

NO. 70318-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NANCY TOMLIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL TRICKEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether it was within the trial court's discretion to hear from the assistant attorney general who was handling the dependency case concerning Tomlin's son because Tomlin wanted to have her son evaluated for competency and to interview him as a potential trial witness.

2. Whether sufficient evidence supports Tomlin's conviction for rape of a child in the first degree where the evidence includes the child's hearsay statements and trial testimony that Tomlin sucked his penis when he was five years old.

3. Whether Tomlin's claims regarding the trial court's failure to file findings of fact and conclusions of law should be rejected because the findings and conclusions were filed before Tomlin filed her opening brief.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Nancy Tomlin, with rape of a child in the first degree based on an incident that occurred with a neighbor's son, N., on November 24, 2010. CP 1-5. A jury trial on this charge occurred in December 2011 before the Honorable

Mariane Spearman. Judge Spearman made pretrial rulings regarding N.'s competency, the admissibility of his child hearsay statements, and the admissibility of Tomlin's statements to the police pursuant to CrR 3.5. RP (12/12/11). The trial ended in a hung jury, and a mistrial was declared. RP (12/22/11) 93-97.

The second trial took place before the Honorable Michael Trickey in March and April 2013. Tomlin waived her right to a jury trial. RP (3/26/13) 31-33. During pretrial motions, defense counsel informed the trial court that he wanted to have Tomlin's son, E., evaluated for competency and that he also wanted to interview E. as a potential defense witness.¹ CP 37-38. E. was the subject of a dependency proceeding that was initiated after Tomlin's arrest, and the State of Washington was his legal guardian; accordingly, an assistant attorney general appeared in court on E.'s behalf. RP (3/25/13) 11. It was the assistant attorney general's position that it would be harmful to E. if he were called as a witness at trial, and she objected to having E. evaluated because he had already been evaluated in the course of the dependency. RP (3/25/13) 25-31. The trial court decided to review available relevant

¹ E. had cognitive deficits, behavioral issues, and poor verbal skills. CP 51-53.

information, including material from the dependency file, before making a ruling on defense counsel's motions. RP (3/25/13) 41.

The next day, the trial court stated that it had reviewed transcripts from the first trial that were relevant to E.'s competency, as well as declarations from the dependency file, a summary of E.'s school performance, a video of the child interview specialist's attempt to interview E. before the first trial, and other materials. RP (3/26/13) 4-5. The trial court heard from both parties and from the assistant attorney general before making its ruling. RP (3/26/13) 7-19. After reviewing the materials and hearing argument, the trial court denied the defense request for an evaluation because it would be more harmful than helpful, but granted the defense's request for an interview. RP (3/26/13) 19-29. Defense counsel then interviewed E. and found that he had no memory of the events in question. RP (4/1/13) 9.

The trial court adopted Judge Spearman's prior rulings regarding child hearsay and the admissibility of Tomlin's statements under CrR 3.5. RP (3/26/13) 50-51, 70-72. Before the second trial, defense counsel challenged the admissibility of Tomlin's statements under CrR 3.6 as the fruit of an illegal entry into Tomlin's apartment. CP 28-31; RP (3/26/13) 73, 83. The trial court

denied the motion. RP (3/27/13) 2-13. Findings of fact and conclusions of law regarding these issues were filed before Tomlin filed her opening brief on appeal. CP 192-202.

At the conclusion of the trial, the trial court found Tomlin guilty of rape of a child in the first degree as charged. RP (4/17/13); CP 161-64. The trial court imposed an indeterminate sentence with a minimum of 93 months. CP 148-58. Tomlin now appeals. CP 159-60.

2. SUBSTANTIVE FACTS

Tomlin and her young son, E., lived in the same apartment complex as five-year-old N. and his mother. RP (4/4/13) 80-81. Tomlin and N.'s mother became acquainted when the boys were attending the same preschool and they would often see each other at the bus stop. RP (4/4/13) 80, 84. N.'s mother thought that she and Tomlin had a good relationship, and N. got along with E. as well. RP (4/4/13) 87-89.

The day before Thanksgiving 2010, N.'s mother was at home pre-cooking her turkey when Tomlin asked if N. could come over to play with E., and N.'s mother agreed. RP (4/4/13) 100. N. liked playing with E. because E. had "really cool toys."

