

No. 63898-0-1

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

A.O.G.,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 JAN 25 AM 11:11
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BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

None.¹

ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether sufficient evidence exists to support the trial court's finding that A.G. acted for the purpose of sexual gratification and the finding of guilt on one count of child molestation in the first degree.
2. What is the proper remedy for the trial court's failure to submit findings and conclusions when A.G. can not show actual prejudice from the delay.

B. STATEMENT OF THE CASE

1. Procedural facts

A.G. was charged with three counts of child molestation in the first degree in Whatcom County Juvenile Court. CP 42. On June 4th, 2009 the juvenile court convicted A.G. of one count of child molestation in the first degree. CP 25-42. The trial court found A.G. not guilty of counts two and three. Id. On July 14th, 2009 the court denied A.G.'s motion to reconsider and imposed a manifest injustice sentence down imposing local sanctions. CP25-28. A.G. filed a notice of appeal on August 4th, 2009. CP 13. The

¹ The State originally cross appealed the disposition. The State would move to withdraw its cross-appeal at this time.

State cross-appealed the imposition of a manifest injustice sentence. CP 2. Findings of fact and conclusions of law for both the fact finding and motion to reconsider were filed with the Superior Court on January 13th, 2010. Supp. CP ___; Sub. No. 124 and 125.

2. Substantive Facts

J.T. was born March 27th, 2001. 1RP 26. In May of 2006 J.T.'s Child Protective Services case worker filed a dependency and J.T. moved in with the Gray family. 1RP 265-267. In October 2006 J.T. began working with another case worker. 1RP 209. In October of 2009 J.T. was still residing with the Gray family as a relative placement. 1RP 210. At the time the Gray family was living in Custer Washington. Id. Along with J.T., the mother and father, Kim and Mark Gray, their three biological children, A.G, J.T., and K.T., as well as a grandmother and a niece all lived in the home. Id. The Gray family moved to a home in Ferndale Washington in June 2007. 1RP 211. J.T. lived with the Gray family in Ferndale from June 2007 until December 2007. Id.

In March of 2008 J.T. disclosed to her foster mother, Angel Finsrud, that, "bad things happened to me that haven't happened to anyone else." 1RP 100 and 104. J.T. told Finsrud that someone had touched her in her "private parts." 1RP 104. The disclosure came as Finsrud was

putting J.T. to bed. Id. When asked who touched her, J.T. told her foster mother “Alex.” Id. J.T. disclosed that the touching occurred in Alex’s room when they had been playing video games. 1RP 111. Jennifer was interviewed on a number of other occasions regarding the allegation that included leading questions which could have contaminated her memory. Supp. CP __; Sub. No. 125. The court found J.T.’s testimony was both consistent and credible that A.G. had touched her on at least one occasion. Id.

The trial court found J.T. to be competent to testify at A.G.’s trial. 1RP 360. J.T. testified that A.G. had done “S-E-X” on her. 1RP 42. She further testified that A.G. had hurt her. 1RP 43. This occurred in A.G.’s bedroom with J.T. laying on the floor and A.G. laying next to her. 1RP 43. J.T. testified that A.G. had “humped” her and touched her private parts with his hands. 1RP 50. J.T. identified her private part in a drawing, and stated it was where she went pee. 1RP 51, 88. J.T. testified that the touching occurred after A.G. pulled off her jeans and underwear. 1RP 52-53. J.T. testified the incidents occurred “every day after school”. 1RP 53. J.T. told A.G. to stop. 1RP 54. J.T. remembered telling her grandmother that A.G. was having “S-E-X” with her after one of the incidents in Ferndale. 1RP 60.

Irma Bartlett testified that she is the grandmother of A.G. 1RP 289. Bartlett remembered J.T. coming to her while the family resided in Custer, WA and telling her A.G. was a “pervert”. 1RP 298. Bartlett told J.T. that if anyone “messed” with her she should scream. Id. Bartlett further stated that she told A.G. if anything was happening that J.T. would be taken away from the family. Id. Bartlett described A.G. as not paying much attention to J.T. in Ferndale and that he and K.G. wanted to do “bigger kid things.” 1RP 296.

The court found both Bartlett and J.T. credible as to the disclosure, though some of the details differed. Supp. CP ___; Sub. No. 124 and 125. The court found the disclosure to have occurred in Custer, WA. Supp. CP ___; Sub. No. 124.

A.G. was described as not wanting to be around J.T. in Ferndale, preferring to be around his friends. 1RP 136 and 326. A.G.’s date of birth is November 19th, 1993. 1RP 253.

