IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAVONTE MARCHE COLLETT and DEZMOND DARBY-CHACON, Appellants.	No. 39515-1-II (consolidated with) No. 39523-1-II UNPUBLISHED OPINION

Van Deren, J. — A juvenile court adjudicated Javonte Collett and Dezmond Darby-Chacon guilty of indecent liberties and second degree rape of "Jane."[1] Collett argues that the juvenile court abused its discretion when it admitted statements from Jane to her friend "Sarah"[2] under the excited utterance exception to ER 802. Darby-Chacon argues that (1) the State's late submission of findings of fact and conclusions of law allowed it to tailor the findings and conclusions in response to his arguments on appeal, (2) sufficient evidence does not support the finding that he used forcible compulsion when he digitally penetrated Jane, and (3) sufficient evidence does not support the finding that he and Jane were not married. We affirm.

[1] We refer to the victim by a fictitious name to protect her anonymity.

[2] We refer to the juvenile witness by a fictitious name to protect her anonymity.

FACTS

At 10:00 pm on November 13, 2008, Jane sneaked out of her house through her bedroom window to watch movies with Darby-Chacon, Darby-Chacon's older sister,[3] and Collett at Collett's apartment.[4] She took along a condom because she felt "that something wasn't right" and "if something did happen, you know, it would be safe." Report of Proceedings (RP) at 20. When she arrived at Collett's apartment, Darby-Chacon's sister was not there. Jane considered leaving but realized that she needed help to sneak back into her bedroom. The three watched a movie in Collett's room while sitting on his mattress.

Collett tried to kiss and touch Jane, which she discouraged. Collett also encouraged her to perform oral sex on them, which she declined.[5] Darby-Chacon then dropped his pants,[6] Collett put pornography on the television, and Darby-Chacon began to masturbate. Jane testified that Collett took her wrist and used her hand to stimulate Darby-Chacon's genitals, which she unsuccessfully resisted. Then Collett took her other wrist and forced her to stimulate his genitals at the same time. Jane tried to remove her hands but could not overcome Collett's resistance.

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[3] Jane knew Darby-Chacon through his sister, and testified that she felt as though Darby-Chacon was like a brother to her. Darby-Chacon denied this and testified that he spent almost no time with her. Jane's mother testified that Darby-Chacon spent time at their home a number of times and that she knew Darby-Chacon better than she knew his sister. Jane's neighbor, the mother of her friend, testified that she had seen Darby-Chacon at Jane's home numerous times.

[4] Jane met Collett through Darby-Chacon and another mutual friend. Collett was living alone in the largely unfurnished apartment, while his mother gradually moved their belongings into the apartment.

[5] Jane testified that she had a boyfriend and did not intend to have any sexual contact with Darby-Chacon or Collett. She also testified that Darby-Chacon was dating her best friend.

[6] At some point Collett also removed his pants.

Next, Darby-Chacon and Collett removed Jane's clothes,[7] while she verbally protested and resisted. Then, Collett and Darby-Chacon took turns restraining her and committing forceful sex acts against her, including digital penetration and masturbation by Darby-Chacon and penile penetration by Collett.[8] Later, the boys took Jane home and helped her sneak back into her bedroom around 1:00 am.

Jane testified that, once home, she felt "[d]isgusted" by what had happened. RP at 47. In the morning she took a shower and, when asked, told her 10 year old cousin that she had only watched movies the night before.[9] At the bus stop, and on the bus to school, she spoke to Darby-Chacon's sister and realized that his sister had not known anything about a plan to watch a movie on the previous night.

At school Jane felt as though she "wanted to die" and she told her best friend Sarah what had happened. During first period, Jane's teacher sent her out of the classroom because she was crying. During second period, Jane sat next to Sarah; she told Sarah more about what happened; she cried more; and the teacher gave Jane a note telling her "to either go to the bathroom or go to the counselor's office." RP at 51. At Sarah's prompting, during lunch Jane told a teacher what had happened the night before; the teacher had Jane tell a counselor and the counselor contacted police. Jane testified that, when she spoke to Lacey Police Detective Steve Brooks, she "could barely talk because [she] was just crying. [She] was just hurt, and [she] just felt horrible." RP at 53. The State charged Darby-Chacon with second degree rape and two counts of indecent

[7] Darby-Chacon apparently found the condom in Jane's pocket and gave it to Collett to use.

