

original

NO. 34348-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA BARTOLOME,

Appellant.

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DIVISION II
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 04-1-01574-8

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether there was sufficient evidence to support the trial court's finding of guilt when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements beyond a reasonable doubt?

2. Whether the trial court erred in failing to hold an evidentiary hearing concerning information set forth in the presentence investigation report when the trial court specifically stated that it did not consider the information that Bartolome objected to in reaching its rulings regarding sentencing?

3. Whether the trial court erred with respect to any credit for time served that Bartolome was entitled to when the trial court's written orders directed the Department of Corrections to give Bartolome credit for the time he was entitled to under the law and when there has been no showing that the Department has failed to properly calculate Bartolome's credit for time served?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Joshua Bartolome was charged by third amended information filed in Kitsap County Superior Court with one count of indecent liberties with

forcible compulsion. CP 24.¹

B. FACTS

In the court below, Bartolome entered a waiver and stipulation in which he waived his right to a jury trial and stated he wished to submit the case to the trial court on a stipulated record. CP 27-28. The parties then submitted an “Agreed Exhibit for Trial on Stipulated Facts” containing numerous police reports and interviews. Exhibit 1 (previously submitted by Appellant). The exhibit was offered without objection and was admitted. RP 11/28 8. The reports and interviews contained in Exhibit 1 included the facts set forth below.

The Stipulated Facts Submitted to the Trial Court Below

On September 27, 2004, Deputy Victor Cleere contacted AMH and her mother in response to a report of a sex offense, not in progress. Ex. 1, Tab 1, page 2 (Report of Deputy Victor Cleere). Deputy Cleere advised AMH’s mother that he was going to talk to AMH “just to get a general statement of what had happened.” Id. AMH then told him that in late May or early June of 2004, she had been at the home of her friend, Kaelah Chavez, and that this friend wanted to go visit her boyfriend, but needed a ride. Id.

¹ The information contained one charge that named two victims (AMH and RAE), listed in the alternative. CP 24. The trial court, however, found that the State had not proven the allegations regarding RAE beyond a reasonable doubt. CP 40. The evidence regarding RAE, therefore, has been omitted from this brief.

AMH then called Bartolome, who agreed to come over and give the girls a ride. Id. After Bartolome drove the girls to their destination, he asked AMH to hang out with him. AMH stated she felt guilty about using Bartolome for a ride, and agreed to hang out with him for 30 minutes. Id. Bartolome and AMH then talked and drove around, and eventually went to Bartolome's home where he obtained some alcohol. Id. Bartolome then drove AMH to an elementary school parking lot and told her he wanted her to drink two bottles of beer. Id. AMH drank the beer, or a portion of it, and then Bartolome started touching her on the inner thigh and rubbing her. Id. AMH said she was taken aback, and pushed his hand away and asked him what he was doing. Id. AMH also indicated that Bartolome had previously taken her cell phone. Id., page 3.

AMH stated that Bartolome turned the car off and threw the keys in the back, and then started kissing her and "humping her." Ex. 1, Tab 1, page 2 (Report of Deputy Victor Cleere). AMH started screaming and crying and told him to get off of her. She also told him that she was only 14 and he was 19 and that what he was doing was wrong. Id. Bartolome took out his penis and tried to get AMH to touch it, but she refused and screamed. Bartolome held AMH down, and asked if her could "hump her butt." Id. She refused. Eventually Bartolome went into the back of the SUV. AMH was still crying, and began to act as if she was going to be sick and told Bartolome that she

had to go to the bathroom. Id. She also asked him for her cell phone, which he had hidden. AMH then saw the phone in the pocket of the driver's side door, and grabbed it, and began acting as if she had to throw up. Bartolome told her to get out of the car, and AMH got out and ran away. Id. AMH ran and hid by a water tower, and called her friend Kaelah, who eventually came to get her. Id. Bartolome, meanwhile, was driving around looking for her, and called AMH numerous times on her cell phone. AMH answered one of his calls and told him that she didn't want to talk to him. Id.

A child interviewer with the Kitsap County Prosecutor's office later interviewed AMH in more detail on October 8, 2004. Ex. 1, tab 7 (Kitsap County Prosecutor Child Interview Report). In this interview, AMH again stated that Bartolome asked her to finish her beer, and then put his hand on her inner thigh or "vaginal area" and was rubbing her. Ex. 1, tab 7, page 4. AMH told him "no," but as AMH explained, Bartolome continued:

AMH: All of a sudden he climbs over the middle section of the front seat and climbs on top of me. He starts to like hump me. He was kissing me on my face. I said, "Stop it what are you doing." I was moving my head away. He was trying to unbutton my shirt and pants and I was trying to button them back up. I was like, "Stop." I was getting really scared I told him to get off of me, he kept humping me.

Child Interviewer: What do you mean by he was humping you?

AMH: I was sitting he was sitting on me with his legs around me and he was rubbing back and forth.

Child Interviewer: How were [Bartolome's] clothes?