The court found J.T. was born March 27th, 2001. Supp. CP ___; Sub. No. 125. A.G. and J.T. were not married and A.G. is more than 36 months older than J.T. Id. The trial court found that J.T.’s disclosure to her foster parent that A.G. had touched her privates was spontaneous. Id. The court found that A.G. had touched J.T. with his hand while they lived

in Ferndale on at least one occasion. Id. In the court's oral ruling the trial judge relied in part that the touchings occurred on multiple occasions to find sexual motivation. 2RP 13. Further the court found that A.G. removed J.T.'s pants and underwear evidencing sexual motivation. Supp. CP ___; Sub. No. 125. The circumstances of the allegations including occurring in A.G.'s bedroom indicated sexual motivation. Id. Based on these findings the trial court found A.G. guilty of one count of child molestation in the first degree and acquitting A.G. on counts two and three. Id.

C. ARGUMENT

1. SUFFICIENT EVIDENCE EXISTS THAT THE CONTACT BY A.G TO J.T. WAS DONE FOR THE PURPOSE OF SEXUAL GRATIFICATION.

The appellant assigns error to a lack of sufficient evidence to convict the appellant of child molestation in the first degree.

In reviewing a challenge to the sufficiency of the evidence, the issue is "whether, after examining the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993). In applying this test, "all reasonable

inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Id. At 339. Circumstantial evidence and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Appellate courts defer to the trier of fact and will affirm where there is evidence to support finding the essential elements of the crime beyond a reasonable doubt. State v. Walton, 64 Wn.App. 410, 425, 824 p.2d 533 (1992). The trier of fact is in the best position to evaluate conflicting evidence, witness credibility, and the weight assigned to the evidence. Id. at 415-16. Following a bench trial, the reviewing court determines whether substantial evidence supports the trial court’s findings of fact and, whether the findings then support the conclusions of law. State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d 699 (2005). Unchallenged findings of fact are verities on appeal and conclusions of law are reviewed de novo. Id. at 193.

To convict the appellant of child molestation in the first degree the State must show the appellant had sexual contact with J.T. who was under the age of twelve and the appellant was more than thirty-six months older than J.T. RCW 9A.44.083. Due process requires the State to prove every

essential element of a crime beyond a reasonable doubt. State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006).

Sexual contact is further defined by statute as “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. Sexual gratification is not an essential element of the crime of child molestation in the first degree, rather, a “definition clarifying the meaning of an essential element.” State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004).

A.G. argues that there is not sufficient evidence for the trial court to find that the sexual contact was for the purpose of sexual gratification. Washington Courts allow juvenile courts to infer sexual gratification from the facts and circumstances surrounding contact with sexual parts. In State v. T.E.H this division of the Court of Appeals held that a juvenile court can “make reasonable inferences based on all the evidence and testimony presented” regarding sexual gratification. 91 Wn. App. 908, 917, 960 P.2d 441 (1998). In T.E.H the State charged an eleven-year-old juvenile with multiple counts of child rape or in the alternative child molestation. Id. at 912. The juvenile court found T.E.H to have capacity and subsequently convicted him of a single count of child molestation. Id.

In affirming the trial court's decision, this division held that the nature of the contact showed sexual gratification, and that the trial court could make "reasonable inferences" based on the evidence in determining that the contact was for the purpose of sexual gratification. Id. at 916-917. The T.E.H. Court made inferences based on the facts that eleven-year-old T.E.H had the victim disrobe and molested him with his hand and other body parts. Id.

The T.E.H. Court refused to require a showing that a respondent understand issues of sex, or show sexual enjoyment or arousal by the respondent. Id. at 916. Rather, the showing of sexual gratification is required to rebut the situation of inadvertent touching. Id.

Further Washington Courts have extended this inference to circumstances involving touching to areas not in the "primary erogenous zone" or through clothing when the contact can not be described as "fleeting" or "susceptible to innocent explanation."² State v. Price, 127 Wn. App. 193, 202, 110 P.3d (2005). The Price Court upheld a conviction of child molestation when the alleged contact was assumed to

² Division One has questioned the application of "susceptible to innocent explanation" as an appropriate standard for review on sufficiency of evidence, stating "If this were the test, child molestation convictions would be subject to dismissal or reversal simply because a jury could believe a non-sexual explanation for the behavior." State v. Veliz, 76 Wn. App. 775, 779, 888 P.2d 189 (1995).

occur over clothing. Id. Price was alleged to have rubbed the victim's vagina over her clothing which resulted in visible redness and swelling. Id. The court held that a jury could properly infer based on the facts that the touching was neither fleeting nor inadvertent, and was done with the purpose of sexual gratification. Id.

The Appellant argues to ignore the established case law allowing juvenile court's to infer sexual gratification based on the facts and circumstances of the sexual contact. This argument fails to consider the doctrine of stari decisis³. Furthermore, jurisdictions relied upon by A.G. still allow a trial court to infer the intent of sexual gratification based on the facts and circumstances presented.

