IN THE HUALAPAI COURT OF APPEALS
HUALAPAI NATION
PEACH SPRINGS, ARIZONA 86434

Colton Ron Selana, Appellant

v.

Hualapai Tribe, Appellee

Appellate Court Case No.: 2008-AP-005

HTC No.: 2007-CR-282ABC

OPINION AND ORDER

Colton Ron Selana appeals from a judgment of guilty for Unlawful Sexual Acts and Endangering the Welfare of a Minor. For the reasons stated below, this Court finds that the judgment was not in error and affirms the convictions.

Statement of Relevant Facts and Procedural History

On September 6, 2007, the Hualapai Tribe ("Appellee") filed a criminal complaint against Colton Ron Selana ("Appellant" or "Selana"). The complaint alleged that in the fall or winter months of 2006, at or around 10-11 p.m., Selana entered the bedroom of A.S., nine years of age, and sexually assaulted her. A physical exam of A.S. on September 4, 2007, revealed a healed tear and scarring to her rectum. During the exam, A.S. told the Registered Nurse, Darlene Bellmore, about the 2006 incident. On September 6, 2007, Appellant was arraigned and charged with Sexual Assault (Hualapai Tribe Law & Order Code, Section 6.112A5), Unlawful Sexual Acts (Section 6.114B), and Endangering the Welfare of a Minor (Section 6.201A1). Appellant pled not guilty to all three charges.

A jury trial was scheduled and then continued until March 24, 2008. Appellant filed numerous subpoena requests for witnesses with the Tribal Court. Both the Tribe and Appellant listed the minor child as a witness. Appellant also moved for an order to compel discovery of A.S.'s diary as the Tribe had only disclosed a portion of it. On March 11, 2008, the Tribal Court vacated the scheduled jury trial date and set a motions hearing for the former day of the trial, March 24, 2008. At the hearing the Tribal Court ordered that the entire diary be released to Appellant. The Tribal Court also found that it was not bound by the Federal Rules of Evidence but would look to them for guidance. The Tribe stated that A.S. was fearful of facing Appellant. The Tribal Court found that A.S. was competent to testify but directed both parties to take "reasonable care" in questioning her at trial. The Tribal Court set a new trial for April 28, 2008,

with the condition that either party could move for an extension for good cause by April 11, 2008.

On April 24, 2008, Appellant filed a motion to continue, citing that his subpoenas had not been served. On April 25, 2008, the Tribal Court denied Appellant's motion on the basis that Appellant's witnesses could appear without a subpoena and the witness who could not appear (due to bereavement) could have her testimony reproduced in court.

A jury trial was held on April 28-29, 2008. On the first day of trial, and prior to jury selection, Appellant objected to the Tribal Court Judge, Judge Joseph Flies Away, hearing the case. Judge Flies Away found that he did not have a direct interest in the matter and that such an objection should have been raised earlier. During the trial Appellant objected to the Tribal Court admitting a Sexual Assault Examination Report ("Report") because only one of the nurses who signed it, Darlene Bellmore, was present at trial. Bellmore testified that she conducted the examination and wrote the Report and that the other nurse who signed the Report, Cyndi Adorno, had observed the examination to gain training hours. The Tribal Court therefore admitted the Report.

The jury returned a verdict of guilty for two of the charges: Unlawful Sexual Acts and Endangering the Welfare of a Minor, but failed to reach a unanimous decision on the third charge, Sexual Assault, and that charge was not entered against Appellant. Appellant objected to the ruling and stated that the entire case against him should be declared a mistrial. The Tribal Court ruled that each charge was a separate case, although assigned the same docket number, and therefore the guilty verdicts would stand. On May 28, 2008, Appellant filed a timely Notice of Appeal.

Issues

1. Whether the Hualapai Tribal Court Judge had a direct interest in the case which required disqualification where he is alleged to have worked with the victim's mother, was nominally employed by Appellant's mother, and disliked Appellant's counsel.

2. Whether the Hualapai Tribal Court Judge improperly referred to the Federal Rules of Evidence when he ruled that he would look to the Rules for guidance.

3. Whether the Hualapai Tribal Court Judge violated Appellant's constitutional rights by instructing Appellant's counsel on how to question the victim and permitting the victim's mother to remain in the courtroom while the victim testified.

4. Whether the Hualapai Tribal Court Judge's behavior towards the victim's mother was improper where he permitted her to remain in the courtroom while her daughter testified and during Appellant's testimony.