AMH: He had on pants and a polo shirt I think.

Child Interviewer: Were they on or off?

AMH: On.

Child Interviewer: Then what happened?

AMH: He said, "Come on [AMH] I just want to taste you." I kept on saying, "No" and tried to push him off with my hands.

Child Interviewer: Where were [Bartolome's] hands?

AMH: On the side of him, he was strong and was like on me.

Child Interviewer: Then what?

AMH: That went on a long time, I started crying, he wouldn't stop. I was scared I was going to slap him but I thought he might be really crazy and hit me or something. I kept saying, "Please get off of me." He kept saying, "Shhhh baby." I was yelling then but no one could hear me. It was like one in the morning. Finally he stopped and he's like, "What's wrong?" I said, "This is wrong." Then he starts again. Finally I said, "Do you like to see girls cry like this Josh?" He said, "Ruby Ann cried the first time too." I cried hard and tried to push him off. He stopped and I was shaking he was doing something with his pants, he was unzipping his pants and then he takes his penis out. I looked away and said, "Oh my God put it away." He's like, "Just touch it." I said, "No."

Child Interviewer: How were your pants and shirt?

AMH: They were buttoned and zipped up.

Child Interviewer: Then what?

AMH: He had his penis out and he grabs my hand and pulled it down there and I tried to pull my hand away. My pinkie touched it. I said, "Put it back, he said, "If I put it back will you let me hump your butt?" I just said, "Put it away." Finally he puts it back into his pants and he tells me to turn around. I said, "No" He started humping me again in the front. He said he was buzzed and horny. I said, "You're 19 years old and I'm 14, this is wrong."

Ex. 1, tab 7, page 4-5. AMH also stated that when Bartolome was sitting on her, “he was touching my boobs and I pulled his hands away and he was rubbing the outside of my pants with his hands. Ex.1, tab 7, page 7.

In a subsequent defense interview on January 28, 2005, AMH again described the events of the night in questions and stated that while she was drinking a beer Bartolome began rubbing her inner thigh. Ex. 1, tab 10, page 32 (Witness Interview of AMH, dated January 28, 2005). AMH described that Bartolome then moved over the center console and got on top of her and began trying to kiss her and take off her clothes, and also started humping her. Id., page 32. AMH told Bartolome to get off of her multiple times, but Bartolome did not listen. Id., page 33. AMH was able to prevent Bartolome from getting her pants undone, but he continued to hump her leg. Id., page 34. AMH stated that it was hard for her to move and she was continually trying to push him off of her. Id., page 34-35. AMH started to cry and was “getting really scared.” Id., page 35. AMH told Bartolome, “Stop. Please get off of me. Please, please.” Id., page 35.

In the defense interview, AMH also again described that Bartolome took out his penis at one point, and that she told him to “please put it away.” Ex. 1, tab 10, page 36. Bartolome asked her to touch it, and she recalled him grabbing her hand and stated that her pinkie “swiped against it.” Id., page 37. AMH went on, and stated,

I was begging him to put it away, and finally he says, "If I put it away, will you let me hump your butt?" I said, "Josh, please just put it away." He's like, "Will you?" I was like, "No. I don't know. No." I just wanted him to put it away.

Then finally he did. It wasn't out for a long time or anything. So then he just continued, like, humping me. Then I pushed him off. I was pushing him and pushing him. "Please, please, please. Get off me."

Ex. 1, tab 10, page 37. AMH then told Bartolome that she had to urinate in an attempt to have him get off of her. *Id.*, page 37. Bartolome eventually got off of her and moved to the back seat. *Id.*, page 37. AMH then began to act like she was sick and started making sounds as if she was going to throw up, and as she did so, she looked around for her cell phone which she located in the driver's side door. *Id.*, page 38. When Bartolome told her to go throw up outside, AMH got out of the car and ran off. *Id.*, page 38-39.

On September 28, 2004, Deputy Steven Duckworth received that case for follow-up. Ex 1, tab 3, page 1 ("Supplemental Report" of Detective Steven Duckworth, dated 8/28/04). He went to Olympic High School to contact Kayla Chavez about the incident. *Id.* Ms. Chavez described that AMH had contacted Bartolome for a ride, and that Bartolome had driven the girls to their friend's house and then took AMH for a drive. *Id.*, pages 1-2. Ms Chavez stated that after AMH failed to come back, she started getting worried and tried to call her, but got no answer. *Id.*, page 2. Ms Chavez stated she later got a call from AMH who was "freaking out" and crying and

asked her to come get her. Id. Eventually, Ms. Chavez and some companions eventually found AMH, who was very upset and crying, and hiding near a water tank. Id. AMH grabbed Chavez and hugged her for a long time. AMH told Chavez that Bartolome had tried to force her to “do things” and had grabbed her by the head and forced her face towards his crotch. Id. Bartolome also tried to force her pants off, but was unable to get them off, and AMH also described how Bartolome had taken her cell phone away and refused to let her make any calls or leave the vehicle. Id.