As cited by the Appellant, the Wisconsin Court of Appeals addressed the issue of sexual gratification in the case of In re Stephen T. 250 Wis. 2d. 26, 643 N.W.2d 151 (2001). Ten-year-old Stephen T. was alleged to have had sexual contact with two younger females during a game of "truth or dare" and "capture the flag." Id. at 32. Stephen T. was convicted of touching one of the victim's breasts during the game. Id. The court expressly found that the juvenile court could draw inferences of

³ A reviewing court will only overturn precedent if there is a showing that "the precedent is both incorrect and harmful." State v. Stalker, 152 Wn. App. 805, 812, 219 P.3d 722 (2009).

sexual gratification from the facts of the case. Id. at 38. Further the court rejected a requirement that the State show a juvenile respondent's sexual maturity in order to uphold a sexual assault conviction. Id. The trial court excluded admission of evidence which pertained to Stephen T's lack of sexual and psychological maturity. Id. at 38-39. Ultimately, the Stephen T. Court did find reversible error by the trial court in not admitting relevant evidence of a lack of sexual and psychological maturity as it was relevant to his presentation of an affirmative defense. Id. at 41. That court made a distinction between the State's ability to seek reasonable inference of sexual gratification and a defendant's right to present relevant evidence to rebut those inferences.

A.G. relies heavily on In re Mathew K., an opinion of the Appellate Court of Illinois. 355 Ill. App. 3d 652, 823 N.E. 2d 252 (2005). In Mathew K. the twelve-year-old respondent was convicted of two counts of aggravated criminal sexual abuse against an eight-year-old victim. Id. at 653. Evidence at trial included Mathew K. putting his hand on the victim's vagina and kissing her with his tongue. Id. at 654. At trial the chief of child psychology at Rush-Presbyterian-St. Luke's Hospital testified that Mathew K. was "socially immature, had few friends, and had trouble keeping up with his peers." Id. He further testified that Mathew

K.'s behavior could better be described as that of a ten-year-old rather than a twelve-year-old and that it was his opinion that Mathew lacked any interest in being sexually aroused by the contact. Id.

The Illinois Appellate Court found that it was unreasonable to infer an intent of sexual gratification based on Mathew's age and the facts presented. Id. at 656-657. However, the Mathew K. Court declined to apply a bright line rule that an inference can not be made in any juvenile prosecution. Id. at 657. Rather, that court required a trial court to consider all evidence including a juvenile's age and maturity prior to deciding whether the intent can be inferred. Id.⁴

In applying the established Washington case law to the facts at hand the record supports the trial judge's findings and conclusions regarding sexual gratification. The trial court found A.G. guilty of one count of child molestation in the first degree. Supp. CP ___; Sub. No. 125. The court found that the act of touching was done with "sexual motivation. Id. The judge relied on testimony that J.T.'s pants and underwear had been removed during the touching. Supp. CP ___; Sub. No. 125. . The conclusion of law was also supported in the judge's oral

⁴ The Court expressly affirmed the inference being applied in a previous case involving a sixteen year old Respondent. Id. at 656, citing Donald R., 343 Ill. App. At 237, 796 N.E. 2d 670 (2003).

ruling indicating the evidence of multiple occasions of the abuse. The trial records support such findings. J.T. testified that the touching had occurred in A.G.'s bedroom. 1RP 43. J.T. was lying down on the floor and A.G. was laying next to her. Id. J.T. stated the touching "hurt" and that she told A.G. to stop. Id. J.T. wrote her testimony out that A.G. had hurt her private part with his hand, and had "humped" her. 1RP 50. A.G. argues that these facts are not credible evidence to sustain a finding of sexual gratification.

Clearly the trial court did not, as the Appellant argues, find all but the testimony that "A.G. touched J.T.'s private parts in his bedroom in Ferndale" not credible. The trial court relied on details of J.T.'s testimony to determine that sexual gratification existed. This is reflected in the court's finding the touching occurred after J.T.'s pants and underwear had been removed. Without question the trial court disapproved of the number of interviews and the techniques used to interview J.T. and was unable to find A.G. guilty of counts two and three based on these interviews. Supp. CP __; Sub. No.125. However, looking at the court's oral ruling the judge clearly gives some weight to the fact that J.T. alleged the contact to have occurred on multiple occasions, supporting the finding of sexual gratification. 2RP 13. Additionally, the trial judge was careful to note that

he found both J.T.'s as well as Irma Bartlett's testimony credible regarding J.T. coming to Bartlett for help. Supp. CP ___; Sub. No. 125. The Court further ruled that this disclosure occurred in Custer, WA prior to the time frame charged. Id. This impliedly shows the court found credible evidence of prolonged abuse, which goes directly to A.G.'s intent for sexual gratification. 2RP 13. Finally, even after acknowledging the contamination that may have occurred in interviews with J.T., the trial court did find a lack of motivation for J.T. to make up the allegation. Supp. CP ___; Sub. No. 125.