5. Whether the Hualapai Tribal Court Judge improperly introduced a sexual abuse examination report into evidence when only one of the signatories was available for cross-examination.

6. Whether the Tribe improperly failed to produce a chain of custody for the victim's diary.

7. Whether a juror responded falsely during voir dire regarding her relationship with a registered sex offender and her alleged kinship with Appellant's mother, thus depriving Appellant of his right to a fair and impartial jury.

8. Whether the Hualapai Tribal Court Judge violated Hualapai law by communicating with the jury during their deliberation to answer a question raised by them.

9. Whether the Hualapai Tribal Court improperly failed to issue Appellant's subpoenas in a timely manner.

10. Whether the trial held on April 28-29, 2008, should be declared a mistrial because the jury failed to reach a unanimous verdict for each of the three charges in the criminal complaint.

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." Thus, in considering this appeal, the Court must limit itself to a review of legal errors in the proceeding below. This Court is not permitted to try contested facts on appeal, and may reexamine facts found below only for the purpose of determining whether trial court findings were "arbitrary and capricious."

Discussion

Appellant raises numerous issues on appeal. However this Court finds that only three deserve significant attention. First, this Court will address the remaining seven less serious issues. Then, it will provide a more extended analysis of the three most substantial issues.

1. The Hualapai Tribal Court Judge was not required to recuse himself.

Appellant argues that the Tribal Court Judge, Judge Flies Away, should have disqualified himself on the statutory basis of direct interest because he (1) had worked with the victim's mother; (2) is supervised by the Hualapai Tribal Council of which Appellant's mother is a member; and (3) disliked Appellant's counsel. Appellant objected to Judge Flies Away hearing the case on the first day of the trial, April 28, 2008. At that time Appellant only raised the first ground for disqualification: that the Judge had worked with the victim's mother. Judge Flies Away could not recall working with the mother, although he acknowledged knowing both her and Appellant prior to the trial. Judge Flies Away found that he was not related to either party in

the first degree and had no direct interest in the matter.[1] He therefore declined to disqualify himself and proceeded with the trial.

Even if the facts are construed in favor of Appellant and even if this Court assumes that all of the above allegations are true, Appellant's failure to object to Judge Flies Away hearing the case until the day of trial was unreasonable. Appellant had numerous opportunities before trial to move for Judge Flies Away's removal but failed to do so. The March 24, 2007 motions hearing date was the last permissible date for making such a motion. This Court finds that the charge that Judge Flies Away should have recused himself in this case is not so substantial that his failure to do so should be treated as plain error. A past history of working with the victim's mother would not normally rise to the level of a "direct interest," and Appellant has pointed to no special circumstances. This Court therefore declines to address Appellant's arguments on this point, finding them forfeited due to the timing of their presentation in the trial court..

2. There was no improper use of the Federal Rules of Evidence by the Hualapai Tribal Court Judge.

Appellant contends that the Tribal Court Judge referred to the Federal Rules of Evidence throughout the trial in violation of Hualapai Law & Order Code ("HLOC"), section 3.8 ("Evidence"). Appellant states that Section 3.8 bars a Hualapai Tribal Court Judge from using the Federal Rules of Evidence, even as guidance.[2] Both the Tribe and Appellant agreed that they would not adhere to the Federal Rules of Evidence during pre-trial and trial. At the March 24 motions hearing the Judge stated that he would not be bound by the Federal Rules of Evidence but would look to them for guidance.

While a Hualapai Tribal Court judge is barred from the wholesale borrowing of foreign statutory law, nothing in the Hualapai Law & Order Code prohibits a Judge from applying the principles represented in such laws. *See* HLOC, § 3.1(D) ("As to any matters that are not covered by the Tribal Constitution, codes, ordinances or resolutions of the Tribe or by Tribal Common Law or by applicable federal law or regulation, the Tribal Court may be guided by common law as developed by other Tribal, federal or state courts."); *see also Bender v. Hualapai Tribe*, 2005-AP-011, 5 (Jul. 16, 2007) ("[T]he Hualapai courts may look to other legal systems for guidance where Hualapai written or common law does not cover the matter in question."). A review of the record does not reveal any instance of the Judge directly referring to the Federal Rules of Evidence, nor did the Judge make a ruling based on any such Rule during trial. To the extent that the Judge was guided by the principles underlying the Rules, such guidance is clearly permitted by the Hualapai Law & Order Code in the absence of controlling Hualapai tribal law.

3. & 4. The Hualapai Tribal Court Judge's treatment of the victim and her mother was appropriate under the circumstances.

