IN THE HUALAPAI COURT OF APPEALS

HUALAPAI RESERVATION, STATE OF ARIZONA

GARNETT QUERTA, Appellant	)	Case No.: 2009-AP-012
	)	Re: 2009-CR-407A
v.	)	
	)	OPINION AND ORDER
HUALAPAI TRIBE, Appellee	)	

Before Justices Carole Goldberg, Pat Sekaquaptewa, and Robert N. Clinton

PER CURIAM

OPINION AND ORDER

Statement of Relevant Facts and Procedural History

On December 15, 2008, Appellant was charged with Sexual Assault in violation of Section 6.112(A)(4) of the Law and Order Code. The Complaint alleged that Garnett Querta [hereafter Appellant] unlawfully engaged in a sexual act with D.W. while he held her down and raped her by penetration in the anus and vagina. The Complaint further specified the victim reported her underwear was ripped off and she was held down against her will. Appellant pled "not guilty" at the arraignment. At the pre-trial hearing on February 2, 2009, the Tribal Judge scheduled the trial for March 17, 2009.

A series of continuances delayed the trial until November 9, 2009. On March 9, the Tribe submitted a Motion for Continuance because the Tribe was still waiting for laboratory evidence from the FBI. The Judge granted the motion. On March 18, the Judge reset the trial date for June 8, 2009 because of this continuance. On March 25, Appellant submitted an Expedited Motion for Speedy Trial, which the Judge denied on May 5. The Judge reiterated the answer in the Minute Order on March 18, 2009 finding "extraordinary circumstances" allowing for the Tribe's Motion for Continuance. On June 8, Appellant submitted a Motion for Continuance because a "vital witness" had not been served. The Tribe did not object. On June 18, the Tribe submitted a Motion for Continuance stating they would be out of the office on the scheduled trial date. Appellant did not object. On August 3, after the initial Judge on the case recused himself, the Court

continued the trial on its own motion and reset the trial date for September 14, 2009. Finally, on August 18, the Tribe submitted a Motion for Continuance stating that an essential witness would be in training from Sep 14 – 18, 2009. Appellant did not object and the Tribal Judge granted the motion. The nonjury trial was set for November 9, 2009.

On November 10, 2009, Appellant was found guilty of sexual assault at the conclusion of the bench trial. The Tribal Judge provided a "Findings of Fact and Order" on November 17, 2009, finding the evidence showed that Appellant sexually assaulted D.W. The Tribal Court found an act of sex did occur between the victim and the Appellant, and that the fact at issue was whether the sex act was consensual. In evaluating the testimony from eight witnesses for the Tribe and four witnesses for the defense, the Court found the victim was confronted by Appellant, was pushed twice down the hallway, hit her head and lost consciousness, and awoke to find Appellant engaged in intercourse with her. The victim waved her arms around causing Appellant to fall off of her and she ran out of the house. The Court further found "the fact that the witness ran out of the house without her slipper on, without her sunglasses, and without her panty shows she left the house in a hurry to get away." The Court found this sufficient evidence to show a lack of consent and found Appellant guilty of sexual assault.

On November 19, 2009, the Tribal Court Judge entered the "Judgment and Sentencing Order," which included a fine of $2500 and 61 days in jail with credit for time served. Based on the record, Appellant has served at least 51 days during the pre-trial period before the posting of bond. Appellant submitted a timely Notice of Appeal on November 19, 2009.

Appellant submitted a brief alleging three errors during trial. First, Appellant alleges the Tribal Judge's Findings of Fact were arbitrary and capricious because there was no evidentiary basis for the conclusion that each element had been proven beyond a reasonable doubt. Second, Appellant alleges the Tribal Court's Findings of Fact were arbitrary and capricious because they were not supported by fair or substantial reason and were contrary to the evidence presented. Finally, Appellant alleges that the combination of errors resulted in a denial of his right to a fair and just trial. In his Notice of Appeal filed on November 19, 2009, Appellant also argued that the act was consensual. Appellant made no speedy trial objection either at trial or before this Court.

Issues

1. Under Section 5.3 of the Law and Order Code, did the Tribal Court err in finding Appellant guilty when the Findings of Fact did not address or find proof beyond a reasonable doubt for every fact asserted in the criminal complaint?

2. Under an arbitrary and capricious standard of review, did the Tribal Judge err in evaluating the quality of the evidence in the Findings of Fact?

3. Were the facts sufficient to show the element of lack of consent necessary to prove sexual assault beyond a reasonable doubt?

Jurisdiction

The Hualapai Court of Appeals is a court of limited jurisdiction that may review final judgments of the Tribal Court in civil, criminal, and juvenile matters. Law and Order Code § 10.2. Additionally, a written Notice of Appeal must be timely filed within five days after the final judgment is entered. Law and Order Code § 10.4.

In the present case, the Tribal Judge sentenced Appellant on November 19, 2009 through a Judgment of Guilt and Sentencing Order. Appellant filed his Notice of Appeal the same day on November 19, 2009. Accordingly, Appellant properly invoked the jurisdiction of this Court by filing his Notice of Appeal in a timely manner following his final judgment of sentence.