[8] When Darby-Chacon straddled Jane, she gave up further protestation and resistance.

[9] Jane's cousin did not notice anything different about her demeanor that morning.

liberties. It charged Collett with indecent liberties and two counts of second degree rape.

At trial, Sarah testified that she saw Jane sitting "against the cafeteria wall" and she looked "completely upset and [was] bawling her eyes out." RP at 87. According to Sarah, Jane "was crying when she was trying to explain everything to [Sarah]. She had to stop a couple of times she was crying so hard." RP at 88. During second period, Jane "was a little bit more under control, but when she started talking about it again telling me the rest of the story, she broke down again." RP at 88. Sarah then testified about what Jane had told her.[10] Sarah corroborated most of Jane's testimony, but Sarah (1) omitted any mention of digital penetration and (2) stated that Darby-Chacon "raped" Jane while Collett held her down. RP at 96-97.

Brooks testified that the police obtained a search warrant for Collett's apartment and that it looked as Jane had described it. During the search, Brooks found specific objects she had mentioned to him.

In an interview with Lacey Police Officer David Miller, Darby-Chacon told Miller that he had asked Jane whether she would have sex with them and that, after she said no, "they continued to have sex with her." RP at 120. Darby-Chacon acknowledged to Miller that Jane told them that she did not want any of the sexual acts to occur and that they used force to accomplish them. In an unrecorded conversation, Collett told Miller that Jane did not want to have sex but, in a

[10] The State moved to introduce this evidence through the excited utterance exception to the hearsay rule, arguing that the statement was "close enough in time to the event, considering it occurred right before [Jane] went to bed; she got up in the morning, went to school, and . . . her emotional state was such that she was still under the influence of the emotion of the event." RP at 88-89. Darby-Chacon objected, arguing that "[t]his is something that [Jane] is talking about having happened after several hours have passed while she is in [Collet]te's apartment after she returns to her house at 1:00 a.m., after she goes to sleep and sleeps several hours, and she gets to school around perhaps 8:00 or 9:00 a.m." RP at 89. The juvenile court allowed the evidence in under ER 803(a)(2).

recorded conversation, Collett told Miller that "she just said no to the threesome, so [Collett] was not sure if she wanted to have sex with him." RP at 129.

According to Collett, Jane volunteered that she had a condom when Collett asked Darby-Chacon if he had one. He claimed that he did not physically cause Jane to stimulate them. He also explained that when he asked Jane "if either of us would have sex, and she said, 'If you're lucky.'" RP at 153. He testified that Jane first declined to engage in a threesome but that she eventually consented: "At first she was saying no. Then she said it was okay, and then she did it." RP at 154. He also claimed that she willingly allowed him to have vaginal intercourse with her,[11] and that Darby-Chacon only straddled her torso after intercourse had begun. Darby-Chacon's testimony was substantially similar to Collett's testimony.[12] Before closing arguments, Darby-Chacon and Collett unsuccessfully moved to dismiss the indecent liberties charges because the State failed to present evidence that Darby-Chacon and Collett were not married to Jane.

The juvenile court adjudicated Collett guilty of the indecent liberties charge and the two second degree rape charges. It adjudicated Darby-Chacon guilty of second degree rape and the

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[11] Collett acknowledged that his testimony conflicted with statements he made to Miller:

> [THE STATE:] So back on the date that you made this taped statement, at least twice you indicated that you had to spread her legs apart because she didn't want to have sex, right?
> [COLLETT:] Yes.
> [THE STATE:] But now you have had time to think about it, you think maybe she did?
> [COLLETT:] Yes.

RP at 187. Collett testified that Miller prompted his answer.

[12] Darby-Chacon testified that at one point he left the room and, when he returned, found Jane stimulating Collett's genitals, at which point he removed his pants. He also testified that Jane held her breasts in place while he straddled her and masturbated against them. According to Darby-Chacon, Jane did not tell him to stop when he digitally penetrated her.

indecent liberties charge based on Darby-Chacon using Jane's breasts to masturbate. The court dismissed Darby-Chacon's other indecent liberties count because the State did not prove beyond a reasonable doubt that Darby-Chacon forcibly compelled Jane to stimulate him.