RP (4/9/13) 130. At some point while N. was at Tomlin's apartment, N.'s mother thought she heard N. yelling the word "mom." RP (4/4/13) 103-04. N.'s mother acknowledged that there was no way that she could have heard N. screaming from inside Tomlin's apartment when she was inside her own apartment.

RP (4/4/13) 107. She thought perhaps it was "mother's intuition" or "God," and she admitted that she "cannot explain it." RP (4/4/13) 107. N.'s mother tried to call Tomlin, but there was no answer, so she went to Tomlin's apartment to check on N. RP (4/4/13) 104.

Tomlin let N.'s mother in and gave her a tour of her apartment. Tomlin was talking very fast and N.'s mother thought her demeanor was odd. RP (4/4/13) 104-05. N. and E. were coloring in E.'s room. N. said, "I'm okay, mom," which made his mother uneasy. RP (4/4/13) 106. After checking on N., however, N.'s mother left and went back to her apartment. RP (4/4/13) 109. A while later, Tomlin brought N. home. Tomlin told N.'s mother that she was "wrestling" with the children and they "had a lot of fun." RP (4/4/13) 111-12.

N. and his mother spent Thanksgiving at N.'s mother's ex-husband's house, and they spent the night there both Thursday and Friday. RP (4/4/13) 119-20. At some point, N.'s mother called

Tomlin and asked if Tomlin would be able to babysit N. N. did not want to go, so N.'s mother called back and cancelled. RP (4/4/13) 123. When N.'s mother tried to put N. to bed on Friday night, he was very fussy and would not go to sleep. N.'s mother thought about spanking him, but then she crawled into bed with him instead. RP (4/4/13) 124-25. After hugging N. for about 15 minutes, N. said he had something to tell her. He said that "something happened over at Nancy's." He said that Tomlin "put [his] private in her mouth and sucked it." RP (4/4/13) 126. N.'s mother asked if Tomlin's mouth was wet or dry, and N. said "wet." She asked if anything happened to his penis, and he said "it got hard." RP (4/4/13) 127. N. said he asked Tomlin to stop three times. N. said when Tomlin finally stopped, she pulled his head up to her face and told him not to tell anyone. RP (4/4/13) 128-29.

N.'s mother started to call the police, but stopped because she did not want to believe what N. had told her. RP (4/4/13) 129-30. The next morning, however, N. said exactly the same thing. At that point, N.'s mother took him home and called the police. RP (4/4/13) 130. Detective Katelyn McGinnis (who was a patrol officer at the time) responded to N.'s mother's call. N. looked at McGinnis and said, "[S]he sucked my penis, Nancy did."

RP (4/4/13) 25. McGinnis took a statement from N.'s mother, told her that a detective would be contacting her, and told her not to contact Tomlin. RP (4/4/13) 29, 31.

The assigned case detective, Annamarie Fein, arranged for N. to be interviewed by child interview specialist Carolyn Webster on December 1, 2010. RP (4/4/13) 47. N. told Webster that Tomlin had wrestled with him and then sucked on his "private." Ex. 4. He said it "felt wet" and that Tomlin's mouth made a "clicking noise." Ex. 4. He said that E. was in the room when it happened. Ex. 4. He said that Tomlin told him not to tell anyone. Ex. 4.

Two days later, Detective Fein and Officer Sanger went to Tomlin's apartment to interview her. Initially, Tomlin spoke with them outside. Fein told her that there was an allegation that N.'s pants were down, and she asked Tomlin if N. had any problems going to the bathroom. Tomlin said that N. did not have problems, and she asked why anyone would accuse her of something sexual. RP (4/10/13) 22. Tomlin eventually agreed to give a statement. RP (4/10/13) 23. Tomlin told Fein that her boyfriend was sleeping in the apartment, so Fein suggested conducting the interview at the police station. Tomlin said that they could do the interview in her apartment. RP (4/10/13) 24-25.

During the recorded interview, Tomlin said that she was spinning the boys around and throwing them on the bed, and that that was the only way she had touched N. Ex. 26. She said that N.'s pants might have fallen down at some point, but that N. pulled them back up. She denied pulling N.'s pants down. Ex. 26. Tomlin said she may have asked N. if he wore "pull-ups" or "drawers," and he said "drawers," but she denied touching N. inappropriately. Ex. 26. Tomlin blamed the allegation on N.'s mother, whom she characterized as "sick," "hateful," and "evil." Ex. 26.

