IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DIG,[†] Appellant.	No. 38786-7-II UNPUBLISHED OPINION

Hunt, J. — DIG[†] appeals the juvenile court's adjudications that he committed indecent liberties and fourth degree assault with sexual motivation. He argues that we should reverse because (1) the State failed to present written findings of fact and conclusions of law until after he filed his Brief of Appellant, (2) the State committed prosecutorial misconduct by questioning him about his statements to a polygraph examiner and about his statements during a psychosexual evaluation, and (3) the evidence was insufficient. In his Statement of Additional Grounds (SAG),[1] DIG also argues ineffective assistance of counsel and raises several other issues. We affirm.

[†] It is appropriate to provide some confidentiality in this case. Accordingly, it is hereby ordered that initials will be used in the case caption and in the body of the opinion to identify the parties and other juveniles involved.

[1] RAP 10.10.

FACTS

I. Crimes

A. Fourth Degree Assault with Sexual Motivation

On an April 25, 2008 school field trip to a movie theater in Lacey, 13-year-old[2] middle school student DIG was sitting next to female classmate CK. He moved his hand under her shirt and then down the back of her pants. CK told DIG to stop, which he did then moved to a different seat. Ten minutes later, however, DIG returned and again began touching CK again, putting his hand up her shirt and rubbing her back and touching her hip area inside her pants. CK's friend tried to intervene by kicking DIG in the leg. CK again told him to stop; this time he did not. Instead, he grabbed her wrist and moved her hand toward his crotch area; she then pulled both her hands away from him, "so he wouldn't grab them." I Verbatim Report of Proceedings (VRP) at 84.

B. Indecent Liberties

On May 9, 2008, DIG[3] was again at a movie theater, this time with friends, including NR.[4] When NR left the theater to receive a phone call, DIG followed her out. After she finished the phone call, DIG asker her for a hug; she complied. But he hugged her too tightly and would not let her go. She asked, "What are you doing?," Clerk's Papers (CP) at 62, DIG responded, "I don't know," CP at 62, and proceeded to place his hands on her bottom, first outside and then

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[2] DIG was born on May 6, 1994.

[3] By this point, DIG had just turned 14. *See* n.2.

[4] The trial court incorrectly refers to NR as "K.R." in the findings of fact and conclusions of law. CP at 62.

inside her clothing. She stepped backwards. As he pushed her up against a nearby wall, she told him to stop, but he did not. With NR's back against the wall, DIG moved his hand down the front of her pants, inside her underwear, moving his fingers in a stroking fashion for about ten seconds. When she told him to stop, he took his hands out of her pants, but immediately moved them up under her shirt and began to kiss her neck and to touch her breasts. She tried to push him away, but he put one hand down the front of her pants and ignored her demands to stop. When he finally stopped, he said "not to tell anyone about this," I VRP at 28, and returned to the movie theater.

II. Procedure

The State charged DIG with fourth degree assault with sexual motivation (RCW 9A.36.041, RCW 9.94A.835) and indecent liberties by forcible compulsion (RCW 9A.44.100(1)(a)).[5] Before trial, DIG submitted to a psychosexual evaluation by a Dr. Whitehill. As part of the evaluation, DIG took several polygraph examinations, administered by a polygraph examiner.

At trial, CK testified that DIG touched her on her bottom, on her back underneath her shift, and on her hip inside her pants, all after she had asked him to stop. Sometime later, CK received "dirty looks" from DIG's sister. I VRP at 86. DIG did not object.

NR testified that (1) DIG backed her up against a wall and, after she told him to stop, put his hand down the front of her pants; and (2) after she again told him to stop, he moved his hands

[5] The State also charged DIG with rape in the second degree (RCW 9A.44.050(1)(a)), but the trial court acquitted him of this charge, finding insufficient evidence of penetration.

up her shirt until she pushed him away and finally he stopped. Later she felt threatened at school by DIG's sister. DIG did not object.