Detective Duckworth also spoke with Zanaeia Thomas on September 29th about the events at issue. Ex. 1, tab 3, page 3-4. Ms. Thomas described that when she found AMH that night she described that Bartolome had told her he would only take her home if she drank beer, and that he had kissed her and got on top of her. Id. Bartolome also held AMH down, unbuttoned his pants, asked AMH to touch his penis, and tried to undo her pants. Id., page 4. AMH tried to push Bartolome off of her, but could not do so. Id., page 4. Eventually Bartolome moved enough to allow AMH to get out from underneath him, and AMH demanded that he take her home, but Bartolome refused and pinned her down again. Id. Zanaeia also stated that AMH had said Bartolome had taken her cell phone and refused to return it to her. Id.

Detective Duckworth also spoke with Bartolome on October 9, 2004, after he had been arrested the night before. Ex. 1, tab 4, page 1

(“Supplemental Report” of Detective Steven Duckworth, dated 10/11/04 13:54:55); Ex. 1, tab 5, page 1 (“Supplemental Report” of Detective Steven Duckworth, dated 10/11/04 15:58:53). Bartolome initially stated that he didn’t know AMH and didn’t remember the incident, and stated he didn’t have a driver’s license and was not allowed to drive his parents’ SUV. Ex. 1, tab 5, page 1. After about twenty minutes, however, Bartolome admitted that he did, in fact, know AMH. Id., page 1. After outlining AMH’s allegations, Detective Duckworth asked Bartolome to tell him about the incident. Id., page 1. Bartolome paused for a long time, and looked at the floor and began shaking his head side to side. Id., page 1. Bartolome maintained that he didn’t remember giving anyone a ride. Id., page 1. After another pause, Bartolome finally began to tell Detective Duckworth that he had given AMH and her friends a ride, and that he later drove AMH around. Id., page 2. Bartolome stated that AMH asked him to kiss her, so they began kissing, but AMH then got out of the car causing Bartolome to think that he had “been bad or something.” Id., page 2. Detective Duckworth asked him if anything else happened after they were kissing, and Bartolome again paused and looked at the floor before answering. Id., page 2. Bartolome said that after they kissed he tried to kiss her one more time and she got mad at him. Id., page 2. Bartolome initially stated that he did not remember rubbing the inside of AMH’s thigh, but later did admit that he kissed her neck and chest

and began rubbing the her thigh or crotch. Id., page 2. He also stated that she told him that it didn't feel right, and he claimed he stopped at this point. Id., page 2.

Detective Duckworth also asked Bartolome if AMH had screamed at any time, and he indicated she had when he had grabbed her arms and told her to calm down. Ex. 1, tab 5, page 3. Bartolome then stated that he had told her that if she would kiss him one more time he would take her to her friend's house. Id., page 3. Bartolome said she told him "no," but he kissed her anyway, and that this was when she got very upset, got out of the car, and took off running. Id., page 3.

Bartolome also gave a taped statement to Detective Duckworth in which he stated, inter alia, that,

. . . she hit me twice in the right arm and I had to grab her wrists and lock her arms against the ceiling and I told her in a toned voice not to . . . not to hit me again and to calm down because she's drunk and then I told her if she . . I told her if she wants me to take her back, then . . . then she needs to calm down and then she just dropped her hands and she gave me a weird look and it was kinda quiet and then she started yelling at me again and then I said hey, you need to calm . . . I looked her straight in the face, I was like probably two inches to an inch away from her face and I said, hey, calm down and I was like you wanna go, just give me a kiss and we'll leave and then I thought she was gonna say yes, so I engaged the kiss at the end and she got mad and started yelling again and then she opened the door and she was walking away then . . . or she ran away . . .

Ex. 1, tab 6, page 1-2 (ellipses, other than final ellipsis, in original).

The Trial Court's Decision and Findings

After hearing arguments on the case, the trial court stated that it would examine the submitted materials and issue written findings. RP 11/28 57. On November 29, 2005, the trial court issued written Findings of Fact and Conclusions of Law in which the court made the following findings of fact:

(4) Bartolome began rubbing the inside of AMH's thigh and she told him to stop. He did not stop but instead climbed over and on top of her and began "humping" her and attempting to unbutton her shirt and pants. He was straddling her and rubbing himself back and forth on her. He grabbed her breasts and rubbed her crotch outside her clothing. She tried to push him off but was pinned down by his weight. She repeatedly asked him to stop, but he persisted.

(5) During the encounter, Bartolome exposed his penis to AMH and asked her to touch it. She refused although there was some inadvertent contact between her hand and his penis. He retrieved his penis but continued the humping. AMH was crying and attempting by words and actions to get Bartolome to stop. She was unsuccessful until she complained of nausea and threatened to vomit in the car.

CP 37. Based on these findings of fact, the court made the following conclusions of law, stating that the State had proven the following beyond a reasonable doubt:

(1) Sometime in May or June of 2004, Bartolome knowingly caused AMH to have sexual contact with him.

