Supreme Ct. No. 92628-0

COA No. 32718-3-III

SUPREME COURT OF THE STATE OF WASHINGTON



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STATE OF WASHINGTON, Respondent

v.

ADRIAN ANGUIANO, Petitioner

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Adrian Anguiano asks this court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

## B. COURT OF APPEALS DECISION

The opinion filed on October 13th, 2015. A copy of the decision is in the Appendix at pages A-1 through A-12.

## C. ISSUES PRESENTED FOR REVIEW

1. Do the court rules require an appellant to assign error to the absence of findings of elements of the offense as to which the respondent bore the burden of proof?
2. When appellant challenges the sufficiency of the evidence to support an essential element of the offense, should the reviewing court decline to consider the issue because he has failed to assign error to the absence of findings as to that element?

3. When the State charges an offense, an element of which is sought to be proved through the actions of an accomplice, and the State fails to present sufficient evidence from which the trial court could infer the elements of accomplice liability, should the conviction be reversed?

## D. STATEMENT OF THE CASE

The events that gave rise to the charge against Mr. Anguiano involved him and two other residents at Twin Rivers Community Facility, a minimum security facility for juveniles. (RP 4-5, 7) Mr. Anguiano was fourteen years old, about five feet four inches tall, and weighed about 130 pounds. (CP 1; RP 36) His roommate, George Thacker, was sixteen or seventeen years old and about five feet six inches tall. (RP 8, 35) David Tyner was fifteen years old, six feet tall, and weighed 200 pounds. (RP 34)

William Chapin is a residential counselor at Twin Rivers. (RP 4-5) Following lunch he was looking for Mr. Thacker. (RP 8) He looked through the window in the door to Mr. Anguiano's room and saw Mr. Anguiano with his pants down and his penis in his hand. (RP 8) When Mr. Anguiano saw Mr. Chapin, he pulled his pants up. (RP 8) Entering the room, Mr. Chapin saw Mr. Thacker had Mr. Tyner in a hold with their backs

against the wall. (RP 8) Prior to this incident, Mr. Thacker and Mr. Tyner had previously been roommates. (RP 21)

According to Mr. Chapin, Mr. Anguiano was in front of Mr. Tyner "kind of dancing around." (RP 8) It appeared to Mr. Chapin that Mr. Tyner "didn't want to be there." (RP 9) Mr. Chapin instructed Mr. Thacker to return to his duties. (RP 12)

During lunch, Mr. Tyner had told Mr. Anguinao he was planning to get some lotion from the front desk. (RP 22) Mr. Anguiano offered to give him some, and after lunch they went to Mr. Anguiano's room. (RP 22, 30-31)

According to Mr. Tyner, after they were in Mr. Anguiano's room Mr. Anguiano asked him "to suck him up" and Mr. Tyner said "no dude I ain't like that . . . ." (RP 32) As Mr. Thacker came into the room Mr. Anguiano was saying "oh come on man just suck me up." (RP 31) Then Mr. Thacker tried to grab Mr. Tyner, they ended up wrestling, Mr. Thacker put Mr. Tyner in a choke hold and had him on the ground against the wall. (RP 31-32) Mr. Anguiano was about five feet away and Mr. Tyner was swinging his free arm to keep him away. (RP 33) Mr. Anguiano had his penis out and was saying something like "oh it ain't gay." (RP 33)

The State charged Mr. Anguiano with one count of indecent liberties by forcible compulsion, RCW 9A.44.100(1)(a). He was found guilty

following a bench trial. The court found Messrs. Anguiano and Thatcher "worked in concert" and concluded the state need not establish that Mr. Anguiano personally applied forcible compulsion since he acted "in conjunction" with Mr. Thatcher. (CP 42-43)

Mr. Anguiano appealed, assigning error to the trial court's conclusions and arguing that an intent to use force was an essential element of attempted sexual contact through forcible compulsion, there was no evidence or finding that Mr. Anguiano intended to use force, and because the trial court had failed to find the essential elements of accomplice liability, Mr. Thacker's intentional use of force could not properly be attributed to Mr. Anguiano.

