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Court of Appeals
Division III
State of Washington

NO. 33049-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

TANNER FUSTON, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-8-00033-3

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

- A. **Whether the juvenile court's findings support the guilty verdict for Child Molestation in the First Degree.**
- B. **Whether Mr. Fuston's attorney provided effective assistance of counsel.**

II. STATEMENT OF FACTS

On November 18, 2012, Alyssa Baird reported to the West Richland Police Department that her five-year-old son, C.B. (DOB: 11/23/2006), disclosed to her that he had been sexually assaulted by Tanner Fuston. CP at 24. Baird also reported that her three-year-old daughter, A.B. (DOB: 02/24/2009), reported that Tanner Fuston sexually assaulted her. *Id.* The West Richland Police investigated the matter and on November 21, 2012, a child forensic interviewer at Kids Haven interviewed C.B. and A.B. CP at 26. C.B. disclosed that Tanner Fuston had bent him over the bed and “sniffed” his “butthole” with his penis. CP at 21. A.B. disclosed Tanner Fuston had “sniffed” her “woo-woo” with his lips. *Id.* A.B. indicated her “woo-woo” was her vagina. *Id.*

On January 18, 2013, the State charged Tanner Fuston by Information with two counts of Child Molestation in the First Degree. CP at 1-2. On February 1, 2013, the trial court entered a pre-trial sexual assault protection order prohibiting Mr. Fuston from contact with C.B. and A.B. CP at 5-6. On February 7, 2014, the State and Mr. Fuston entered a

Stipulated Order of Continuance for 24 months to an amended information of one count of Child Molestation in the First Degree. CP at 12-14, 32-33; RP at 27, 54. Also on February 7, 2014, Mr. Fuston signed a second sexual assault protection order prohibiting him from having contact with C.B. and A.B. CP at 15-16.

On August 13, 2014, the State and Mr. Fuston entered a First Amended Stipulated Order of Continuance. CP at 17-19; RP at 38-40. On November 3, 2014, upon the request of the State, the juvenile court revoked the amended Stipulated Order of Continuance and set the case for a stipulated facts bench trial. RP at 47-49. On December 17, 2014, the Honorable Joseph Schneider found Mr. Fuston guilty of one count of Child Molestation in the First Degree after the court held a stipulated facts bench trial in which the only evidence admitted was the police reports and the Kids Haven interview. CP at 17-19, 20-31; RP at 53-59. The juvenile court entered written findings of fact and conclusions of law. CP at 53-54.

Mr. Fuston now appeals his conviction.

III. ARGUMENT

A. The court's findings are sufficient to support the guilty verdict for Child Molestation in the First Degree.

The court's written findings and conclusions state the facts as to each element of the crime of Child Molestation in the First Degree. The

Juvenile Court Rules require the court to enter “written findings and conclusions in a case that is appealed. The findings shall 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).

An individual commits the offense of Child Molestation in the First Degree when he has “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.” RCW 9A.44.083. “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. “[S]exual gratification’ is not an essential element to the crime of first degree child molestation but a definitional term that clarifies the meaning of the essential element, ‘sexual contact.’” *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004).

In the case at hand, the trial court entered written findings after a stipulated facts bench trial was held. CP at 53-54. The trial court considered the police reports and Kids Haven interview as the only evidence. CP at 20-31; RP at 53-59. The trial court made oral and written findings that Mr. Fuston pulled down his pants, bent C.B. over a bed, and made contact with his penis to C.B.’s buttohole. CP at 53-54; RP at 57. In its conclusion of law 1, which Mr. Fuston correctly classifies as a finding

of fact, the trial court found, “Mr. Fuston had sexual contact [with] C.B.” CP at 54. These findings, both oral and written, are sufficient to support the guilty verdict for Child Molestation in the First Degree.

B. If written findings did not satisfy JuCR 7.11, the proper remedy is remand.

If the juvenile court did not enter proper findings of fact regarding the ultimate facts, the lack of findings requires remand for entry. If findings of fact and conclusions of law do not state ultimate facts on each element of offense as required by juvenile court rule, that error can be cured by remand. *State v. Alvarez*, 128 Wn.2d 1, 904 P.2d 754 (1995). A lack of findings by a juvenile court requires remand for entry when the record contains facts supporting the missing findings. *State v. Avila*, 102 Wn. App. 882, 10 P.3d 486 (2000). If this Court determines that the findings did not satisfy JuCR 7.11(d), the Court should remand to the trial court for the missing findings.