(2) The touching and rubbing of AMH's breasts, inner thigh, and vaginal area, outside her clothing, were done for the purpose of gratifying Bartolome's sexual desires.

(3) This sexual contact occurred because Bartolome used physical force to overcome AMH's continued physical and verbal resistance.

CP 39. The trial court, therefore, found Bartolome guilty of one count of indecent liberties with forcible compulsion. CP 40.

Sentencing

Prior to sentencing, a Pre-Sentence Investigation Report (PSI) was prepared. CP 41. Bartolome then filed a document entitled Defendant's Presentence Motion and Report. CP 68. In this document, Bartolome acknowledged that he had previous juvenile convictions for "first degree child rape, fourth degree assault with sexual motivation, and criminal trespass with sexual motivation." CP 69. Bartolome also stated that he had received a SSODA sentence and successfully completed treatment. CP 69. Bartolome objected, however, to the fact that the PSI included a summary of the current offense and set out the facts of his prior offenses. CP 72-73. Bartolome argued that the sentencing court could not consider any facts regarding his prior convictions beyond the facts outlined in the plea forms entered in those offenses. CP 75.² Bartolome also attached to his Motion a copy of the

² Bartolome stated that sum total of the facts regarding the prior convictions that the court could consider consisted of the following statement, "In Kitsap County Court I: In October 2000 I stuck my finger in CC's vagina. She was under 12 and more that 24 months younger than me. Count II: On December 8, 2000, I touched K.K. on the breast and she did not want to be touched. Count III: On December 8, 2000, I stayed in K's house after she asked me to leave." CP 74-75.

Statement of Juvenile on Plea of Guilty from his prior convictions. CP 133-138.

A sentencing hearing was held on January 20. At the beginning of the hearing, the trial court stated,

This was a stipulated facts trial and my recollection is counsel spent enumerable hours parsing that record to make sure I only had what was appropriate for me to consider. I am going to consider what was in that parsed record, and if it shows up in the presentence investigation, then it will be something that I have considered. If the presentence investigation report contains things that weren't in the stipulated facts trial, then it will not be a part of my decision.

RP 1/20 3-4. The court then allowed the parties to argue whether there were other things that the court should or should not consider. RP 1/20 4. After hearing argument on these issues and hearing the sentencing recommendations from both sides, the trial court stated to defense counsel,

Ms. Corey, in answer to your legal concerns, let me tell you as I make my decision today, I am considering only the findings of fact and conclusions of law, in making my decision, together with the criminal history, the convictions themselves, together with the statement of defendant on plea of guilty, which you have provided.

RP 1/20 45. The trial court then imposed a mid-range, standard range, sentence of 78 months. RP 1/20 47, CP 141.

Bartolome then asked to receive credit for what his counsel claimed

was 474 days spent in custody. RP 1/20 48. The trial court, however, stated,

I am not going to make that decision today. I am going to say it doesn't count. If you want to file a motion for reconsideration, with appropriate authority, I may reconsider my decision.

RP 1/20 48. No motion for reconsideration was filed.

Ultimately, the trial court signed a written judgment and sentence, and this written document did not incorporate the trial court's oral statements regarding what would or would not count as credit for time served. Rather, the Judgment and Sentence entered by the trial court stated that,

Credit for Time Served. RCW 9.94A.505. Defendant shall receive credit for time served prior to sentencing solely for this cause number as computed by the jail unless specifically set forth.

CP 142. In addition, the written Warrant of Commitment stated that,

You, the director, and officers of the Department of Corrections (DOC, if applicable, are commanded to receive or deliver the Defendant for classification, confinement and placement to the agency checked in the caption above consistent with this Order and related disposition document. The Defendant shall receive credit for time served prior to sentencing solely for this cause number as computed by the jail or DOC.

CP 149. There is nothing in the record before this court that in any way indicates that the Department of Corrections has incorrectly calculated

Bartolome's credit for time served.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF GUILT BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS BEYOND A REASONABLE DOUBT.

Bartolome argues that there was insufficient evidence to support the indecent liberties conviction. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements beyond a reasonable doubt.

1. Standard of Review

The standard of review in this case should be whether the trial court's findings of fact were supported by "substantial evidence" and "whether the findings support the conclusions of law."

Although Bartolome concedes that the usual standard of review is a review for substantial evidence, he argues that a de novo review is warranted because the trial court did not hear any live testimony below. App.'s Br. at 14-15. Bartolome claims that because this court has the same record before it, namely the stipulated material, this court should review the trial court's decision de novo, and Bartolome specifically focuses on the issue of AMH's

credibility. App.'s Br. at 15, 17-20.