The Court of Appeals affirmed, holding that while the trial court had not entered findings as to the essential elements of accomplice liability Mr. Anguiano had not assigned error to the trial court's failure to enter such findings, and so the insufficiency of the findings to support the court's conclusions need not be considered:

> [Appellant] implicitly complains that the court's findings do not meet this standard, repeatedly addressing matters that the court "did not find" or as to which it "made no findings." *E.g.*, Br. Of Appellant at 7, 9, and 10. Yet Mr. Anguiano has not assigned error to the trial court's failure to make sufficient

> findings. *See* RAP 10.3(a)(4) Given Mr. Anguiano's decision not to assign error to any inadequacy of the court's findings under JuCR 7.11(d), we will not address the Juvenile Court Rule requirements further.

Opinion at 4-5.

## E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### 1. SUMMARY.

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or another division of the Court of Appeals, or involves a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b).

The State bears the burden of proving the essential elements of the charged offense, and the purpose of findings is to identify the evidence the trial court relied upon to determine whether the State has met its burden. Absence of a finding is resolved against the party having the burden. The Court of Appeals lacks the power to resolve the factual issues on its own.

When findings are insufficient to support a conviction, the conviction should be reversed. If the record contains evidence from which a rational trier of fact could find the essential elements of the offense, the matter may be reversed and remanded for additional findings.

The Court of Appeals declined to consider the sufficiency of the evidence to support Mr. Anguiano's conviction because he did not assign error to the lack of findings as to the elements of accomplice liability upon which his conviction was obviously predicated.

The central factual issue in this case is whether the evidence was sufficient to establish complicity. The trial court's written and oral findings fail to address the elements of accomplice liability and accordingly, to the extent the conclusions supporting Mr. Anguiano's conviction are predicated on Mr. Thacker's acts or intentions, they are not supported by the findings.

The court's failure to consider the central issue in this case because appellant failed to assign error to the absence of findings as to which the respondent bore the burden of proof is contrary to numerous decisions of this court and the Court of Appeals.

2. IN REVIEWING CASES TRIED TO THE BENCH, THE COURT MUST PROPERLY APPLY THE PRINCIPLES GOVERNING THE FUNCTION OF WRITTEN FINDINGS AND CONCLUSIONS.

In every criminal prosecution, the State must prove the elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In a case that is appealed, the rules for juvenile court require the court to enter written findings stating the ultimate facts as to each

element of the crime and identify the evidence supporting its decision. JuCR 7.11(d); *Alvarez*, 128 Wn.2d at 16, 904 P.2d 754 (1995).

Under that court rule, the juvenile court is required to enter written findings of fact and conclusions of law in a case that is appealed. These findings and conclusions must address each essential element of the offense charged. *State v. Souza*, 60 Wn. App. 534, 537, 805 P.2d 237 (1991). Adequate written findings are necessary to permit meaningful appellate review. *State v. Mewe*, 84 Wn. App. 620, 621–22, 929 P.2d 505 (1997).

"An appellate court cannot substitute its judgment for that of the trial court in resolving factual issues." *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 903, 792 P.2d 1254 (1990) (citing *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959)). Findings of fact supported by substantial evidence are verities on appeal. 54 Wn.2d at 575.

"The purpose of findings of fact is to enable an appellate court to determine the basis on which the case was decided in the trial court and to review the questions raised on appeal." *In re Welfare of Woods*, 20 Wn. App. 515, 516-17, 581 P.2d 587 (1978). Written findings serve to show how the trial court resolved disputed evidence and facts. *Id.*

The courts recognize two types of necessary findings: material facts and ultimate facts. *Wold v. Wold*, 7 Wn. App. 872, 875, 503 P.2d 118 (1972):

> A material fact is one . . . which is important, carries influence or effect, is necessary, must be found, is essential to the conclusions, and upon which the outcome of litigation depends. Ultimate facts are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an essential particular. They are the necessary and controlling facts which must be found in order for the court to apply the law to reach a decision.

*Id.* (Citations omitted)

"A court is not required to make findings in regard to every item of evidence introduced in a case, but it is necessary that it make findings of fact concerning all of the ultimate facts and material issues." *Id.* The State bears the burden of proving the essential elements of the charged offense: "Due process requires that the State prove each essential element of the crime charged beyond a reasonable doubt . . ." *State v. Hanson*, 59 Wn. App. 651, 660, 800 P.2d 1124 (1990) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)), *State v. McHenry*, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

"When a court enters findings of fact and conclusions of law following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether they support the trial court's conclusions of law and judgment." *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 78, 180 P.3d 874 (2008) (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wn. App. 209, 214, 43 P.3d

1277 (2002), *aff'd*, 149 Wn.2d 873, 73 P.3d 369 (2003)); see *State v. Call*, 75 Wn. App. 866, 869, 880 P.2d 571 (1994).