Scope of Review

Article VI, section 12 of the Hualapai Constitution provides that "[a]ll matters of law and procedure may be decided by the Court of Appeals. Findings of fact shall be made by the Trial Court, and shall be reviewable only when arbitrary and capricious." Accordingly, in considering this appeal, the Court may review legal errors *de novo*. This Court is not permitted to retry contested facts on appeal, but may reexamine facts found below only for the purpose of determining whether the Trial Court findings were "arbitrary and capricious."

Discussion

1. Under Law and Order Code Section 5.3(C), the Criminal Complaint does not have to contain the specific facts of the case necessary to prove at trial, but only must set forth the actions of the defendant and the general provisions of law.

The Appellant argues the Tribal Court erred in the Findings of Fact because the Court did not address all the facts alleged in the Criminal Complaint, specifically the facts that the victim was held down against her will, and both vaginal and anal penetration occurred. See Appellant Supplemental Brief, Argument 2A. However, the Law and Order Code does not require the Criminal Complaint to provide the exact facts and specific provisions of law to be proven at trial. Section 5.3(C) specifies that the complaint must only articulate clearly the actions of the defendant and the general provisions of law, which those actions are alleged to violate. The provision states "Failure to cite a specific provision of law... shall not be grounds for dismissal with prejudice of a criminal complaint, provided the complaint clearly articulates the actions of the defendant(s) and the general provision(s) of law which those actions are alleged to violate." Law and Order Code § 5.3(C). So long as the provision of law detailed in the complaint has sufficient specificity to put the defendant on notice to prepare a defense

against the charges at trial, the complaint meets the requirements in Section 5.3(C).

Here, the Criminal Complaint alleged the defendant committed sexual assault and included the specific provision in the Law and Order Code that he allegedly violated, Section 6.112(A)(4). Thus, Appellant had adequate notice of the charge against him, as is required under the due process provision of the Hualapai Constitution. Hualapai Const. art. IX (d). Appellant argues the Prosecutor had to allege "against her consent" (rather than "against her will") in the complaint in order for the Tribal Judge to base the "Findings of Fact and Order" on this standard. However, the Law and Order Code only requires the complaint to provide "general provisions of law." Law and Order Code § 5.3(C). The use of "against her will" in the complaint provides a sufficient legal standard, since the prosecutor included the relevant provision of the law that Appellant allegedly violated. Finally, the Tribal Judge did not have to address all the facts in the complaint in the "Findings of Fact and Order," so long as the Judge sufficiently showed how the facts proved the elements of sexual assault.

The Law and Order Code also allows the Tribal Court opportunities to amend the complaint if the complaint does not provide enough specificity. Law and Order Code § 5.3(C). This demonstrates the complaint itself is not a rigid document, requiring exact proof at trial, but instead a basis for providing notice to the defendant. The complaint is not intended to be a complete review of the facts the prosecutor aims to prove at trial. Instead, the complaint provides a basis for the defendant to conduct criminal discovery, as occurred in this case. As long as the complaint provides the alleged date and time, and facts alleging the commission of a crime together with the general provisions of law supporting that crime, the defense has a clear basis for conducting discovery and can adequately defend against the charge during trial. Thus, there is no reason to tie the prosecution to the exact language in the complaint when the proof differs only slightly but still demonstrates all elements of the alleged crime.

2. In the Findings of Fact and Order, the Tribal Judge did not arbitrarily or capriciously find the evidence presented at trial proved the facts.

Under Law and Order Code Section 6.112(A)(4), sexual assault is the unlawful act of engaging "in a sexual act or attempt[ing] to do so with another against the will or consent of the other." In finding Appellant guilty, the Tribal Court based its findings of fact on witness testimony demonstrating the victim failed to consent. Appellant conceded the sexual acts during the trial. In the "Findings of Fact and Order," the Tribal Judge reasoned that the witness testimony concerning the victim's rush to leave the house in which the assault occurred, her lack of underwear and other clothing items, including a slipper and her sunglasses, demonstrated the victim was in a rush to leave the house and did not consent to the sexual act. *See* Findings of Fact and Order.

Article VI, section 12 of the Hualapai Constitution provides that "findings of fact shall be made by the Tribal Court, and shall be reviewable only when arbitrary and capricious." Accordingly, in considering this appeal, the Court is not permitted to retry contested facts on appeal, but may reexamine facts found below only for the purpose of

determining whether the Tribal Court findings were "arbitrary and capricious."