Darby-Chacon and Collett appeal.[13]

ANALYSIS

I. Excited Utterance

Collett argues that the juvenile court abused its discretion when it admitted hearsay statements Jane made to Sarah because Jane made those statements after having time to reflect. Collett also argues that this admission was not harmless because the testimony affected the juvenile court's credibility determination in a close case.

We review a trial court's determination of whether a statement falls under the excited utterance exception for abuse of discretion. *State v. Thomas*, 150 Wn.2d 821, 854, 83 P.3d 970 (2004), *abrogated in part on other grounds*, *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Thus, we will not disturb the trial court's ruling unless "no reasonable judge would have made the same ruling." *Thomas*, 150 Wn.2d at 854.

Hearsay statements are admissible under the excited utterance exception if they are (1) related "to a startling event or condition" and (2) "made while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2); *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). The declarant must make the statement while still "under the influence of external physical shock" and without "time to calm down enough to make a

[13] Although the juvenile court orally ruled on May 6, 2009, it did not enter findings and conclusions until November 23, 2009, almost two weeks after Darby-Chacon filed his opening brief in this appeal.

calculated statement based on self-interest." *Hardy*, 133 Wn.2d at 714. The declarant must make the statement while so "'under the influence of the event . . . that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (second alteration in original) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)), *abrogated in part on other grounds*, *Crawford*, 541 U.S. 36. Courts generally consider (1) the amount of time between the event and when the declarant makes the statement and (2) the declarant's observable level of emotional stress when making the statement. *See, e.g.*, *Strauss*, 119 Wn.2d 416-17. "The passage of time alone, however, is not dispositive." *Strauss*, 119 Wn.2d at 417.

In *Strauss*, our Supreme Court held that a rape victim was still under the influence of the incident when she made the statement even though more than three hours may have passed. 119 Wn.2d at 416-17. There, the victim appeared to be in a state of shock; the officer described the victim as "very distraught, very red in the face and crying."[14] *Strauss*, 119 Wn.2d at 416. Similarly, a statement made in a record that indicated a range of six to seven hours after an event can still be an excited utterance where the declarant is still under the stress of that event. *State v. Thomas*, 46 Wn. App. 280, 282, 284-85, 730 P.2d 117 (1986), *aff'd*, 110 Wn.2d 859, 757 P.2d 512 (1988); *State v. Flett*, 40 Wn. App. 277, 278-79, 287, 699 P.2d 774 (1985).

In *Flett*, the trial court properly admitted the victim's statement as an excited utterance when she made the statement after going to work following the assault on her and around six

[14] Similarly, a hearsay statement was admissible under the excited utterance exception after 45 minutes passed when the victim was "'whimpering, like crying almost,'" "'very emotional, very distraught, clearly upset and in a lot of pain.'" *State v. Woods*, 143 Wn.2d 561, 599, 23 P.3d 1046 (2001) (quoting *Woods* Report of Proceedings at 2899).

hours passed before she made the statement. 40 Wn. App. at 278-79, 287. In both *Strauss* and *Flett*, the record reflected the continuing stress experienced and exhibited by the victims. And in *Thomas*, we held that the trial court did not abuse its discretion when it admitted hearsay statements under the excited utterance exception where the declarant slept between the time of the event and a telephone conversation with her mother. 46 Wn. App at 285.

On the other hand, in *State v. Dixon*, 37 Wn. App. 867, 869-70, 873-74, 684 P.2d 725 (1984), a victim's four page written statement was held to be erroneously admitted under the excited utterance exception when the victim had been calmed by the police over a period of two hours as she wrote the statement. Even though the declarant was described as "'upset'" when she prepared the detailed, complete written description of the event, Division One of our court held that there was "no basis for finding a guaranty of trustworthiness, which is the ultimate basic ingredient which must be present in order to qualify a statement as an excited utterance" and that there was no indication that the declarant's "ability to reason, reflect, and recall pertinent details was in any way impeded." *Dixon*, 37 Wn. App. at 874.

Here, it is unclear how much time passed between the events at Collett's apartment and the time Jane talked to Sarah. The record reflects that Jane arrived home at 1:00 am. The record also reflects that Jane slept, woke up, showered, and rode the bus to school. Jane spoke to Sarah before first period, during second period, and later in the school cafeteria. Certainly, some number of hours elapsed in between the incident and when Jane spoke to Sarah but that Jane spent several hours sleeping does not necessarily cut off the influence of the event and make her statements unreliable.