If the State is required to prove the essential elements of the offense, and the trial court must make findings concerning the material issues and ultimate facts, then it follows the absence of a finding as to a material fact gives rise to an inference the material fact has not been proven. Indeed, absence of a finding is resolved against the party having the burden. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *Id.*; see *Pacific N.W. Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702, 754 P.2d 1262 (1988) (citing *Rhodes v. Gould*, 19 Wn. App. 437, 441, 576 P.2d 914 (1978)).

If the written and oral findings both fall short of the rule's requirements, the reviewing court may remand for sufficient findings as long as there is evidence in the record from which a rational trier of fact could find the elements of the charged offense. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995). If the written findings do not state the ultimate facts on each element of the offense, and there is no evidence in the record to support the omitted findings, reversing and dismissing the charge is warranted. *See*

*State v. Bynum*, 76 Wn. App. 262, 265, 884 P.2d 10 (1994); *State v. Austin*, 65 Wn. App. 759, 761–62, 831 P.2d 747 (1992).

### 3. THE RULES OF APPELLATE PROCEDURE DO NOT REQUIRE A PARTY TO ASSIGN ERROR TO THE ABSENCE OF FINDINGS ON FACTS AS TO WHICH THE OPPOSING PARTY BEARS THE BURDEN OF PROOF.

The Rules of Appellate Procedure require assignment of error to each written finding an appellant contends was improperly made:

> The brief of the appellant or petitioner should contain . . . [a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error. . . . A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 10.3(a)(4) and (g). "[W]hen an appellant fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995).

RAP 10.3 does not, by its terms, require an assignment of error to the mere absence of a finding. An exception has been noted when the omitted finding is necessary to support the appellant's theory of the case, and

appellant contends the evidence was sufficient to support entry of the omitted finding. See *Pacific N.W. Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702, 754 P.2d 1262 (1988). In such cases, error must be assigned to the omission or otherwise clearly disclosed in the assignments of error and related issues. *Id.*; RAP 10.3(g).

An appellant must assign error to the absence of a finding of a material fact that is essential to the appellant's theory of the case. See *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); *Pacific N.W. Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702, 754 P.2d 1262 (1988).

In *Turnbull*, the appellant, plaintiff in the trial court, did not assign error to the trial court's failure to make findings as to the knowledge and intent elements of appellant's action for fraud. Because the absence of such findings created a presumption that Pacific had failed to prove these essential elements, Pacific was required to assign error to their omission and prove the evidence required them.

When an appellant challenges the sufficiency of the findings as to which the respondent bears the burden of proof, no assignment of error to the absence of findings is required. See *State v. Souza*, 60 Wn. App. at 537-38. When appellant claims findings are insufficient to support an element of the alleged offense, the issue is properly raised by alleging insufficiency of the

evidence. See *State v. Alvarez*, 128 Wn.2d 1, 10, 904 P.2d 754 (1995); *State v. Commodore*, 38 Wn. App. 244, 245, 684 P.2d 1364 (1984).

In any event, failure to assign error pursuant to RAP 10.3 should be waived "where the briefing makes the nature of the challenge perfectly clear . . . ." *State v. Neeley*, 113 Wn. App. 100, 105, 52 P.3d 539 (2002) (citing *Daughtry v. Jet Aeration Co.*, 91 Wn.2d 704, 709-10, 592 P.2d 631 (1979)); RAP 1.2(a).

When the reviewing court determines the trial court findings are insufficient to support the conclusions of law, remand for sufficient findings is appropriate where there is evidence from which a rational trier of fact could find the elements of the charged offense. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

4. THE REVIEWING COURT IMPROPERLY REFUSED TO ADDRESS AN ISSUE OF THE SUFFICIENCY OF THE EVIDENCE ON THE GROUNDS APPELLANT FAILED TO ASSIGN ERROR TO THE TRIAL COURT'S FAILURE TO ENTER FINDINGS AS TO MATTERS FOR WHICH THE EVIDENCE IS ALLEGED TO BE INSUFFICIENT.

