

64453-0

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NO. 64453-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GARY RALPH KING,

Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court during the appeal and are consistent with the trial court's oral ruling. Has the trial court properly submitted written findings in this case?

2. Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. During its prosecution of the defendant for two counts of Child Molestation in the First degree, the State presented evidence that the defendant slept at B.F's and E.F's house on at least four occasions during December 2006. The victims disclosed to numerous professionals as well as testified at trial, that during these encounters the defendant engaged in sexual contact with both B.F and E.F for his own sexual gratification. Viewed in a light most favorable to the State, did the State present sufficient evidence to establish the defendant's guilt for the charged offense?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Gary King, waived his right to a jury trial and the matter was tried to the court. 5/26/09 RP 28-32. At the conclusion of the trial, the court issued an oral ruling finding Mr. King guilty of two counts of Child molestation in the First degree. 6/24/09 RP 24. At sentencing, the court imposed a minimum

intermediate sentence of 80 months in prison. 10/30/09 RP 27. The court supplemented its oral ruling with a document entitled "Court's Memorandum in Support of Oral Rulings and Verdict." 6/24/09 RP 2-3.

2. SUBSTANTIVE FACTS

The charges of child molestation in the First degree against the defendant arise primarily from incidents that occurred at the apartment where B.F and E.F lived in with their grandmother, Marilyn Fryhling, in December 2006. The defendant first approached B.F and E.F to see if they wanted to ride bikes with him. 6/3/09 RP 9. After this, Mr. King began taking the boys to the park and other area locations regularly. 6/3/09 RP 10-17. These trips occurred from the period of approximately June 2006 to the end of 2006. 6/3/09 RP 20.

In November 2006, Mr. King helped the boys and Ms. Fryhling move to their new apartment in Tukwila. 6/30/09 RP 22. Mr. King continued to see the boys and came over to the apartment almost every day. 6/3/09 RP 22. On at least four occasions during the month of December 2006, Mr. King slept in the boy's room, the first being on or around December 17th. 6/3/09 RP 24. On two separate occasions, Ms. Fryhling checked the children's bedroom and noted that all three were sleeping on the floor. 6/3/09 RP 25-30. In particular, Ms. Fryhling noted that B.F slept on one side of Mr. King while E.F slept on the other side. 6/3/09 RP 29.

Furthermore, Mr. King spent the night in the boy's room on both December 23rd and 24th. 6/3/09 RP 33. On the night of December 23rd, the defendant informed Ms. Fryhling that B.F was having trouble sleeping, which she

noted was odd and unlike B.F. 6/3/09 RP 33. On December 24th, the defendant returned to spend another evening at the apartment. The defendant later appeared in the middle of the night to inform Ms. Fryhling that E.F was having trouble sleeping. 6/3/09 RP 38. From this period until today, E.F has had problems sleeping. 6/3/09 RP 41. During one sleepless night in January 2007, E.F first disclosed that Mr. King had inappropriately touched him. 6/3/09 RP 49. Ms. Fryhling subsequently contacted the police. 6/3/09 RP 49.

The boys later described and made disclosures about Mr. King's inappropriate sexual contact with them to a teacher, Ally Bird, as well as their therapists, Ann Magmin and Dipti Sarnaik. 6/4/09 RP 68-69; 78-85; 99-101. In addition, the boys later conversed with Detective Stock of the Tukwila Police Department, Carolyn Webster, an interview specialist, and Dr. Rebecca Wiester. 6/8/09 RP 12-17. During these interviews, among other descriptions of sexual contact with the defendant, both E.F and B.F disclosed that the defendant had touched their penises. In particular, B.F described an instance in which the defendant slept on the floor with both E.F and B.F and the defendant touched B.F's and E.F's penis under the blanket. 6/8/09 RP 13-15. Based on this evidence, the defendant was charged with two counts of child molestation in the first degree.

C. **ARGUMENT**

1. **THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CRR 6.1 FINDINGS.**

King asserts that the trial court failed to enter Findings of Fact and Conclusions of Law as required by CrR 6.1. On May 25, 2010, the trial court entered the required written findings. Supp. CP __ (Sub 175).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369, rev. denied, 120 Wn.2d 1011 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125, rev. denied, 102 Wn.2d 1024 (1984).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of King's appeal. There is no resulting prejudice. Hillman, 66 Wn. App. at 774; McGary, 37 Wn. App. at 861.