Unlike the victim in *Dixon*, Jane was more than merely upset. Jane testified that she felt as

though she "wanted to die," she "was crying all day," she "kept getting sent out by the teachers because [she] was crying," she "couldn't stop crying," and her "teacher came over and slipped [her] a note telling [her] to either go to the bathroom or go to the counselor's office" as a result of her upset. RP at 49-51. According to Sarah, she found Jane in the cafeteria and Jane "wasn't talking to anybody, and she looked upset"; Sarah further described Jane as "completely upset and bawling her eyes out." RP at 87. As Jane told Sarah about the events that occurred the night before, Jane "was crying when she was trying to explain everything to me. She had to stop a couple of times she was crying so hard." RP at 88.

Although Jane did not tell her 10 year old cousin or anyone on the school bus about the incident and did not cry on the bus ride, the evidence supports the juvenile court's determination that Jane remained under the event's influence when she spoke to Sarah. We hold that the trial court did not abuse its discretion in admitting Jane's statements to Sarah.[15]

II. Late Findings of Fact

Darby-Chacon initially argued that we should reverse and dismiss his convictions because the State failed to file written findings of fact and conclusions of law. After the State submitted late findings and conclusions, Darby-Chacon argued that the State tailored them to address issues raised in his briefing, specifically to counter his arguments that sufficient evidence did not support his convictions. Darby-Chacon contends that the State tailored the findings and conclusions because (1) they do not refer to his testimony negating the forcible compulsion element and (2)

[15] Even if we were to find an abuse of discretion, any error was harmless. Jane testified and described facts consistent with Collett raping her and taking indecent liberties. Darby-Chacon's statements to Miller supported Jane's trial testimony. The juvenile court also noted the consistency of the statements Jane made to her teacher and to the police. Thus, other persuasive evidence supported the juvenile court's findings.

they compensate for the State's failure to present sufficient evidence that he and Jane were not married.

Whether to reverse or dismiss a conviction when a trial court fails to enter timely, written findings of fact and conclusions of law is a legal issue we decide for the first time on appeal.[16] *See State v. Portomene*, 79 Wn. App. 863, 864-65, 905 P.2d 1234 (1995); *State v. Nelson*, 74 Wn. App. 380, 393, 874 P.2d 170 (1994); *see, e.g.*, *State v. Brockob*, 159 Wn.2d 311, 343-44, 150 P.3d 59 (2006). Various rules require the trial court to enter findings and conclusions in order "to have a record made," which enables us "to conduct appellate review." *State v. Hoffman*, 116 Wn.2d 51, 95, 804 P.2d 577 (1991); *see, e.g.*, CR 52(a); CrR 3.6(b); CrR 6.1(d); JuCr 7.11(d); *see also Bard v. Kleeb*, 1 Wash. 370, 371, 375-76, 25 P. 467, 27 P. 273 (1890). Thus, on appeal we consider whether there is a sufficient record for review. *Nelson*, 74 Wn. App. at 393. Although we may reverse if the trial court does not enter findings and conclusions at all,[17] "failure to enter written findings and conclusions is a clerical error that may be corrected . . . after an appeal is filed." *State v. Pruitt*, 145 Wn. App. 784, 794, 187 P.3d 326 (2008); *see State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984).

Untimely findings and conclusions may require reversal where the delay[18] prejudices the

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[16] Our review does not "rest on constitutional or jurisdictional grounds" but arises, instead, from our "inherent power to assure the orderly and efficient exercise" of our jurisdiction. *State v. Cowgill*, 67 Wn. App. 239, 240-41, 834 P.2d 677 (1992).

[17] Indeed, we "are not nearly as reluctant to reverse a disposition when there has been no formal entry of findings and conclusions before or during the appellate process." *State v. Taylor*, 69 Wn. App. 474, 477, 849 P.2d 692 (1993).