In support of his argument for a de novo review, Bartolome cites *Smith v. Skagit County*, 75 Wn.2d 715, 718-19, 453 P.2d 832 (1969) and *Danielson v. City of Seattle*, 45 Wn. App. 235, 240, 724 P.2d 1116 (1986). App.'s Br. at 15. While those cases do state that appellate courts are in as good a position to review written submissions and, thus, may generally review de novo decisions of trial courts that were based on affidavits and documentary evidence, the Washington Supreme Court has more recently held that a de novo review in such a case is not appropriate where the proceedings at the trial court turned on credibility determinations. *See, In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003).

In *Rideout*, the Court of Appeals, and later the Washington Supreme, was called on to review a Superior Court contempt proceeding. *Rideout*, 150 Wn.2d at 340. The contempt proceeding in the Superior Court was considered solely on written submissions, including declarations and affidavits. *Rideout*, 150 Wn.2d at 349-50. In addressing the appropriate standard of review, the Supreme Court noted that the Court of Appeals determined that the standard of review was whether the trial court's findings of fact were supported by substantial evidence, thereby rejecting the petitioner's argument that the review should be de novo. *Rideout*, 150 Wn.2d at 350. The Court noted that the petitioner had cited to cases such as *Smith v.*

Skagit County and Danielson v. City of Seattle, in support of this argument for de novo review. The Supreme Court, however, held that these cases differed from the instant case in that they “did not require a determination of the credibility of a party,” and that, “[h]ere, credibility is very much at issue.” *Rideout*, 150 Wn.2d at 350.

The Supreme Court in *Rideout* further stated that it agreed with the Court of Appeals that, “no Washington appellate court reviewing documentary records has weighed credibility.” *Rideout*, 150 Wn.2d at 350. Rather, the court held that where the proceeding at the trial court turned on credibility determinations, “it seems entirely appropriate for a reviewing court to apply a substantial evidence standard of review.” *Rideout*, 150 Wn.2d at 351. Ultimately, the court stated,

We hold here that the Court of Appeals correctly concluded that the substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved.

Rideout, 150 Wn.2d at 351.

Similarly, other more recent Washington courts have held that even in stipulated facts trials, an appellate court reviews the record for substantial evidence in support of the trial court’s findings and then consider whether the trial court erred in applying the law to the facts to reach its legal conclusions.

In re Marriage of Stern, 68 Wn. App. 922, 928-29, 846 P.2d 1387 (1993);
Med. Consultants N.W. v. State, 89 Wn. App. 39, 44 n. 2, 947 P.2d 784
(1997) (applying same standard of review for cases heard on stipulated facts).

In *Stern*, the court was asked to review an order modifying a decree of dissolution that was entered after a trial by affidavit. *Stern*, 68 Wn. App. at 925. The court rejected the respondent's claim that the standard of review should be de novo, stating,

It is illogical to state that we conduct exactly the same review as the trial court when we also require the trial court to enter findings of fact and conclusions of law. See CR 52(a)(2)(B). In addition, the trial court below has the benefit of oral argument to clarify conflicts in the record. It is consequently in a better position than the reviewing court to balance and assess discrepancies, resolve conflicts, and determine an equitable method for determining income and deductions. Moreover, concerns of judicial economy prevent an exhaustive appellate review of each detail of every support modification. Therefore, the proper standard of review is whether the findings are supported by substantial evidence and whether the trial court has made an error of law that may be corrected upon appeal.

Stern, 68 Wn. App. at 928-29.

In the present case, Bartolome correctly points out that the trial court was called upon to make credibility determinations. This fact, however, distinguishes the present case from *Smith v. Skagit County* and *Danielson v. City of Seattle*, and makes the present case more similar to *Rideout*, where the

Supreme Court held that a de novo review was inappropriate precisely because the trial court was called on to make credibility determinations.

In addition, if the trial court decision in this case is reviewed de novo, the entire proceeding at the trial court level is mooted by the appellate review. Such a proceeding would be a waste of judicial resources, as well as the resources of the parties. Principles of economy, therefore, strongly mitigate against the requirement that the parties and the trial court progress through a cumbersome and pointless process just so the case may proceed to the appellate court where it will actually be decided.

For all of these reasons, the standard of review in this case, as in *Rideout*, should not be de novo.

Generally, the standard of review with respect to a claim regarding 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 the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). “[W]hen 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). In performing this review and drawing inferences,

circumstantial evidence is as reliable as direct evidence. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A reviewing court also will not invalidate a conviction based on conflicting evidence when sufficient evidence supports the verdict. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 246, 391 P.2d 194 (1964).

The standard of review is also sometimes characterized as a “substantial evidence” test. Under this formulation, a reviewing court will affirm a trial court's findings if, after analyzing the evidence and all inferences that can reasonably be drawn therefrom in favor of the trial court's findings, there is substantial evidence to support those findings. *State v. Trasvina*, 16 Wn. App. 519, 557 P.2d 368 (1976), *review denied*, 88 Wn.2d 1017 (1977); *State v. Bennett*, 6 Wn.2d 208, 107 P.2d 344 (1940). “Substantial evidence exists where the record contains a sufficient quantity of evidence to persuade a fairminded, rational person of the truth of the allegation.” *State v. Halstein*, 122 Wn.2d 109, 129, 857 P.2d 270 (1993); *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Where findings of fact and conclusions of law are supported by substantial but disputed evidence, an appellate court will not disturb the trial court's ruling. *State v. Smith*, 84 Wn.2d 498, 527 P.2d 674 (1974); *State v. Chapman*, 84 Wn.2d 373, 526 P.2d 64 (1974).