In *State v. Alvarez*, the Supreme Court determined what the proper remedy should be if findings do not satisfy JuCR 7.11(d). The Court upheld the appellate court’s holding that Alvarez was not denied his right to a fair trial, even though the trial court did not enter findings of ultimate facts. *Alvarez*, 128 Wn.2d at 19-20. An error by the court in entering judgment without findings of fact and conclusions of law is remedied by

subsequent entry of findings, conclusions, and judgment. *Id.* at 19. If findings of fact and conclusions of law do not state “ultimate” facts, that error can be cured by remand. *Id.*

In *State v. Avila*, the juvenile court did not enter findings of fact and conclusions of law regarding the ultimate facts. This Court held lack of findings requires remand for entry when the record contains facts supporting the missing findings. *Avila*, 102 Wn. App. at 896; *see also State v. Hescoek*, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (noting the *Alvarez* court “remanded where evidence supported conviction but trial court failed to enter findings of ultimate facts”).

The case at hand is similar to both *Alvarez* and *Avila*. In *Alvarez*, the Court found the findings did not state the specific words used by *Alvarez* to support a necessary element of the crime charged. *Alvarez*, 128 Wn.2d at 15. Here, the Court may find that the written findings do not address the ultimate fact of whether or not touching between Mr. Fuston and C.B. was for the purpose of sexual gratification. If the Court does find that this ultimate fact is missing from the juvenile court’s written findings, then this Court, as did the Court in *Alvarez*, should remand the case back to the juvenile court to consider the evidence and enter findings addressing the ultimate facts as to each element of the crime.

In *Avila*, the juvenile court did not enter findings of fact and conclusions of law regarding the ultimate facts; however, the appellate court found the record contained facts supporting the missing findings. *Avila*, 102 Wn. App. 896-97. Here, as in *Avila*, the record contains facts supporting the missing findings. The police report, the only evidence for the juvenile court to consider at trial, supports the missing finding. CP 20-31. Additionally, the juvenile court's oral findings also support the missing findings. RP at 57. If the trial court failed to enter findings of fact regarding the ultimate facts, this Court should follow *Avila* and remand the case back to the trial court to consider the evidence presented at the stipulated facts bench trial and enter findings addressing the ultimate facts.

C. Mr. Fuston's attorney's representation did not prejudice him.

Mr. Fuston's attorney provided effective assistance of counsel. To demonstrate ineffective assistance of counsel, a defendant must make two showings:

(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). “[T]he defendant must show that the deficient

performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In the case at hand, Mr. Fuston claims that his trial court attorney’s failure to request the trial court to vacate the sexual assault protection order for A.B. is ineffective assistance of counsel. The State disagrees that failure to remove the order amounted to actual prejudice for Mr. Fuston. Without actual prejudice, an ineffective assistance of counsel cannot be shown. The State concedes that the sexual assault protection order for A.B. should have terminated once the count with A.B. as the victim was dismissed by the State’s filing of the amended information. The Court should remand to the trial court to vacate the sexual assault protection order for A.B.

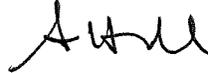
IV. CONCLUSION

The trial court’s written findings of fact are sufficient to support Mr. Fuston’s conviction for Child Molestation in the First Degree. The court’s oral and written findings support the finding that the ultimate fact of sexual gratification was shown. In the alternative, if the written findings did not satisfy JuCR 7.11, the Court should remand to the trial court to

consider the evidence and enter findings of fact on the ultimate facts as to each element of the crime.

RESPECTFULLY SUBMITTED this 10th day of November, 2015.

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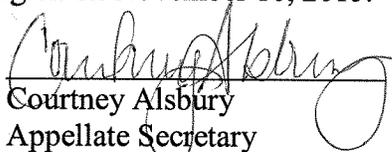
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on November 10, 2015.


Courtney Alsbury
Appellate Secretary