[18] Too extensive a delay may also raise concerns under Washington's Constitution. *See State v. Smith*, 68 Wn. App. 201, 209 & n.17, 842 P.2d 494 (1992); *see also* Wash. Const. art. I, §§ 10, 22.

defendant or the State tailors the findings to meet the issues raised in the appellant's brief. *See State v. Lopez*, 105 Wn. App. 688, 693, 20 P.3d 978 (2001); *State v. Harris*, 66 Wn. App. 636, 640-41, 833 P.2d 402 (1992). We do not infer prejudice from the delayed entry of findings and conclusions. *State v. Head*, 136 Wn.2d 619, 625, 964 P.2d 1187 (1998). Instead, the defendant carries the burden to prove such prejudice and does so "by establishing that the belated findings were tailored to meet the issues raised in the appellant's opening brief." *Pruitt*, 145 Wn. App. at 794. Furthermore, we do not find prejudice where the findings and conclusions track the trial court's oral opinion, the findings and conclusions do not contain unanticipated material, and the defendant does not identify ways in which he was prejudiced by the delayed entry. *See, e.g.*, *Brockob*, 159 Wn.2d at 344; *State v. Cannon*, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996). *But see State v. Charlie*, 62 Wn. App. 729, 733, 815 P.2d 819 (1991).

JuCr 7.11(d) requires entry of written findings of fact and conclusions of law, which the State must submit "within 21 days after receiving the juvenile's notice of appeal." Here, the juvenile court entered its findings and conclusions after Darby-Chacon filed his opening brief in this appeal and 138 days after Darby-Chacon filed his notice of appeal. The State and the juvenile court were delinquent in their respectively late submission and entry of the findings and conclusions. Thus, we address whether the late submission prejudiced Darby-Chacon.

In relevant part, the trial court found:

> 1.11 That . . . Darby-Chacon . . . removed the clothing of [Jane] against her will.
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> . . . .
>
> 1.13 That [Jane] did not consent to any of the sexual intercourse with . . . Darby-Chacon . . . , that she initially tried to resist the advances of . . . Darby-Chacon, and ultimately became passive.
>
> . . . .
>
> 1.15 While seated on top of her pinning her down, . . . Darby-Chacon used

> [Jane's] breasts to masturbate.
>
> 1.16 That . . . Darby-Chacon intentionally used force when he penetrated [Jane's] vagina with his finger.
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> 1.17 That at no time did [Jane] give permission to . . . Darby-Chacon to digitally penetrate her.
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> 1.18 That at the time of the incident . . . Darby-Chacon and [Jane] were in [m]iddle school. . . . Darby-Chacon was 12 years old. [Jane] was 13 years old. [Jane] lived with her mother and sister. [Jane] stated that . . . Darby-Chacon . . . was "like a brother" to her. [Jane] stated that she had a "boyfriend" in Seattle at the time of the incident. [Jane] stated that she was not romantically interested in . . . Darby-Chacon.
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> . . . .
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> 1.30 That credible evidence was not presented that . . . Darby-Chacon was pressured or encouraged to say anything that he did not believe was the truth during the time that statements/recorded statements were given by . . . Darby-Chacon.
>
> 1.31 That the changes in . . . Darby-Chacon['s] recollection of events during the adjudicatory hearing supported the lack of credibility of his testimony.

Clerk's Papers (CP) at 62-65. The juvenile court concluded (1) that Darby-Chacon, "by forcible compulsion, did intentionally insert his finger(s) into the vagina of [Jane] against her will" and, (2) "by inferring all relevant circumstantial evidence, that . . . Darby-Chacon and [Jane] were not married to each other." CP at 65.

These written findings and conclusions do not vary from the juvenile court's oral ruling, demonstrating that the State did not tailor them for this appeal. The juvenile court noted that Darby-Chacon supported Jane's testimony "that she did not consent, that she tried to resist, and that she then became passive." RP at 343. The juvenile court also noted that (1) Darby-Chacon's statements to the detectives were more credible than his trial testimony, (2) Jane was more credible than Darby-Chacon, and (3) Jane testified that she did not consent to the sexual acts and force that Darby-Chacon used against her. The juvenile court thus found "that there was forcible compulsion" to support Darby-Chacon's second degree rape conviction. RP at 348.

After noting that "[t]here has been a question as to whether or not they were married," the juvenile court found that:

> The State has painstakingly gone through the various pieces of evidence in this case. They are circumstantial. They were not direct. Nobody was ever asked a question about marriage, but there is ample circumstantial evidence in this case for this Court to find beyond a reasonable doubt that these young people were not married to each other, and so I will so find.