Mr. Anguiano contends the evidence was insufficient to prove accomplice liability, an essential element of the charged offense. No error was assigned to the absence of necessary findings because, contending the State had presented insufficient evidence, he does not claim their omission

was error. Rather, because he contends the evidence was insufficient to support them, he assigns error to the court's conclusions as to his guilt.

The argument in Mr. Anguiano's opening brief should have made the nature of his challenge to the sufficiency of the evidence perfectly clear, to wit:

> The essential elements of indecent liberties by forcible compulsion include knowingly causing another person to have sexual contact with the offender or another person by forcible compulsion. RCW 9A.44.100(1)(a). "'Forcible compulsion' means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." *State v. Gower*, 172 Wn. App. 31, 41-42, 288 P.3d 665 (2012), reversed on other grounds, 179 Wn.2d 851, 321 P.3d 1178 (2014); RCW 9A.44.010(6). RCW 9A.44.100(1)(a) does not purport to criminalize voluntary sexual contact involving an otherwise willing and competent person.
>
> Although the mental element of indecent liberties by forcible compulsion is knowledge, "[w]here . . . the crime is defined in terms of acts causing a particular result, a defendant charged with attempt must have specifically intended to accomplish that criminal result." *State v. DeRyke*, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003).
>
> *DeRyke* involved a charge of attempted first degree rape. *Id.* Because proof of that offense requires proof of forcible compulsion, the court concluded that the intent element of first degree rape required the State to prove "the defendant's intent to have *forcible* sexual intercourse." 149 Wn.2d at 913. Similarly, because proof of indecent liberties by forcible compulsion requires proof of forcible compulsion, the intent element of the attempted commission of that offense requires proof of an intent to use force.
>
> The court did not find that Mr. Anguiano intended to employ force to cause Mr. Tyner to have sexual contact with

him (or Mr. Thacker), nor would the act of exposing his genitals be strongly corroborative of such an intent.

The court's conclusion that Mr. Anguiano attempted to commit indecent liberties by forcible compulsion is predicated on the findings that Mr. Anguiano was working in concert with Mr. Thacker and Mr. Thacker "held the victim, David Tyner in a hold on the floor" and on the conclusion that Mr. Anguiano acted in conjunction with Mr. Thacker. (CP 42)

The court did not articulate any facts or legal theory that would establish that Mr. Anguiano was legally accountable for Mr. Thatcher's conduct. The court's determination that Mr. Anguiano's conviction could be predicated on Mr. Thatcher's conduct implies a determination that Mr. Anguiano is accountable for Mr. Thacker's conduct based on accomplice liability:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
> (2) A person is legally accountable for the conduct of another person when:
> . . .
> (c) He or she is an accomplice of such other person in the commission of the crime.

RCW 9A.08.020; *State v. Trout*, 125 Wn. App. 403, 409, 105 P.3d 69 (2005).

In order to find an individual guilty as an accomplice, the defendant must associate and participate in the venture "as something he wished to happen and which he sought by his acts to make succeed." *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993) (citing *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973), cert. denied, 418 U.S. 949 (1974); *State v. Castro*, 32 Wn. App. 559, 563, 648 P.2d 485, review denied, 98 Wn.2d 1007 (1982)). Mere presence at the scene of the crime is not enough. *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

"The law holds an accomplice equally culpable as the principal, regardless of which one actually performed the harmful act." *State v. McDonald*, 90 Wn. App. 604, 611, 953

P.2d 470 (1998). Rather, the defendant, "[w]ith knowledge that it will promote or facilitate the commission of the crime," must solicit, command, encourage, or request another to commit the crime or aid or agree to aid another in planning or committing the crime. RCW 9A.08.020(3). "Knowledge of the particular crime committed is an essential element of accomplice liability." *State v. Stein*, 144 Wn.2d 236, 248, 27 P.3d 184 (2001).

The court made no findings as to any of the elements of accomplice liability.

The evidence would support the inference that by holding Mr. Tyner on the ground, Mr. Thacker facilitated or aided in the commission of a crime. But the court did not find, nor did the State present any evidence, that Mr. Thacker knew Mr. Anguiano was attempting to commit indecent liberties by force. The only evidence that Mr. Anguiano contemplated causing Mr. Tyner to have sexual contact with him was Mr. Tyner's testimony that Mr. Anguiano had asked him to perform oral sex. The court made no finding that Mr. Anguiano actually made such a request and, in any event, there is no evidence Mr. Thacker heard such a statement being made.