Based on these facts the trial court could reasonably infer that A.G. acted with the motive of sexual gratification. The present case is akin to the facts of T.E.H. where the Court of Appeals found it reasonable to infer an eleven-year-old respondent acted for the purpose of sexual gratification when he had the victim disrobe and proceeded to molest the victim with his hands and body. T.E.H. 91 Wn. App. 908, 916, 960 P.2d 441. Similar to T.E.H. the trial judge also found that J.T.'s pants and underwear were removed when A.G. touched her with his hand. Supp. CP ___; Sub. No. 124.

The T.E.H. court expressly declined to require the State to show evidence of sexual knowledge or maturity. T.E.H. 91 Wn. App. 908, 916,

960 P.2d 441. Here, A.G. is alleged to be thirteen to fourteen-years-old during the time of the incident, a far cry from an eleven-year-old respondent, who is presumed to lack capacity.⁵

Further the record is silent as to A.G.'s sexual or mental immaturity. Unlike In re Stephen T. and In re Mathew K., the present record is entirely devoid of any evidence as to A.G.'s sexual or mental immaturity. The trial testimony actually reflects the opposite, that A.G. did not consider J.T. on his peer level, dispelling any notion of "doctors play" between children. Witnesses described A.G. as not being interested in spending time with J.T. preferring instead to spend time with the "older kids" and his friends. 1RP 136, 296, 326.

In reviewing the evidence in the light most favorable to the State, the trial court could reasonably infer A.G. acted for the purpose of sexual gratification. Evidence at trial does not diminish this reasonableness, as there was no evidence of A.G.'s lack of sexual, social, or mental development.

2. DISMISSAL IS NOT THE REMEDY FOR THE STATE'S FAILURE TO SUBMIT WRITTEN FINDINGS.

⁵ RCW 9A.04.050 presumes children between the ages of eight and twelve lack the capacity to commit a crime.

In order for an appellate court to review juvenile cases, the prosecution must submit meaningful findings of fact and conclusions of law. JuCR 7.11, State v. Fellers, 37 Wn. App. 613, 616, 683 P.2d 209 (1984). The findings need not be extensive, but must state the ultimate facts related to each essential element and are to be entered within 21 days after the notice of appeal is filed. JuCR 7.11(c),(d), State v. Royal, 122 Wash.2d 413,417, 858 P.2d 259 (1993), State v. Commodore, 38 Wn. App. 244, 250, 684 P.2d 1364 *review denied*, 103 Wash.2d 1005 (1984).

Although JuCR 7.11 does not specifically address the appropriate remedy when the prosecution fails to file findings and conclusions in a timely manner, the Washington State Supreme Court held in Royal that the test for determining the appropriate remedy is based on whether or not the appellant was prejudiced by such failure. State v. Royal, 122 Wn.2d 413, 419, 858 P.2d 259 (1993), State v. Bennett 62 Wn. App. 702, 711, 814 P.2d 1171 (1986). The appellant bears the burden of showing how one's personal liberty is actually prejudiced. State v. Royal, 122 Wn.2d 413, 423, 858 P.2d 259 (1993).

Failure to enter findings after a trial court has rendered a judgment does not prejudice an appellant. The appellate court cannot infer prejudice

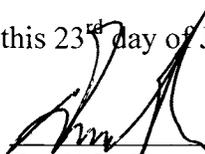
from a delay in entering findings and conclusions. State v. Head 136 Wn.2d 619, 625, 964 P.2d 1187, 1191 (1998). Prejudice has been shown where the (1) defendant's liberty interest is adversely affected by the late entry or (2) the record reflects that the findings and conclusions were tailored to address the assignments of error raised in the appellant's brief. Id., State v. Litts, 64 Wn. App. 831, 836-37, 827 P.2d 304 (1992).

Clearly A.G.'s liberty interest has not been adversely affected in the present case. The trial judge imposed a manifest injustice sentence downward on the request of A.G. and imposed local sanctions at disposition. 2RP 40. Additionally, the trial court's findings and conclusions were not tailored to the issues in the Appellant's brief. The findings and conclusions clearly reflect the oral ruling made by the trial judge at the time of the adjudication and reconsideration. Further, the issue of sufficiency of the evidence of sexual gratification was the primary argument of counsel for A.G. at the adjudication and motion to reconsider making it of little surprise that the issue is now raised on appeal. Therefore, the proper remedy would be to remand the case to the juvenile court for entry of findings and conclusions. However, findings and conclusions have since been entered by the court on January 13th, 2010. Supp. CP ___; Sub. No. 124 and 125.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm the trial court's finding that the Appellant is guilty of one count of Child Molestation in the First Degree.

Respectfully submitted this 23rd day of January 2010



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CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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Marianne White
Legal Assistant

1-23-10
Date