DIG intended to call Dr. Whitehill as a defense witness to testify about his psychosexual evaluation of DIG, DIG's dangerousness, and DIG's performance during the evaluation as "consistent in his story."[6] II VRP at 233. The State objected, asserting that DIG had not complied with discovery rules and that the testimony was irrelevant. Sustaining the State's objection on grounds of "relevance," the trial court commented:

> Counsel, I know of no authority that allows the use of a psychological evaluation on the ground for the purpose of establishing credibility or upholding credibility or on the ultimate fact of whether something did or did not happen. If you know of some authority, I would certainly like to see it, but this is an extremely novel approach as far as I know.

II VRP at 233. Thereafter, neither party attempted to call Dr. Whitehill to testify; nor did either party offer his report into evidence.

DIG testified in his own defense that any physical contact was consensual when it began and that when the victims asked him to stop, he stopped.[7] The State cross-examined him about a

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[6] DIG made the following offer of proof:

> Well, your Honor, the relevance is that, based on the report and the fact that [DIG] did perform his examination, in his opinion, he would show that [DIG] is consistent in his story, and in his opinion, [DIG] is consistent in his story.

II VRP at 233.

[7] DIG testified that he and NR shared a mutual hug outside the movie theater. As they hugged, NR's tight-style shirt lifted up. Because his hands "were a little low, [he] placed [them] on her waistline region of her body." II VRP at 243. She then turned to walk away, and "[DIG's] hands were caught inside of her shirt, her hoody, . . . [and since] she was walking, [ ] it made it difficult for [DIG] to maneuver and get [his] hands off of her." II VRP at 244. Then NR stopped, faced him, and said, "What are you doing?" II VRP at 244. DIG did not understand why she said that. DIG denied having put his hands down NR's pants or leaning up against her when she was against the wall.

different version of the events that he had related to Dr. Whitehill during the psychosexual evaluation. Defense counsel did not object. The State also cross-examined DIG about statements he had made to the polygraph examiner. Defense counsel objected to this latter line of questioning on grounds that polygraphs are not admissible. The trial court overruled the objection, ruling the questioning permissible because it concerned DIG's statement, a statement of a party opponent admissible under ER 801(d)(2)(i).

Explaining that its verdict depended on whom it found credible among DIG, CK, and NR, the trial court found both victims' testimonies credible and convicted DIG of fourth degree assault with sexual motivation and indecent liberties. Following the bench trial and DIG's sentencing, the State neglected to submit written findings of fact and conclusions of law, which, therefore, the trial court did not enter, until more than two months after DIG filed his appellate brief.

DIG appeals.

DIG testified that he and CK were "laughing and joking" together in the movie; he sat next to her and "had [his] hand on her mid lower back." II VRP at 257. CK was "being kind of giggly and said, '[w]hat are you doing?'" II VRP at 257. He then took his hand off, left, came back and again put his hand on her lower back. She said, "Stop. What are you doing?" II VRP at 260. DIG then took his hand away. DIG denied touching CK's bra, trying to go down the back of her pants, or trying to unhook her bra.

ANALYSIS

I. Late Findings and Conclusions

DIG argues that the late filing of written findings of fact and conclusions of law[8] requires reversal. We disagree.

As the Supreme Court explained in *State v. Head,* reversal is an appropriate remedy only where a defendant can show "actual prejudice," such as a "strong indication that findings ultimately entered have been 'tailored' to meet issues raised on appeal." 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998). Such is not the case here. We can discern no evidence of such tailoring from a review of the trial court's findings and conclusions. Nor does DIG in his Reply Brief, filed after the trial court entered its findings and conclusions, demonstrate prejudice from the late filing through tailoring or otherwise. We hold, therefore, that the late filing of findings of fact and conclusions of law does not warrant reversal here.

II. Prosecutorial Misconduct

DIG next argues that the State committed prosecutorial misconduct when it cross-examined him about allegedly inconsistent statements he had made to Dr. Whitehill and statements he had made to Richard Perrigran, the polygraph examiner. These arguments fail.

We review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). "A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." *State v. Perrett*, 86 Wn. App. 312,

[8] JuCR 7.11(d) requires the trial court to "enter written findings of fact and conclusions of law in a case that is appealed." This rule further requires the State to submit proposed findings and conclusions within 21 days of receiving the juvenile's notice of appeal.