[1] Article VI, section 10 of the Hualapai Constitution provides that "[n]o Judge shall be qualified to act in any case wherein he has any direct interest or wherein any relative by marriage or blood in the first degree are a party."
[2] Section 3.8 provides: "In any trial of a matter, the Tribal Court shall not be bound by any federal, state or common law rules of evidence, but may accept any evidence which it deems, in its discretion, necessary, relevant, reliable, and probative…."

Appellant argues that the Tribal Court Judge's instructions regarding the treatment of the victim, A.S., prevented Appellant's counsel from zealously cross-examining her and that the presence of her mother tainted both A.S.'s testimony and Appellant's testimony. At the March 24 motions hearing the Tribal Court Judge noted that A.S., ten years old at the time of trial, had expressed fear at facing Appellant in court. The Tribal Court found that A.S. was competent to participate in the trial but that both Appellant and the Tribe were to take "reasonable care" in questioning A.S. The mother and then A.S. testified and were cross-examined at trial. Before A.S. took the stand the Judge instructed both the Tribe and Appellant to "be delicate with her, as best you can."[3] The mother remained in the courtroom throughout her daughter's testimony. Appellant alleges that while she was on the stand A.S. looked at her mother for signals conveyed by facial expression. The mother also remained in the courtroom during Appellant's testimony.[4]

HLOC, section 5.16, provides that at a criminal trial "the Judge must preserve to the defendant the rights guaranteed to the defendant under Article VI, Section 13, and Article IX of the Tribal Constitution." Article VI, section 13(c), of the Hualapai Constitution guarantees the right of criminal defendants to confront witnesses against them.

Nothing in the Constitution or Law & Order Code of the Hualapai Tribe addresses special conditions for child witnesses; however there is near universal acceptance of a judge's discretion to alter the court environment in order to accommodate a child witness. This includes permitting the presence of a support person while a child victim testifies, even if that support person is also a witness. *See, e.g.,* 44 CRIM. L. BULL. 5, 8, 11-12 (2008) (citing numerous ways jurisdictions have adapted the normal questioning procedure to accommodate and protect child witnesses, such as altering the courtroom set-up, allowing support persons to sit in the courtroom, and other shielding procedures which reduce the trauma associated with testifying in court); 3 J. INT'L CRIM. JUST. 721, 734 (2005) (discussing the International Criminal Court ("ICC") Rules on child victims as witnesses, which provide that "a support person may be assigned to them to assist through all stages of the proceedings").

Therefore neither the Judge's instructions regarding A.S. nor her mother's presence impermissibly violated Appellant's constitutional rights.[5] Appellant concedes that he did not object to the mother's alleged "facial gestures" to A.S. while they were occurring and while there was a chance to cure such behavior. It would be prejudicial to the Tribe to speculate on how A.S.'s testimony would have differed had Appellant made a timely objection. Finally, the recording of the trial reveals that the mother's testimony preceded her daughter's and that the mother did not testify again during trial, thus protecting Appellant's right to question an untainted witness.

5. The Tribal Court did not improperly admit the Sexual Assault Examination Report.

[3] Recording of Trial, April 28, 2008.

[4] *Id.*, April 29, 2008.

[5] Appellant claims that the Judge's instructions prevented his counsel from asking A.S. "graphic" questions. While this Court is not prepared to rule on what type of questions should or should not be permitted when examining a child witness, a review of the recording of the trial satisfies us that Appellant's questions were "graphic" according to the metric of an adult.

Appellant argues that both the timing of the Tribal Court Judge's admission of a Sexual Assault Examination Report ("Report") and the admission of the Report itself was prejudicial to his case. In particular, Appellant objects to the Report being admitted when only one of the signing nurses, Darlene Bellmore ("Bellmore"), appeared at trial. At trial Bellmore stated that the second signature belonged to Cyndi Adorno, who was present at the examination to gain training hours and had not written any of the Report. Appellant also objects to the Judge making his final decision to admit the Report after the jury had left the courtroom.

HLOC, section 3.8, provides that the Tribal Court may "accept any evidence which it deems, in its discretion, necessary, relevant, reliable and probative." Because the Hualapai Tribe does not have a detailed evidence code the Tribal Court Judge necessarily has broad authority to decide what is entered as evidence. *Walema v. Hualapai Tribe*, No. 2007-AP-004, 8 (Jan. 18, 2008) ("[U]nder current Hualapai law it is up to the sitting judge to determine, guided by Section 3.8, what evidence to admit in a trial."). That authority is not without limits however, because the same section of the Code also provides that "no evidence shall be admitted or omitted by the Court in violation of the Article VI, Section 13,[6] or Article IX[7] of the Tribal Constitution." Section 13(c) includes the right of criminal defendants to confront the witnesses against them.