Even if Mr. Thacker had overheard this request, there is neither evidence nor finding that Mr. Thacker knew Mr. Anguiano intended to accomplish the proposed sexual contact by the use of force. There is no basis for finding that Mr. Thatcher acted with knowledge that his action would facilitate the crime of attempted indecent liberties by force.

The evidence was insufficient to support the conviction beyond a reasonable doubt. The court erred in predicating its conclusion that Mr. Anguiano was guilty of attempted indecent liberties by force on a theory of accomplice liability for which there is no support in the record or the court's own findings. Insufficient evidence to support the conviction bars retrial on the same offense. *State v. Scott*, 145 Wn. App. 884, 891, 189 P.3d 209 (2008).

(Appellant's Opening Brief, pp. 5-10)

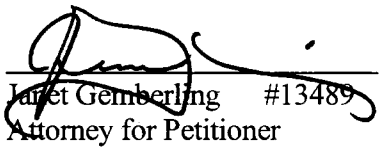
Mr. Anguiano asks this court to reaffirm an important principle of appellate law: when the trial court fails to find essential facts necessary to establish the legal elements of the offense with which a defendant is charged and the record does not contain evidence from which a reasonable fact-finder could infer such facts, the appellate court must presume that the prosecution has failed to meet its burden of proof and, as a matter of due process, the conviction must be reversed.

## F. CONCLUSION

Review should be granted and the Court of Appeals decision affirming Mr. Anguiano's conviction should be reversed.

Dated this 18th day of December, 2015.

Respectfully submitted,



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# APPENDIX

**FILED**
**OCTOBER 13, 2015**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, Respondent, v. ADRIAN ANGUIANO, Appellant. | ) | No. 32718-3-III<br>UNPUBLISHED OPINION |

SIDDOWAY, C.J. — Adrian Anguiano, a juvenile, was found guilty of attempted indecent liberties after he told a fellow resident at the Twin Rivers juvenile detention facility to perform oral sex on him while Mr. Anguiano's roommate held the victim in a chokehold against a wall. Mr. Anguiano challenges the sufficiency of the evidence to show that (1) he and his roommate worked in concert in the commission of the crime and (2) as the juvenile court implicitly found, Mr. Anguiano was attempting to have sexual contact with the victim. He also challenges three of the juvenile court's conclusions of law as erroneous, predicated entirely on his challenges to the two findings.

Because substantial evidence supports the challenged findings, we affirm.

## FACTS AND PROCEDURAL BACKGROUND

Fourteen-year-old Adrian Anguiano was a resident at Twin Rivers Community Facility, an all-male, minimum security facility for juvenile offenders. On March 28,

2014, he was eating lunch with D.T., another Twin Rivers resident, who mentioned that he was going to stop at the front desk to get some lotion. Mr. Anguiano responded that he had some in his room and would "hook [him] up." Report of Proceedings (RP) at 22. D.T. grabbed some small cups from the salad bar and the two boys headed for Mr. Anguiano's room.

After they entered his room, Mr. Anguiano pulled out his penis, held it in his hand, and said to D.T., "[C]ome on man just suck me up," and "it [i]sn't gay or nothing." RP at 31, 32. D.T. responded, "[N]o dude I ain't like that." RP at 32. Mr. Anguiano's roommate, George Thacker, came into the room, apparently shortly after Mr. Anguiano and D.T. entered, and was present as Mr. Anguiano continued to tell D.T. to "just do it." *Id.* Mr. Thacker grabbed D.T. from behind and wrestled him to the ground, placing him in a chokehold against the wall. D.T. "had one arm free" and "was swinging with it to keep [Mr. Anguiano] away." RP at 33. He estimated Mr. Anguiano was roughly five feet away from him at this point.

William Chapin, a residential counselor at the facility, was doing a population count after lunch that day and went looking for Mr. Thacker, who was assigned to dish detail. Upon arriving at Mr. Thacker's room, he saw Mr. Anguiano through the window; Mr. Anguiano's shorts were pulled down and he was holding his penis in his hand, "kind of dancing around." RP at 8. As soon as Mr. Anguiano saw Mr. Chapin, he pulled up his pants and his face reddened. Mr. Chapin opened the door, entered the room, and

immediately saw that Mr. Thacker had D.T. in a hold against the wall and that D.T. was struggling to get away. Mr. Chapin estimated that Mr. Anguiano was three to four feet away from the two other boys.