RP at 347. Although the juvenile court announced this finding during its discussion of Collett's indecent liberties conviction, the finding mirrored the trial court's earlier ruling on the motion to dismiss:

> And so the real question at this point is whether or not the State has present[ed] sufficient circumstantial evidence of the fact of non-marriage between the defendants and the complaining witness such that the trier of fact could make a finding that the parties were not married.
>
> [The State] has listed various items of testimony and facts that were presented which would be a sufficient basis for a trier of fact to find beyond a reasonable doubt that the defendants were not married to the complaining witness.
>
> I'm not making that finding right now. All I'm doing is ruling on the motion, and the motion is denied because there is evidence to support that element in the State's case.

RP at 299.

This record does not bear out Darby-Chacon's argument that the State tailored the findings and conclusions to his appeal. We decline to reverse or dismiss Darby-Chacon's convictions on this basis, but we are aware that under RAP 18.9 sanctions for late submission of the findings and conclusions are available. Should the State continue this practice, such sanctions are sure to follow.[19]

[19] Timely entry protects against human fallibility, promotes efficiency, and raises no question of tailoring; it is a best practice to submit and enter these findings as each rule requires. *See State v. Garcia*, 146 Wn. App. 821, 826, 193 P.3d 181 (2008), *review denied*, 166 Wn.2d 1009 (2009). As Division One of this court aptly noted, the failure to submit findings and conclusions in juvenile cases can lead to "an enormous waste of time and energy by defense counsel and by this

III. Sufficiency of the Evidence

Darby-Chacon argues that sufficient evidence does not support his convictions for second degree rape and indecent liberties. We disagree.

A. Standard of Review

We examine "the evidence in the light most favorable to the State," when reviewing sufficiency issues, to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The finder of fact may infer facts, such as intent, "where . . . plainly indicated as a matter of logical probability" and the finder of fact "determine[s] what conclusions reasonably follow" from the circumstantial evidence in a case. *Delmarter*, 94 Wn.2d at 638; *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). We "defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-75.

"In reviewing a juvenile court adjudication, we must decide whether substantial evidence supports the . . . findings of fact and . . . whether the findings support the conclusions of law." *State v. B.J.S.*, 140 Wn. App. 91, 97, 169 P.3d 34 (2007). "Substantial evidence is evidence

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court in addressing these issues." *Smith*, 68 Wn. App. at 210. Had the findings and conclusions been timely submitted, we would not have expended judicial resources deciding this issue. This case is not the lone example of late submission of findings and conclusions from Thurston County. We decline to impose sanctions in this case in hopes that this will not happen again.

sufficient to persuade a fair-minded, rational person of the finding's truth." *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). "We consider unchallenged findings of fact verities on appeal, and we review conclusions of law de novo." *Stevenson*, 128 Wn. App. at 193.

B. Second Degree Rape

Darby-Chacon argues that the State did not prove beyond a reasonable doubt that he forcibly compelled Jane to engage in sexual acts. "A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion." RCW 9A.44.050(1). "Forcible compulsion"[20] includes "physical force which overcomes resistance." RCW 9A.44.010(6). The victim need not necessarily physically resist the forcible compulsion. *State v. McKnight*, 54 Wn. App. 521, 525, 774 P.2d 532 (1989); *State v. Gonzales*, 18 Wn. App. 701, 703, 571 P.2d 950 (1977). "[W]e hold that whether the evidence establishes the requisite resistance is a fact sensitive determination based on the totality of the circumstances, including the victim's words and conduct." *McKnight*, 54 Wn. App. at 526. At the same time, the "force" required to show "forcible compulsion" is the force used to overcome the victim's resistance, not the force inherent in sexual penetration. *McKnight*, 54 Wn. App. at 527-28. Thus, to establish that a defendant engaged in sexual intercourse by forcible compulsion, the State must show that the defendant exerted force greater than that "normally required to achieve penetration" and that this force "was directed at overcoming the victim's resistance." *McKnight*, 54 Wn. App. at 528.