319, 936 P.2d 426 (1997) (*quoting Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 168, 876 P.2d 435 (1994)). We find no abuse of discretion here.

First, DIG's failure to object to the State's cross examination precludes his raising it on appeal unless he shows that the questioning was "'so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990) (quoting *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988)). Although DIG alleges flagrant and ill-intentioned misconduct, he fails to support this conclusory assertion, as RAP 10.3(a)(6) requires. Thus, we do not further consider this argument.[9]

Second, as the trial court correctly noted, DIG's statements to defense polygraph examiner Perrigran were admissible as statements by a party-opponent under ER 801(d).[10] Furthermore, the State did not offer any polygraph test results. The State committed no misconduct by eliciting these statements and the trial court did not err in overruling defense counsel's objections.

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[9] Even if DIG had preserved this alleged error for our review, his argument would fail. *See* discussion of defense counsel's competence in failing to object, *infra,* in connection with DIG's ineffective assistance of counsel argument.

[10] ER 801(d)(2), Admission by Party-Opponent, provides that a statement is not hearsay where:

> The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

III. Sufficiency of the Evidence

DIG also argues the State elicited insufficient evidence to support his adjudications. This argument also fails.

The test for determining the sufficiency of the evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). We draw all reasonable inferences from the evidence in favor of the State and interpret it most strongly against the defendant. *Gentry*, 125 Wn.2d at 597.

Viewed in the light most favorable to the State, the victims' testimonies alone, which the trial court found credible, support the trial court's adjudications that DIG committed the charged crimes. We hold, therefore, that sufficient evidence supports the adjudications.

IV. Effective Assistance of Counsel

In his appellate attorney's brief and in his SAG, DIG raises a number of instances that he claims constitute ineffective assistance of counsel. DIG's argument fails.[11]

First, DIG argues generally that his trial counsel "fail[ed] to properly prepare and argue his case." Br. of Appellant at 15. But he presents no argument in support of this assertion and provides no citations to relevant parts of the record as RAP 10.3(a)(6) requires. Therefore, we do not further consider this argument.

Next, DIG argues that trial counsel failed to object to the State's asking NR and CK about

[11] To prove ineffective assistance of counsel, DIG must show that (1) counsel's performance was deficient, and (2) that this deficient performance prejudiced the outcome of his case. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

how they felt at school following the charged incidents. The victims' answers to these questions was arguably favorable to DIG to the extent he could argue that it tended to show the victims' motive to fabricate or to embellish their accounts of the alleged sexual assaults. "Counsel's decisions regarding whether and when to object fall firmly within the category of strategic or tactical decisions," and we presume that a failure to object constituted a legitimate strategy or tactic. *State v. Johnston*, 143 Wn. App. 1, 19, 21, 177 P.3d 1127 (2007). DIG fails to meet his burden of "demonstrat[ing] an absence of legitimate strategy or tactics in failing to object." *Johnston*, 143 Wn. App at 21.

DIG also argues that defense counsel failed to object to the State's cross examination of him about his statements to Dr. Whitehill, which DIG asserts the trial court had previously ruled inadmissible. Contrary to DIG's contention, the State did not attempt to elicit anything from him that the trial court had ruled inadmissible. And although the State did cross-examine DIG about his inconsistent statements to Dr. Whitehill,[12] the trial court had not ruled these statements inadmissible.[13] Thus, DIG fails to establish the deficient performance prong of the ineffective assistance of counsel test.

V. Remaining SAG Issues

In his SAG, DIG raises several other grounds that concern matters outside the record,[14]

[12] "[State]: And then you get interviewed by Dr. Whitehill, and you gave him a different version of events; is that right?" II VRP at 271. DIG denied that he had given Dr. Whitehill a different version.

[13] Rather, the trial court had ruled inadmissible Dr. Whitehill's report and had precluded him from testifying.

[14] SAG 1-3.

which we cannot address on direct appeal.[15] *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10 (1991). Accordingly, these issues do not provide grounds for reversal.

[15] A personal restraint petition under RAP 16.3 is the proper procedure for raising issues dependent on matters outside the record.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Penoyar, C.J.

Van Deren, J.