Mr. Chapin described both Mr. Anguiano and Mr. Thacker as laughing until they realized they had been caught. He described D.T. as also "kind of appear[ing] to be laughing," but was doing so awkwardly, as if he "didn't want to be there." RP at 9.

Mr. Anguiano was charged with attempted indecent liberties by forcible compulsion in violation of RCW 9A.44.100(1)(a) and RCW 9A.28.020. The information charged him with "knowingly attempt[ing] to cause [D.T.], a person who was not his/her spouse, to have sexual contact with him/her by forcible compulsion, to-wit: tried to touched [sic] him with his penis while he was being held against his will." Clerk's Papers (CP) at 1.

The matter proceeded to an adjudicatory hearing before the Benton County Juvenile Court. Following presentation of the evidence, the defense argued that the State failed to prove Mr. Anguiano had anything to do with the force used by Mr. Thacker because there was no evidence Mr. Anguiano asked Mr. Thacker to use force or that they had any sort of plan or agreement. Also, because Mr. Anguiano was several feet away from D.T., defense counsel argued that the State could not establish that there was "forced sexual touching." RP at 43.

The trial court rejected the defense arguments and found Mr. Anguiano guilty. It orally announced its decision at the conclusion of the trial and later entered written findings and conclusions. Mr. Anguiano appeals.

ANALYSIS

Mr. Anguiano's opening brief mentions the requirement of the Juvenile Court Rules that when a juvenile case is appealed, the juvenile court must enter written findings and conclusions that "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). The argument portion of his brief implicitly complains that the court's findings do not meet this standard, repeatedly addressing matters that the court "did not find" or as to which it "made no findings." *E.g.*, Br. of Appellant at 7, 9, and 10. Yet Mr. Anguiano has not assigned error to the trial court's failure to make sufficient findings. *See* RAP 10.3(a)(4) (each error claimed by an appellant must be identified under an appropriate heading by a separate concise statement of the alleged error).

If he had assigned error to the failure to make sufficient findings, we would first consider the trial court's oral findings for purposes of review. *State v. Robertson*, 88 Wn. App. 836, 843, 947 P.2d 765 (1997). If review of both the written and oral findings fell short of the rule's requirements, we would remand for sufficient findings as long as there was evidence in the record from which a rational trier of fact could find the elements of the charged offense. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

Mr. Anguiano's required assignments of error are to only two findings of fact and three conclusions of law. Br. of Appellant at 1, Section "A. ASSIGNMENTS OF ERROR". Given Mr. Anguiano's decision not to assign error to any inadequacy of the court's findings under JuCR 7.11(d), we will not address the Juvenile Court Rule requirements further.

We first separately address Mr. Anguiano's assignments of error to two findings of fact. We then address collectively his assignments of error to the juvenile court's conclusions of law.

> *Assignment of Error No. 1. The court erred in finding: "The respondent and co-respondent, George Thacker, worked in concert in the commission of this crime." CP at 42.*

"Due process requires the State to prove all elements of the crime beyond a reasonable doubt." *State v. Washington*, 135 Wn. App. 42, 48, 143 P.3d 606 (2006). Mr. Anguiano was charged with attempted indecent liberties by forcible compulsion. Although intent is not an element of indecent liberties,[1] crimes of attempt require proof of a specific intent to commit the offense. *See, e.g., State v. Dunbar*, 117 Wn.2d 587, 591, 817 P.2d 1360 (1991) (while defendant may be guilty of murder even without an actual intent to kill, attempt to murder requires specific intent to kill); *State v. Aumick*, 73 Wn.

[1] *State v. Price*, 17 Wn. App. 247, 249, 562 P.2d 256 (1977); *State v. Thomas*, 98 Wn. App. 422, 425-26, 989 P.2d 612 (1999) (the necessary culpable mental state for the crime of indecent liberties is knowledge, which "is a less culpable mental state than, and does not necessarily include, intent").

App. 379, 383, 869 P.2d 421 (1994), *aff'd*, 126 Wn.2d 422, 894 P.2d 1325 (1995) ("Unlike the crime of rape, attempted rape requires proof of a specific intent to rape."). "A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime." RCW 9A.28.020(1). Attempt therefore consists of two elements: "(1) intent, and (2) a substantial step." *Aumick*, 126 Wn.2d at 429.