Finally, an appellate court “must defer to the trier of fact on issues of

conflicting testimony,” and on “the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-75.

2. Sufficiency of the evidence

RCW 9A.44.100(1)(a) provides “(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another: (a) By forcible compulsion.” RCW 9A.44.010(6) states that "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.

Forcible compulsion requires more than the force normally used to achieve sexual intercourse or sexual contact. *State v. Ritola*, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991), citing *State v. McKnight*, 54 Wn. App. 521, 528, 774 P.2d 532 (1989). The concept that a woman consents unless she struggles to the limit of her strength was long ago discarded as the legal standard. *State v. Gonzales*, 18 Wn. App. 701, 703, 571 P.2d 950 (1977)(citing *State v. Thomas*, 9 Wn. App. 160, 510 P.2d 1137 (1973)). Indeed, forcible compulsion can be satisfied without any showing of physical resistance. *McKnight*, 54 Wn. App. at 525. Instead, the resistance necessary to establish forcible compulsion is satisfied by "any clear communication of the victim's lack of consent." *McKnight*, 54 Wn. App. at 525 (quoting *State*

v. Reed, 166 W. Va. 558, 562, 276 S.E.2d 313 (1981)). The reason that physical resistance is not required is two-fold. First, studies have shown that different victims respond differently to confrontational situations, some panicking or freezing, thus effectively offering no resistance. *McKnight*, 54 Wn. App. at 526 (citing *People v. Barnes*, 42 Cal.3d 284, 228 Cal.Rptr. 228, 721 P.2d 110, 118-19 (1986)). Second, studies have similarly shown that resistance increases the risk that the perpetrator will employ violence or that the victims will receive greater injuries than if no resistance were offered. *McKnight*, 54 Wn. App. at 526(citing *Barnes*, 721 P.2d at 118-19).

In *McKnight*, the 17-year-old juvenile defendant was convicted of second degree rape. *McKnight*, 54 Wn. App. at 522. On appeal, *McKnight* argued that the evidence was insufficient to support the forcible compulsion element of the offense. *McKnight*, 54 Wn. App. at 522. McKnight went with the 14-year-old victim to her apartment where they started kissing on the living room couch. *McKnight*, 54 Wn. App. at 522. The victim told McKnight to stop. McKnight proceeded to disrobe the victim and had sexual intercourse with her despite her requests for him to stop. *McKnight*, 54 Wn. App. at 523. The court held that there was sufficient evidence to establish the element of forcible compulsion. *McKnight*, 54 Wn. App. at 528.

In the present case, the trial court found that:

(4) Bartolome began rubbing the inside of AMH's thigh and she told him to stop. He did not stop but instead climbed over and on top of her and began "humping" her and attempting to unbutton her shirt and pants. He was straddling her and rubbing himself back and forth on her. He grabbed her breasts and rubbed her crotch outside her clothing. She tried to push him off but was pinned down by his weight. She repeatedly asked him to stop, but he persisted.

(5) During the encounter, Bartolome exposed his penis to AMH and asked her to touch it. She refused although there was some inadvertent contact between her hand and his penis. He retrieved his penis but continued the humping. AMH was crying and attempting by words and actions to get Bartolome to stop. She was unsuccessful until she complained of nausea and threatened to vomit in the car.

CP 37. Each of these findings was supported by substantial evidence, as the evidence at trial included the following facts:

Bartolome began rubbing the inside of AMH's thigh and she told him to stop: Ex. 1, Tab 1, page 2; Tab 7, page 4; Tab 10, page 32.

He did not stop but instead climbed over and on top of her and began "humping" her and attempting to unbutton her shirt and pants: Ex. 1, Tab 1, page 3; Tab 7, page 4; Tab 10, page 32.

He was straddling her and rubbing himself back and forth on her: Ex. 1, Tab 7, page 4; Tab 10, page 34, 37.

He grabbed her breasts and rubbed her crotch outside her clothing, Ex. 1, Tab 5, page 2; Tab 7, page 7.

She tried to push him off but was pinned down by his weight: Ex. 1, Tab 7, page 5; Tab 10, page 34-35, 37.

She repeatedly asked him to stop, but he persisted: Ex. 1, Tab 7, page 5; Tab 10, page 33.

Bartolome exposed his penis to AMH and asked her to touch it: Ex. 1, Tab 1, page 3; Tab 7, page 5; Tab 10, page 36.

She refused although there was some brief contact between her hand and his penis: Ex. 1, Tab 7, page 5; Tab 10, page 37.