After the interview was concluded, Fein and Sanger placed Tomlin under arrest. RP (4/10/13) 32. Tomlin asked what would happen to her son, and Fein suggested that Tomlin's boyfriend could care for him. Tomlin then admitted that no one else was there, and that she had wanted Fein and Sanger to think that she had a boyfriend present in her apartment. RP (4/10/13) 33. Fein then contacted CPS to arrange for care for E. RP (4/10/13) 36.

N. testified that on the day of the incident, Tomlin was spinning him and E. around in E.'s room and that it was fun. RP (4/9/13) 132-33. He said that Tomlin put him down, pulled his

pants down, and “put her mouth on [his] private area.” RP (4/9/13) 133-35. He said it made him “[k]ind of angry” because he “didn’t think she should do that.” RP (4/9/13) 136. He said it felt “[w]eird” and “[k]ind of wet,” and that he had not had that feeling before. RP (4/9/13) 137-38. N. said that Tomlin told him not to tell anyone, but he knew he should tell someone so he told his mother. RP (4/9/13) 151. He said it felt good to tell his mother because he “knew that [his] mom wouldn’t let her do it again.” RP (4/9/13) 142. N. said that his mother was “kind of upset” because “she thought Nancy was her friend.” RP (4/9/13) 142. N. said that he did not see E. after that, and that he missed playing with E. RP (4/9/13) 143.

Tomlin also testified at trial. Tomlin admitted that she had left things out and said things that were not true during her interview with Detective Fein and Officer Sanger, but she claimed that she was “under duress” at the time. RP (4/11/13) 175, 184-85. Tomlin maintained that she believed that N.’s mother had told N. to say that Tomlin sexually assaulted him. RP (4/15/13) 20.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING AN ASSISTANT ATTORNEY GENERAL TO PROVIDE RELEVANT INFORMATION ABOUT A POTENTIAL WITNESS IN THIS CASE.

Tomlin first argues that the trial court erred, and that defense counsel was ineffective, in allowing an assistant attorney general to provide information to the trial court regarding Tomlin's son, E., who was the subject of a dependency proceeding that was initiated after this case was filed. Opening Brief of Appellant, at 16-19. This claim should be rejected. The trial court acted well within its discretion to allow the assistant attorney general to provide relevant information regarding E., given that the defense wanted to have E. evaluated for competency and also wanted to interview him as a potential defense witness. Because the trial court properly exercised its discretion in this regard, Tomlin's trial counsel was not ineffective for not objecting to the assistant attorney general's input in this case.

The trial court has inherent authority and broad discretion to manage the courtroom and regulate the conduct of a trial. See State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006). Accordingly, it is within the trial court's discretion to allow a

non-party to provide relevant information or to state a position on an issue in a criminal case, so long as the trial court does not allow a non-party to intervene in a criminal case in a manner that violates the defendant's rights. State v. Savoie, 164 Wn. App. 156, 262 P.3d 535 (2011).

In Savoie, a murder case, the defense sought mental health records and Child Protective Services records regarding the young victim and his family. Savoie, 164 Wn. App. at 158-59. The Department of Social and Health Services – a non-party – “opposed unrestricted disclosure” of these sensitive materials, so the trial court conducted an *in camera* review to determine what portions of the records were relevant and should be disclosed to the defense. Id. at 159. This was entirely proper.

However, when the prosecutor's office then mistakenly released all of the records rather than the limited portion ordered by the trial court, the prosecutor asked the trial court to appoint counsel for the victim's family to represent their interests. Id. Subsequently, the family's appointed counsel took an active role in the trial, and ultimately convinced the trial court to close part of the proceedings to the public. Id. at 159-60. On appeal, the defendant's murder conviction was reversed on grounds that his

right to a public trial was violated at the behest of appointed counsel for the victim's family, and the court also held that it was error to appoint counsel for the family to intervene in the criminal trial in the first instance. Id. at 160-63.