"The intent required is the intent to accomplish the criminal result of the base crime." *State v. Johnson*, 173 Wn.2d 895, 899, 270 P.3d 591 (2012). To determine the required criminal result, the court looks to the definition of the base crime. *Id.* at 899. As relevant here, RCW 9A.44.100(1)(a) provides that a person is guilty of indecent liberties "when he or she knowingly causes another person to have sexual contact with him or her or another . . . [b]y forcible compulsion." Because the requisite criminal result is that sexual contact occur by forcible compulsion, *see State v. Ticeson*, 26 Wn. App. 876, 880, 614 P.2d 245 (1980), the intent required for the crime of attempted indecent liberties is an intent to cause sexual contact by forcible compulsion. "Forcible compulsion" is defined in RCW 9A.44.010(6) to include "physical force which overcomes resistance." "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).

The elements of a crime can be split between a principal and an accomplice. If one of them commits the necessary physical acts and the other has the necessary mental state, both can be convicted. *State v. Walker*, 182 Wn.2d 463, 483, 341 P.3d 976 (2015); *State v. Haack*, 88 Wn. App. 423, 427-28, 958 P.2d 1001 (1997). The theory of accomplice liability need not be included in the charging document because it is the same as direct liability. *State v. Carothers*, 84 Wn.2d 256, 262, 525 P.2d 731 (1974). As the Supreme Court explained in *Carothers*:

> The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.

*Id.* at 264.

An accomplice "need not participate in or have specific knowledge of every element of the crime nor share the same mental state as the principal." *State v. Berube*, 150 Wn.2d 498, 511, 79 P.3d 1144 (2003). A defendant can be charged as a principal and convicted as an accomplice; the jury need not determine the defendant's exact role in the crime. *State v. Baylor*, 17 Wn. App. 616, 618, 565 P.2d 99 (1977). A person is liable as an accomplice if, "[w]ith knowledge that it will promote or facilitate the commission of the crime, he . . . (i) [s]olicits, commands, encourages, or requests such other person to

commit it; or (ii) [a]ids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a).

The first finding of the juvenile court challenged by Mr. Anguiano is its finding that he and Mr. Thacker "worked in concert in the commission of this crime." CP at 42. Where a defendant challenges the sufficiency of the evidence, we must "view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt." *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). In evaluating the sufficiency of the evidence, we "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

"The elements of a crime can be established by both direct and circumstantial evidence." *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977). Circumstantial evidence is considered just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Mr. Anguiano argues that there was no evidence that Mr. Thacker knew that Mr. Anguiano was attempting to commit indecent liberties by force. Br. of Appellant at 9. Yet the evidence established that Mr. Thacker, having witnessed Mr. Anguiano, penis in hand, asking D.T. to "suck him up," wrestled D.T. to the floor while Mr. Anguiano stood three to five feet away. It established that Mr. Anguiano continued to face D.T. with his

exposed penis in his hand and was dancing around as D.T. swung his free arm at Mr. Anguiano in an effort to fend him off.

Mr. Anguiano would have us conclude that he and Mr. Thacker were engaged in independent horseplay without any demonstrated knowledge of the other's intent. But the element of intent "may be inferred from all the facts and circumstances surrounding the commission of an act or acts." *State v. Bergeron*, 105 Wn.2d 1, 19, 711 P.2d 1000 (1985); *State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011) (noting that specific criminal intent may be inferred "from conduct that plainly indicates such intent as a matter of logical probability"). The juvenile court inferred it here, and it was in the best position to weigh credibility and the persuasiveness of D.T.'s and Mr. Chapin's perceptions. Their testimony was substantial evidence that Mr. Thacker's actions both encouraged and aided Mr. Anguiano in attempting to have sexual contact by providing the necessary force. Substantial evidence therefore supported the juvenile court's finding that Mr. Anguiano and Mr. Thacker worked in concert in the commission of the crime.

*Assignment of Error No. 2. The court erred in finding: "[D.T.] used his free hand to prevent the respondent from having sexual contact with him." CP at 43.*

The second factual finding challenged by Mr. Anguiano is the juvenile court's finding that "[D.T.] used his free hand to prevent the respondent from having sexual contact with him." CP at 43. Mr. Anguiano concedes that sufficient evidence supports the finding that D.T. was swinging his arm; what he challenges is the finding that he was

doing this to prevent Mr. Anguiano from having sexual contact with him and the implied finding that Mr. Anguiano *did* have the intention of having sexual contact with D.T.