He put his penis away but continued the humping: Ex. 1, Tab 7, page 5; Tab 10, page 37.

AMH was crying and attempting by words and actions to get Bartolome to stop: Ex. 1, Tab 7, page 5; Tab 10, page 34-35.

The trial court's findings of fact, therefore, were each supported by substantial evidence, and the evidence was sufficient to demonstrate that Bartolome used physical force that overcame AMH's resistance.

These findings of fact in turn support the trial court's conclusions of law that the State proved beyond a reasonable doubt that: Bartolome knowingly caused AMH to have sexual contact with him; the touching and rubbing of AMH's breasts, inner thigh, and vaginal area, outside her clothing, were done for the purpose of gratifying Bartolome's sexual desires; and that this sexual contact occurred because Bartolome used physical force to overcome AMH's continued physical and verbal resistance.

Although the trial court labeled these as "conclusions of law," these findings are more appropriately characterized as "findings of fact." A finding of fact incorrectly labeled as a conclusion of law is reviewed as a finding, for substantial evidence. *Valentine v. Department of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (1995). The trial court's actual findings of fact, therefore, regardless of how the trial court labeled them, should be reviewed

as findings of fact. In any event, as outlined above, there was sufficient evidence to support the trial court's finding that Bartolome knowingly caused AMH to have sexual contact with him and that Bartolome used physical force to overcome AMH's continued physical and verbal resistance

For all of these reasons, the trial court did not err in finding Bartolome guilty of one count of indecent liberties with forcible compulsion.

B. THE TRIAL COURT DID NOT ERR IN FAILING TO HOLD AN EVIDENTIARY HEARING CONCERNING INFORMATION SET FORTH IN THE PRESENTENCE INVESTIGATION REPORT BECAUSE THE TRIAL COURT SPECIFICALLY STATED THAT IT DID NOT CONSIDER THE INFORMATION THAT BARTOLOME OBJECTED TO IN REACHING ITS RULINGS REGARDING SENTENCING.

Bartolome next claims that the trial court erred in considering matters in the presentence report without first holding an evidentiary hearing on the contested facts. App.'s Br. at 22-26. This claim is without merit because the trial court specifically stated that it was only considering: (1) the facts presented at trial; (2) the fact that there were actual prior convictions; and, (3) the statements in plea of guilty provided by the defense which related to those offenses.

Bartolome concedes that a sentence should be based on "the actual

crime of which the defendant was convicted, his or her criminal history, and the circumstances surrounding the crime.” App.’s Br. at 23. Furthermore, Bartolome expressly acknowledged his prior convictions at the sentencing below, and stated that the convictions were for “first degree child rape, fourth degree assault with sexual motivation, and criminal trespass with sexual motivation.” CP 69. Bartolome also provided the trial court with the statement of defendant relating to these offenses. CP 133-38.

Although Bartolome objected to other items contained in the PSI, the trial court specifically stated that it was considering only those things that Bartolome conceded were appropriate, stating,

Ms. Corey, in answer to your legal concerns, let me tell you as I make my decision today, I am considering only the findings of fact and conclusions of law, in making my decision, together with the criminal history, the convictions themselves, together with the statement of defendant on plea of guilty, which you have provided.

RP 1/20 45.

Bartolome’s argument on appeal appears to be that the trial court must have considered something more, because the statement of defendant itself does not “include any reference to sexual motivation.” App.’s Br. at 24. This argument, however, is misplaced, as Bartolome had clearly acknowledged to the trial court that his prior convictions were for “first degree child rape,

fourth degree assault with sexual motivation, and criminal trespass with sexual motivation.” CP 69. Although Bartolome appears to argue that the factual statements in the statement of defendant do not describe the offenses as ones including sexual motivation, the trial court, nevertheless, was well aware that the actual convictions contained sexual motivation special allegations because Bartolome himself had informed the trial court of this fact.

Furthermore, Bartolome’s arguments regarding the contents of the PSI are irrelevant because the trial court essentially granted Bartolome’s objections and stated it was not considering any of the disputed information, and specifically stated it was not considering anything other than the fact the convictions existed and the statements contained in the statement of defendant that was submitted by Bartolome. Requiring an evidentiary hearing, therefore, was unnecessary, as the trial did not consider any of the contested information. For these reasons, Bartolome’s argument must fail.

C. **THE TRIAL COURT DID NOT ERR WITH RESPECT TO ANY CREDIT FOR TIME SERVED THAT BARTOLOME WAS ENTITLED TO BECAUSE THE TRIAL COURT'S WRITTEN ORDERS DIRECTED THE DEPARTMENT OF CORRECTIONS TO GIVE BARTOLOME CREDIT FOR THE TIME HE WAS ENTITLED TO UNDER THE LAW AND THERE HAS BEEN NO SHOWING THAT THE DEPARTMENT HAS FAILED TO PROPERLY CALCULATE BARTOLOME'S CREDIT FOR TIME SERVED.**

Bartolome next claims that the trial court erred when it refused to credit him for 343 days of time served on EHM. App.'s Br. at 26. This claim is without merit because the record before this court does not show that the trial court's orders actually denied Bartolome credit for any time that he was entitled to under the law as the trial court expressly left the calculations concerning credit for time served to the Department of Corrections.