Analogizing this case to Savoie, the assistant attorney general's role in these proceedings was more like the role of DSHS, and not like the role of counsel appointed for the victim's family. The fact that there was an ongoing dependency proceeding was certainly relevant to the trial court's consideration of the defense's request to evaluate and interview E. as a potential witness, and information related to the dependency proceeding was provided to the trial court in an appropriate manner. In addition, although the assistant attorney general objected to E.'s participation in the case as a witness, the trial court did not allow the assistant attorney general to intervene in the case in a manner that violated Tomlin's constitutional rights. To the contrary, the trial court considered all of the relevant information at its disposal (including materials from the dependency file), determined that another competency evaluation would be harmful to E. and not fruitful for the defense, but also ruled that defense counsel would be allowed to interview E. as a potential defense witness. RP (3/26/13) 4-5, 19-29.

In this case, the trial court acted within its discretion in receiving relevant information from the assistant attorney general about E. in order to be fully informed in making its rulings. Unlike the family's attorney in Savoie, the trial court did not appoint the assistant attorney general to represent E.'s interests, and the assistant attorney general did not interfere with the trial. To the contrary, the assistant attorney general already represented E.'s legal guardian (the state), and she provided helpful information to enable the trial court to make well-informed rulings. No error occurred.

For the same reasons, this Court should reject Tomlin's ineffective assistance of counsel claim based on trial counsel's failure to object to the assistant attorney general's participation in the case because that participation was entirely proper.

To prove ineffective assistance of counsel, a defendant must meet both prongs of a stringent two-part test by showing: 1) that counsel's performance was actually deficient (the performance prong); and 2) that the deficient performance resulted in actual prejudice (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's

performance is deficient only when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs only when, but for the deficient performance, there is a reasonable probability that the outcome of the trial would have been different. McFarland, 127 Wn.2d at 335.

In this case, Tomlin cannot meet either prong of the Strickland standard. First, counsel was not deficient in failing to object to the trial court exercising its discretion appropriately. Second, even if counsel had objected, the trial court almost certainly would have overruled that objection, and thus, there is no prejudice. Furthermore, defense counsel's interview of E. revealed that he had no memory of the events in question. RP (4/1/13) 9. There is no prejudice for this reason as well. Tomlin's claim fails.

Lastly, Tomlin argues that the assistant attorney general provided highly prejudicial "character evidence" against Tomlin, and that this "adversely affected [Tomlin's] credibility" at trial. Opening Brief of Appellant, at 19. But a judge is presumed to ignore inadmissible evidence when making decisions in a bench trial. State v. Read, 147 Wn.2d 238, 245-46, 53 P.3d 26 (2002). Although this presumption is rebuttable, there is no evidence in the

record that the trial court considered any information regarding E.'s dependency in rendering its verdict. Tomlin's argument is without merit, and this Court should affirm.

**2. AMPLE EVIDENCE SUPPORTS TOMLIN'S
CONVICTION FOR RAPE OF A CHILD.**

Tomlin also argues that the evidence produced at trial is insufficient to support her conviction for rape of a child in the first degree and that the trial court's findings of fact and conclusions of law to the contrary are erroneous. Opening Brief of Appellant, at 24-38. Tomlin argues that N.'s testimony and his mother's testimony are "irreconcilable" due to "[m]ajor inconsistencies which cannot be resolved and which are essential to any finding of guilt[.]" Opening Brief of Appellant, at 26. This claim should be rejected. Ample evidence supports Tomlin's conviction, and Tomlin's arguments to the contrary are essentially challenges to the trial court's determinations as to the weight and credibility of the evidence, which cannot be reviewed. Accordingly, this Court should affirm.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any

rational trier of fact could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992).

An appellate court considering a sufficiency challenge must defer to the fact finder's determination as to the weight and credibility of the evidence and the fact finder's resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In addition, circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In sum, under these deferential standards, any question as to the

meaning of the evidence should be resolved in favor of the conviction whenever such an interpretation is reasonable.