King cannot establish unfairness or prejudice resulting from the delayed entry of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp. CP __ (Sub 175). The language of the findings follows the trial court's oral and memorialized ruling. RP 2-3. Moreover, the trial prosecutor who drafted the findings of fact had no

knowledge of the issues in this appeal. Supp. CP __ (Sub 174, 5/24/2010 Trial Prosecutor Declaration).

In light of the above, King cannot demonstrate an appearance of unfairness nor resultant prejudice. The trial court's CrR 6.1 findings of fact and conclusions of law are now properly before this Court.

2. THE EVIDENCE ESTABLISHED KING'S GUILT FOR TWO COUNTS OF CHILD MOLESTATION IN THE FIRST DEGREE.

King asserts on appeal that the State's evidence was insufficient to establish his guilt for two counts of Child Molestation in the First degree. His challenge to the evidence establishing that sexual contact occurred is misguided. Upon review for sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. State v. Finch, 132 Wn.2d 792, 831, 975 P.2d 967 (1999). Moreover, the reviewing court defers to the fact finder to resolve conflicting testimony, to evaluate witness credibility, and to decide what weight the evidence deserves. State v. Fiser, 99 Wn.App. 714, 719, 995 P.2d 107 (2000). Thus, "all reasonable inferences from the evidence are drawn in favor of the State and against the defendant." Finch, 137 Wn.2d at 831.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). RCW 9A.44.083(1) provides:

A person is guilty of child molestation in the first degree when the person has, or knowingly cause another person under the age of eighteen to have sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

The court noted that the only element at issue before the court was whether during the time intervening between June 1, 2006 and January 29, 2007, the defendant had sexual contact with E.F and B.F. CM (Court's Memorandum in Support of Oral Rulings and Verdict) 51. King alleges that the State failed to produce evidence that Mr. King was guilty of touching B.F and E.F for his sexual gratification during the period charged in the information.

Here, the court found beyond a reasonable doubt that, on one or more nights in December 2006, during a sleepover or on an occasion that E.F and B.F believed was a sleepover, the defendant had sexual contact with E.F and B.F. CM 52. Ultimately, the court found the trial testimony of the boys themselves to be credible. CM 52.

In particular, the court noted that B.F's vivid trial testimony, illustrated by drawings that he created in open court, that the defendant touched his penis and then travelled back and forth under the blankets committing acts of sexual conduct on both B.F and E.F, as the defendant lay on the floor of the boy's room with the boys on either side of him, was especially compelling. CM 52. B.F's testimony is credible circumstantial evidence that the defendant touched E.F's

penis on the same occasion as he touched B.F's penis. CM 52. Moreover, their testimony was credibly corroborated by their disclosures to third parties. In E.F's case, the court relied not only on his initial disclosure to his grandmother, but also on his consistent disclosure to credible professionals - Detective Stock, Carolyn Webster, and Dr. Rebecca Wiester - that the defendant touched his penis. CM 52. Although it is true that B.F, unlike E.F, made no disclosures to Carolyn Webster or Dr. Wiester, he did make disclosures that the defendant touched his penis to both Detective Stock and his counselor, Dipti Sarnaik. CM 54.

According to the court, the limited alibi evidence offered by several defense witnesses to suggest that the defendant may not have stayed overnight with the boys on December 14, 2006 carries little weight. CM 52. There is no indication that the sexual contact with the boys occurred only during that day. In fact, the court noted that the evidence supports that Mr. King slept in the boy's bedroom on one or more nights throughout December 2006. CM 52.

Thus, the State's evidence established that the defendant did sleep over in the boy's room on one or more nights during December 2006 and during these visits the defendant engaged in sexual contact with both B.F and E.F by touching their penises. In absence of any evidence establishing that no sexual contact occurred between the Mr. King, B.F, and E.F, the defendant is unable to cast doubt on the judge's verdict.

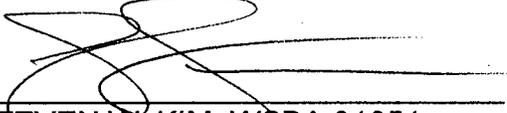
D. CONCLUSION

Drawing all reasonable inferences in favor of the State, the evidence sufficiently established King's guilt for two counts of child molestation in the first degree.

DATED this 20th day of August, 2010.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Tom Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GARY RALPH KING, Cause No. 64453-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Betty A. Huddleston
Name
Done in Seattle, Washington

8/20/10
Date

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