This Court has never provided a precise definition for the arbitrary and capricious standard of review; therefore it is informative to look to applications of this standard used in other legal systems. Law and Order Code Section 3.1(D) permits the Court of Appeals to look to other legal systems for guidance where Hualapai written and common law do not cover the matter in question. Based on examples from other tribal courts, the United States Supreme Court, and United States federal courts, arbitrary and capricious is an extremely deferential standard of review. To overturn the lower court's ruling under an arbitrary and capricious standard, the appellate court must find an absence of a rational connection between the evidence presented and the facts found. *Gollnick v. Powless*, No. 01-AC-019 (Oneida Appeals 07/01/2002) (finding "the standard for an arbitrary decision is one in which no rational basis is presented or such a basis cannot be determined" in an appeal of an employment decision); *Bethel v. Mohegan Tribal Gaming Authority*, No. GDTC-T-98-105 (Mohegan Gaming 12/14/1998) (defining arbitrary and capricious in a disciplinary employment action as a decision not grounded on a "reasonable basis"); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Natural Resources v. United States*, 966 F.2d 1292, 1297 (9th Cir. 1992). While required by the Hualapai Constitution, the arbitrary and capricious standard of review is not typically used in criminal appeals in tribal, federal, and state courts, but typically appears in administrative law appeals, which give great deference to agency adjudication. Instead, these courts generally use a clearly erroneous standard to review issues of fact on appeal, which is understood to grant the appellate court greater authority to reexamine findings of fact. *See, e.g., United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); *Anderson v. Bessemer City*, 470 U.S. 564 (1985); Federal Rule of Civil Procedure 52(a) (stating "[findings] of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness"). Thus, the Hualapai Constitution and the Law and Order Code provide far greater deference to the Tribal Court's determinations of fact, and permit this Court to overturn the Tribal Court's findings of fact only when there is no rational connection between the evidence and the facts found.

Applying that definition here, there was not an absence of a rational connection between the testimony of the witnesses and the Tribal Court's findings of fact. The Tribal Court reached two main findings of fact: 1) the victim was in a hurry to get away, 2) the victim was pushed against a wall. The Court found that the victim was in a hurry to get away based on her testimony, as well as the evidence showing articles of her clothing remained in the house. There is a rational connection between the conclusion of her hurry and the evidence of left items. The Tribal Court also found that the testimony of Ms. Fowler, the "rape kit" medical examiner, showed the victim had a bruise above her left eye. The Court connected this fact with the victim's testimony that Appellant pushed her into a wall to find the victim was in fact pushed. Again, the finding of fact is based on a rational connection and consistency between the testimonies of two witnesses. These two findings of fact supported the legal conclusion of the Tribal Court that the evidence was sufficient to prove a lack of consent. However, the legal conclusion that the evidence was sufficient to prove the element of lack of consent is reviewed *de novo* as

an issue of law below.

3. Under a *de novo* standard of review for legal error, the Tribal Court correctly found the evidence presented at trial sufficient to prove the lack of consent element in the sexual assault charge beyond a reasonable doubt.

On appeal, Appellant also raises the issue of whether the evidence was sufficient for the Tribal Court to find him guilty. *See* Appellant's Supplemental Brief. At trial, Appellant specifically challenged whether the evidence the Tribe presented was sufficient to show a lack of consent. This objection raises the legal issue of whether there was sufficient evidence to prove an element of the offense beyond a reasonable doubt. The issue of sufficient evidence is a matter of law and, therefore, the Court of Appeals reviews the question *de novo*. *Walema v. Hualapai Tribe*, 2007-AP-004, at 5 (Hualapai Ct. App. 2008) (citing Constitution of the Hualapai Indian Tribe, Article VI, section 12; Law and Order Code, §10.9).

Though not binding on this Court, federal law also reviews the issue of sufficient evidence *de novo*. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (establishing the standard as whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" when viewing the evidence in the light most favorable to the conviction); *United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000); *United States v. Seymour*, 468 F.3d 378, 388 (6th Cir. 2006). All the evidence admitted at trial, even improperly submitted evidence, can be reviewed in order to determine the sufficiency of the evidence. *Seymour*, 468 F.3d at 388. Circumstantial evidence is also sufficient to sustain a guilty verdict on appeal. *Id.* In *United States v. Seymour*, for instance, the Sixth Circuit found the victim's testimony that the defendant penetrated her sufficient evidence for a guilty verdict in a count of sexual assault of a minor.

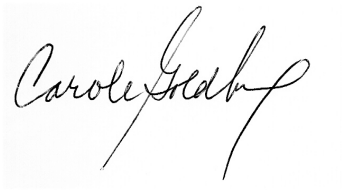
Here, the victim's testimony of penetration and lack of consent combined with the evidence showing the victim hurried from the house provides sufficient evidence to uphold the Tribal Court's finding of guilt. In the Tribal Court's "Findings of Fact and Order," the Court also notes that the injury on the victim's forehead demonstrated the victim was pushed into a wall or door. Thus, a rational trier of fact could readily have found the essential element of lack of consent was met beyond a reasonable doubt when viewing the evidence presented, taken as a whole.

Conclusion and Order

Under an arbitrary and capricious standard of review, the Tribal Court did not err in concluding that the evidence proved the facts found in the "Findings of Fact and Order." The Tribal Court also did not have to address each fact in the criminal complaint in the findings of fact. Finally, the Tribal Court correctly found the evidence sufficient to prove the lack of consent element of sexual assault beyond a reasonable doubt.

For the foregoing reasons, IT IS ORDERED that this appeal is DISMISSED and Appellant's conviction is AFFIRMED.

Entered this 2nd day of March, 2010
on behalf of the entire panel



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Justice Carole Goldberg