In this case, within days of the crime, N. reported to three people – his mother, Det. McGinnis, and Carolyn Webster – that Tomlin had sucked his penis. RP (4/4/13) 25, 126-28; Ex. 4. N. told his mother and Webster that Tomlin's mouth was "wet," he told Webster that Tomlin's mouth made a "clicking" sound, and he told his mother that his penis got hard when Tomlin sucked it. RP (4/4/13) 127; Ex. 4. N. told his mother and Webster that Tomlin told him not to tell anyone. RP (4/4/13) 128-29; Ex. 4. N. testified at trial that Tomlin sucked his penis and that it felt "weird." RP (4/9/13) 136-37. N. testified that Tomlin told him not to tell anyone, but he knew that he should tell someone so he told his mother. RP (4/9/13) 141. N. explained that it felt good to tell his mother what Tomlin had done because he "knew that [his] mom wouldn't let her do it again." RP (4/9/13) 142.

Under the well-established standards for reviewing a challenge to the sufficiency of the evidence on appeal, these child hearsay statements and testimony by N. about what occurred are more than sufficient to sustain Tomlin's conviction. N. consistently stated and testified that Tomlin put her mouth on his penis when

he was five years old, and the trial court found N.'s hearsay statements and testimony to be credible. CP 168 (findings of fact 17 and 18). These credibility findings cannot be reviewed. Tomlin's claim should be rejected on this basis alone.

Nonetheless, Tomlin argues that the trial court's findings of fact 9 through 12 and 17 through 21 are not supported by substantial evidence, which leads to the conclusion that the evidence is insufficient to sustain the conviction. Opening Brief of Appellant, at 28-37. These arguments are without merit. The challenged findings are either supported by substantial evidence, or they are determinations as to the weight and credibility of the evidence, which cannot be reviewed on appeal.

A trial court's findings of fact, when challenged, should be sustained on appeal when they are supported by substantial evidence. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 599 (2005). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth." Id. In turn, the reviewing court determines whether the findings of fact support the conclusions of law, which are reviewed *de novo*. Id. Unchallenged findings of fact are verities on appeal. Id. Credibility determinations cannot be reviewed. Camarillo, 115 Wn.2d at 71.

Finding of fact 9 states that there are inconsistencies in the evidence, such as whether N. knew the word “penis” when he was five and what position Tomlin was in when the crime occurred, but that “these inconsistencies must be evaluated in the context of [N.] and his mother.” CP 162 (finding of fact 9). The evidence shows that there was inconsistent evidence on these points; the trial court then made the unremarkable observation that these inconsistencies must be evaluated in context. To the extent that this is a finding of fact at all, it is supported by the evidence and by common sense.

Finding of fact 10 concerns the trial court’s observation that neither N. nor his mother demonstrated any particular antipathy toward Tomlin during their testimony. CP 162 (finding of fact 10). This finding is based largely on the trial court’s observation of the witnesses’ demeanor and the trial court’s interpretation of the witnesses’ testimony. As such, it is largely unreviewable. To the extent that it is based on the evidence, such as N.’s mother’s testimony regarding her initial disbelief of N.’s disclosure and her testimony that she thought she had a good relationship with Tomlin, it is supported by the evidence. See RP (4/4/13) 87, 128-30.

Finding of fact 11 states that the trial court did not find it “particularly significant” that N. used the word “penis” when he told

Det. McGinnis what happened and he used the word “private” at other times. CP 162 (finding of fact 11). This is a finding regarding the weight (or lack thereof) that the trial court ascribed to this aspect of the evidence, and as such, it cannot be reviewed.

Finding of fact 12 states that although there were inconsistencies in N.’s and his mother’s testimony, their testimony was consistent as to “the essential facts[.]” CP 162 (finding of fact 12). The evidence supports this finding. Although there were inconsistencies in their testimony (which is certainly the case in any trial), N. and his mother both testified that N. went to Tomlin’s apartment the day before Thanksgiving to play with E., that N. told his mother that Tomlin had sucked his penis when they were in E.’s room, and that N.’s mother later called the police. RP (4/4/13) 100-01, 126, 130; RP (4/9/13) 131-35, 141-43.

In finding of fact 17, the trial court found that N. appeared stressed during his interview with Carolyn Webster, and that the court believed what N. told Webster. CP 163 (finding of fact 17). The finding regarding N.’s demeanor during the interview is supported by the evidence. Ex. 4. The remainder of this finding is a credibility determination, which cannot be reviewed. Similarly, in finding of fact 18, the trial court found N. to be “very

straightforward,” “articulate,” and “credible” when he testified.

CP 163 (finding of fact 18). This is also credibility determination, which cannot be reviewed.

