January 2020 2012.

S/ Nicholas Marchi
Nicholas Marchi
Attorney for Appellant

CERTIFICATE OF FILING

I hereby certify that on the 30th day of January 2020, I filed the original Petitioner's

Opening Brief via ECF to:

Clerk of the Court
Court of Appeals of the State of Washington, Division III
500 N. Cedar St
Spokane, WA 99201

Dated this 30th day of January 2020.

S/ Nicholas Marchi
Nicholas Marchi
Attorney for Appellant

CARNEY & MARCHI PS

January 30, 2020 - 1:44 PM

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Phone: 206-224-0909

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