Substantial evidence supports a finding of physical force and compulsion. Jane testified

[20] "'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." RCW 9A.44.010(6).

that (1) she declined Collett and Darby-Chacon's sexual advances, (2) Collett and Darby-Chacon physically restrained and forced Jane to engage in sexual acts, (3) Collett and Darby-Chacon disrobed Jane, (4) Jane physically resisted their restraint until she realized further resistance was futile, and (5) she never consented to any sexual act. In his statement to Miller, Darby-Chacon admitted that they used physical force to accomplish sexual acts with Jane and that Jane did not consent. Jane's testimony, when combined with Darby-Chacon's statements to Miller, provides sufficient evidence to find forcible compulsion beyond a reasonable doubt.

At trial, Darby-Chacon testified that he and Collett did not force Jane to engage in sexual acts, Jane did not tell them to stop, and Jane willingly participated. Darby-Chacon's testimony raised questions of credibility and conflicting evidence that the juvenile court resolved against him. We defer to the fact finder's credibility determinations, and we will not invalidate a conviction based on conflicting evidence when sufficient evidence supports the verdict. *Thomas*, 150 Wn.2d at 874-75. Thus, this claim fails.

C. Indecent Liberties

Darby-Chacon also argues that the evidence fails to establish that he was not married to Jane. We disagree.

A person commits the crime of "indecent liberties"[21] when he, "[b]y forcible compulsion," "knowingly causes another person who is not his . . . spouse to have sexual contact with him." RCW 9A.44.100. The State can prove the nonmarriage of a sexual offender and the victim, like other elements of the crime, by circumstantial evidence. *State v. Rhoads*, 101 Wn.2d 529, 532, 681 P.2d 841 (1984); *State v. Bailey*, 52 Wn. App. 42, 50-51, 757 P.2d 541 (1988), *aff'd* 114

[21] The State limited the charge of indecent liberties to acts committed by forcible compulsion.

Wn.2d 340, 787 P.2d 1378 (1990).

In *Bailey*, the defendant challenged the sufficiency of the evidence where the State presented no direct evidence that he was not married to the victim. 52 Wn. App. at 50-51. Circumstantial evidence presented at trial included testimony by the three year old victim and the victim's mother that Bailey had lived with the family for a short time and "had served as [the victim's] babysitter on several occasions." *Bailey*, 52 Wn. App. at 51. We noted that "[a] conviction may be based wholly on circumstantial evidence even if the evidence is not inconsistent with the hypothesis of innocence" and held, "[f]rom this evidence, the jury could properly conclude that [the victim] was not married to the defendant." *Bailey*, 52 Wn. App. at 51.

Similarly, Division One has held that sufficient evidence supported the element of nonmarriage where one victim was in ninth grade, knew the defendant for a month, had a boyfriend, and had never stayed at the defendant's home. *State v. Shuck*, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983). In the same case, Division One held that sufficient evidence supported

the nonmarital status of the other victim where she was in ninth grade and only knew the defendant for a month. *Shuck*, 34 Wn. App. at 458. And our Supreme Court has affirmed convictions where the State supported the nonmarriage element with evidence that the victim in one case did not know the defendant and that the victim in another case "was under the age of fourteen years, . . . was living at home with her father and mother, . . . [bore] her maiden name[,] . . . was a mere school girl, and there [wa]s nothing in the record to indicate that she was married." *State v. May*, 59 Wash. 414, 415, 109 P. 1026 (1910); *Rhoads*, 101 Wn.2d at 532.

Here, the State presented circumstantial evidence that Jane and Darby-Chacon were not married.[22] At the time of the incident, Jane was 13 years old and in the eighth grade, and Darby-Chacon was 12 years old[23] and in the seventh grade. Jane continued to use her maiden name and testified that she had a boyfriend. According to Jane, she and Darby-Chacon were friends and she thought of him as a brother. Similarly, Jane's mother described the two as "friends." RP at 278. And Darby-Chacon testified that, not only did he not consider Jane to be like a sister, he "didn't have a relationship with her" and they did not socialize. RP at 233. Nothing in the record indicates that the Darby-Chacon and Jane were married. Although there is no direct

[22] The juvenile court did mention that the State did not supply direct evidence about marriage, but it specifically noted that the State presented ample circumstantial evidence to permit a logical inference that the parties were not married.

[23] They could not legally marry in Washington without waiver by a superior court judge "on a showing of necessity." RCW 26.04.010.

evidence that Jane and Darby-Chacon were not married at the time of the incident, we hold that sufficient evidence supports the finding of nonmarriage.

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.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, P.J.