D.T. testified that after being pulled to the ground and held by Mr. Thacker, "I had one arm free and I was swinging with it to keep Adrian away." RP at 33. He testified that Mr. Thacker wrestled him to the ground and held him after Mr. Thacker witnessed Mr. Anguiano with his penis in his hand, asking D.T. to "suck him up." RP at 32. When D.T. was asked how Mr. Anguiano appeared after D.T. had been wrestled to the ground and was in Mr. Thacker's hold, he testified "Well he had his, you know, his penis out and, you know, he kept saying that stuff like oh it ain't gay. I'm up with on you and stuff like that." RP at 33.

Mr. Chapin testified consistently, recounting that he saw D.T. on the ground, in a hold, and "struggling to get away from [Mr. Thacker]," while Mr. Anguiano was three or four feet in front of D.T., penis in hand, "kind of dancing around." RP at 8, 9. Mr. Chapin testified that upon seeing Mr. Chapin, Mr. Anguiano pulled up his pants, blushed, and "looked like he just knew that he just got caught doing something." RP at 9. D.T. testified that following the incident, Mr. Anguiano "told me not to snitch and stuff like that." RP at 34.

This testimony from D.T. and Mr. Chapin is substantial evidence supporting both the juvenile court's finding that D.T. was swinging his arm to prevent Mr. Anguiano

from having sexual contact with him and its implicit finding that Mr. Anguiano *did* have the intention of having sexual contact with D.T.

> *Assignments of Error No. 3, 4, and 5. The court erred in concluding:*
>
> *"The court finds beyond a reasonable doubt that the respondent in conjunction with the co-respondent, George Thacker, took a substantial step toward forcing [D.T.] to have sexual contact with the respondent through forcible compulsion." CP at 43;*
>
> *"The state does not have to establish that the respondent alone provided the forcible compulsion." Id.; and*
>
> *Mr. Anguiano was guilty of attempted indecent liberties by forcible compulsion.*

Mr. Anguiano's remaining challenges are to the juvenile court's three conclusions of law: (1) that the State proved beyond a reasonable doubt that he, in conjunction with Mr. Thacker, "took a substantial step toward forcing [D.T.] to have sexual contact with [Mr. Anguiano] through forcible compulsion," (2) that the State does not have to establish that Mr. Anguiano alone provided the forcible compulsion, and (3) that Mr. Anguiano is guilty of the crime of attempted indecent liberties by forcible compulsion. CP at 43.

In reviewing a conclusion of law, we decide whether it is supported by the juvenile court's findings. *State v. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007). Our review is de novo. *Id.* We treat unchallenged findings of fact, of which there are several

in this case, as verities on appeal. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Mr. Anguiano's brief does not provide argument or authority for his challenge to the juvenile court's three legal conclusions. His assignment of error to the conclusions appears to be predicated entirely on his challenge to the underlying factual findings that he intended to have sexual contact with D.T. and acted in concert with Mr. Thacker. He evidently relies on the fact that if the critical findings fail, the conclusions will as well. We have held, however, that the challenged findings were supported by substantial evidence.

Given no other suggestion as to why the conclusions of law are in error, Mr. Anguiano's remaining assignments of error merit no further discussion. RAP 10.3(a)(6).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, C.J.

WE CONCUR:

Brown, J.

Fearing, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | No. _____ |
| Respondent, | ) | |
| vs. | ) | COA No. 32718-3-III |
| | ) | |
| ADRIAN ANGUIANO, | ) | CERTIFICATE |
| | ) | OF MAILING |
| Petitioner. | ) | |

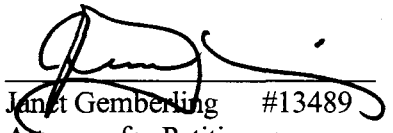
I certify under penalty of perjury that on this day I served a copy of the Petition for Review in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Andrew Miller
prosecuting@co.benton.wa.us

I certify under penalty of perjury that on this day I served a copy of the Petition for Review in this matter by pre-paid first class mail addressed to:

Adrian Anguiano
1307 E Oak St
Othello, WA 99344

Signed at Spokane, Washington on December 18, 2015.



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