The judgment and sentence entered by the trial court stated that,

Credit for Time Served. RCW 9.94A.505. Defendant shall receive credit for time served prior to sentencing solely for this cause number as computed by the jail unless specifically set forth.

CP 142. In addition, the warrant of commitment stated,

You, the director, and officers of the Department of Corrections (DOC, if applicable, are commanded to receive or deliver the Defendant for classification, confinement and placement to the agency checked in the caption above consistent with this Order and related disposition document.

The Defendant shall receive credit for time served prior to sentencing solely for this cause number as computed by the jail or DOC.

CP 149. Nothing in the judgment and sentence or in the warrant of commitment directed the Department of Corrections or the Kitsap County Jail to not give Bartolome credit for any EHM time he might have served prior to trial.

It is true that at the sentencing hearing Bartolome requested credit for 474 days in custody, and that the trial court's oral response was as follows:

Let me interrupt you. I am not going to make that decision today. I am going to say that it doesn't count. If you want to file a motion for reconsideration, with appropriate authority, I may reconsider that decision.

RP 1/20 48.³ While the trial court's oral statement seems to state that the

³ RCW 9.94A.030(27) states that "Home detention" is "a program of partial confinement available to offenders wherein the offender is confined in a private residence subject to electronic surveillance." The Washington Supreme Court has previously held that electronic home monitoring constitutes home detention. *State v. Speaks*, 119 Wash.2d 204, 208-09, 829 P.2d 1096 (1992). In addition, RCW 9.94A.505(6) provides that a sentencing court shall give an offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

The State, therefore, concedes that if a trial court imposes electronic home monitoring, as it is defined by statute, as a condition of release pending trial, and the offender actually serves time on electronic home monitoring as defined by statute, then the offender is statutorily entitled to credit for that time.

In the present case, Bartolome argues that he served 343 days that he spent on electronic home monitoring, citing to the Report of Proceedings from January 20 at page 48. App.'s Br. at 8. This section of the transcript, however, only contains the Defense counsel's oral claim that Bartolome had served 474 days in custody. RP 1/20 48. Bartolome, however, has provided no other evidence or authority in the record before this court that establishes: (1) that the trial court authorized electronic home monitoring or ordered it as a condition of

court did not feel that Bartolome was entitled to credit for time served on EHM, the trial court also stated that she was “not going to make that determination today,” and the written judgment and sentence and warrant of commitment left the credit for time served calculation to the Department of Corrections. CP 142, 149. In addition, no written order from the trial court ever directed the Department to not give Bartolome credit for time spent on EHM. Thus, the oral statements of the trial court were never incorporated into any written order.

Finally, Bartolome has provided no evidence in the record before this court that in any way indicates that the Department of Corrections has miscalculated the credit for time served in this case.

In sum, despite the trial court’s oral statement at sentencing regarding EHM, the trial court’s written orders clearly delegated the calculation of Bartolome’s credit for time served to the Department of Corrections, and Bartolome has provided no evidence or argument to suggest that the

release; (2) that Bartolome actually served time on electronic home monitoring solely in regard to this offense and in a program that meets the statutory requirements under RCW 9.94A.030(27); or, (3) that Bartolome served 343 in such a program, as claimed by defense counsel.

Thus, even if the trial court’s written orders had denied him credit for time spent on EHM, the record before this court would be inadequate to support the relief requested by Bartolome, and the appropriate remedy would be to remand this issue to the trial court for a determination regarding whether Bartolome was entitled to any additional credit for time served. In any event, the trial court’s written orders clearly left the actual calculations to DOC, and there is nothing in the record to suggest that DOC failed to properly calculate Bartolome’s credit for time served. Remand, therefore, is unnecessary, as there has been no

Department of Corrections has erred in calculating the amount of time Bartolome had spent in confinement prior to sentencing.

Thus, despite any potentially erroneous oral statements made by the trial court at sentencing, the trial court's written orders complied with the law and directed the Department of Corrections to give Bartolome credit for time served pursuant to RCW 9.94A.505. As there is nothing in the record before this court to indicate that Department of Corrections incorrectly calculated Bartolome's credit for time served, his arguments on this issue must fail.

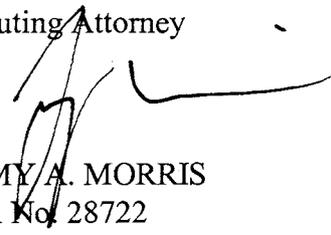
IV. CONCLUSION

For the foregoing reasons, Bartolome's conviction and sentence should be affirmed.

DATED February 9, 2007.

Respectfully submitted,

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showing that Bartolome's credit for time served was ultimately calculated incorrectly.