Finding of fact 19 concerns the trial court’s finding that N.’s mother “has not had an easy life” and “is disabled,” and that she was “credible in her testimony[.]” CP 163 (finding of fact 19). It was undisputed that N.’s mother received Social Security disability payments due to injuries and post-traumatic stress from domestic violence. RP (4/4/13) 62. The remainder of finding of fact 19 is a credibility determination that cannot be reviewed. Similarly, finding of fact 20 concerns the trial court’s determination that Tomlin was not a credible witness. CP 163 (finding of fact 20). This finding also cannot be reviewed.

Finding of fact 21 is that Tomlin had sexual intercourse with N. by sucking his penis on November 24, 2010. CP 163 (finding of fact 21). As set forth above, this finding is amply supported by N.’s child hearsay statements and by his trial testimony, both of which the trial court found to be credible.

Lastly, Tomlin challenges the trial court’s conclusions of law finding her guilty of first-degree rape of a child. Opening Brief of Appellant, at 37-38. But, because the trial court’s findings of fact

are supported by the evidence, Tomlin's challenge to the trial courts conclusions of law is without merit.

In sum, the evidence produced at trial is plainly sufficient to support Tomlin's conviction; indeed, N.'s hearsay statements and trial testimony are sufficient in themselves in this regard. Tomlin's claim is largely based upon her disagreement with the trial court's determinations as to the weight of the evidence and the credibility of the witnesses; such determinations cannot be reviewed on appeal. This Court should affirm.

3. FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE TRIAL COURT'S RULINGS UNDER CrR 3.5 AND CrR 3.6 WERE FILED BEFORE THE APPELLANT'S OPENING BRIEF WAS FILED.

Tomlin also argues that her ability to raise issues on appeal has been prejudiced because the trial court did not enter findings of fact and conclusions of law pursuant to CrR 3.5 and CrR 3.6. Opening Brief of Appellant, at 20-24. This is incorrect. The findings of fact and conclusions of law under CrR 3.5 were filed on October 23, 2013. CP 192-95. The findings of fact and conclusions of law under CrR 3.6 were filed on December 19, 2013.

CP 196-99. The appellant's opening brief was filed on or about March 3, 2014.

The purpose of written findings of fact and conclusions of law is "to ensure efficient and accurate appellate review." State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). Findings and conclusions "may be 'submitted and entered even while an appeal is pending' if the defendant is not prejudiced by the belated entry of findings." Id. (quoting State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125, rev. denied, 102 Wn.2d 1024 (1984)). Even when the findings are not filed until after the appellant's opening brief, no error occurs if the appellant cannot demonstrate prejudice and if the findings have not been tailored to meet the issues raised on appeal. State v. Pray, 96 Wn. App. 25, 30-31, 980 P.2d 240, rev. denied, 139 Wn.2d 1010 (1999) (citing Cannon, 130 Wn.2d at 329-30). In this case, the findings and conclusions for the CrR 3.5 and CrR 3.6 rulings were filed before the appellant's opening brief was filed. Tomlin's argument fails.

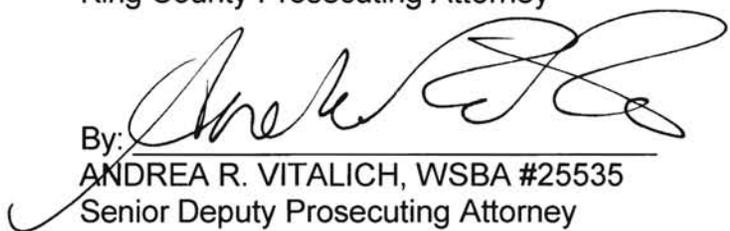
D. CONCLUSION

For the reasons stated above, this Court should affirm Tomlin's conviction for rape of a child in the first degree.

DATED this 13th day of May, 2014.

Respectfully submitted,

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King County Prosecuting Attorney

By: 

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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 Barbara Corey, the attorney for the appellant, at 902 S. 10th Street, Tacoma, WA 98405, containing a copy of the Brief of Respondent, in STATE V. NANCY TOMLIN, Cause No. 70318-8-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.

W Brame
Name
Done in Seattle, Washington

5/13/14
Date

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2014 MAY 13 PM 2:52