Here, Appellant concedes that the Report is in Bellmore's handwriting. Bellmore testified at trial and was cross-examined by Appellant. Appellant argues that Bellmore's statements were inconsistent with the Report's content, but gives no specific example of this inconsistency. Appellant clearly had the opportunity to cross-examine Bellmore over any such inconsistencies, thus vindicating his right of confrontation and allowing him to expose Bellmore's possible lack of credibility to the jury. Moreover, the jury's ability to evaluate Bellmore's credibility is enhanced, not diminished, by the admission of the Report in that it would allow the jury to contrast the Report with Bellmore's testimony. Regarding the timing of the Report's admission, Appellant has not shown how it prejudiced his case: there was no surprise as to the Report's existence and the Tribe's intent to enter it into evidence at trial, and the jury was already aware of its existence and contents through Bellmore's testimony. Thus the Tribal Court Judge did not abuse his discretion in admitting the Report and Appellant's constitutional rights were not violated by the Report's admission.

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[6] Section 13. Rights of Defendants. The Hualapai Tribe, in exercising its powers of self-government, shall not:

(a) subject any person for the same offense to be twice put in jeopardy;
(b) compel any person in any criminal case to be a witness against himself;
(c) deny to any person in a criminal proceeding the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of an advocate for his defense admitted to practice before the Tribal Courts;
(d) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
(e) pass any bill of attainder or ex post facto law; or (f) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

[7] The Hualapai Tribe, in exercising its powers of self-government shall not . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law. Article IX (d).

6. The victim's diary was properly entered into evidence.

Appellant states that the Tribe's failure to forward a copy of the "Chain of Custody for Evidence (involving the diary)" in a timely manner violated Appellant's due process rights under Article IX (d) of the Hualapai Constitution .

A.S. apparently kept a diary in a composition book. The diary contained a letter to A.S.'s sister describing Appellant's assault. The "letter" was never removed from the diary and during discovery the Tribe disclosed a copy of the "letter" portion to Appellant. The Tribal Court Judge chose to admit the entire contents of the Diary, which included no more than four written pages.

Appellant chiefly objects to the diary's admission on the basis of his having received it at a late date. However, Appellant states that he received the diary by at least April 3, 2008: twenty-five days before trial. The written portion of the diary was no more than a few pages, thus Appellant had ample time to read and review its contents before trial. Appellant has not demonstrated how receiving the diary at an earlier time would have assisted his case. The portion of the diary that was not initially disclosed to Appellant arguably went to the mother's character, however Appellant's counsel, while vigorously questioning the mother on her character at trial, did not mention the relevant diary entry to her.

In addition, there was a reasonable basis for the Judge's conclusion that the diary was reliable: Appellant did not allege that there was any tampering with it nor provide any evidence of tampering. Furthermore, Appellant's assertion that A.S. seemed confused when questioned about the diary goes to the weight the jury would give to the diary as evidence and not to its admissibility. Thus the Tribal Court Judge's admission of the diary was not in error and did not violate Appellant's constitutional rights as he had the opportunity to cross-examine both the author and subject of the diary entry.

7. Appellant has not demonstrated that the jury foreperson was biased against him.

Appellant contends that the jury foreperson, Lisa Gala ("Gala"), was deceptive during the jury selection process and infers from this that Gala could not be a fair and impartial juror. Appellant was apparently told by someone after the trial ended that Gala was in a common law marriage with a registered sex offender. Appellant also discovered that Gala was the brother of a potential juror who had asked to be excused because he was related to Appellant. Appellant therefore argues that Gala's participation in the jury deprived him of his right to due process under Article IX (d) of the Hualapai Constitution.

Hualapai Constitution, Article VI, section 13(e) provides that the Hualapai Tribe "shall not . . . deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons." HLOC, section 5.5 provides that "[e]very criminal defendant accused of any violation of Tribal or applicable federal law shall have the right to trial by jury in the Tribal Court." This Court has not previously addressed juror bias, but some of our recent decisions discuss the concept of fairness underlying the defendant's right to due process. *See, e.g., Walema*, 2007-AP-004, at 6 (finding that the concept of fairness requires incorporating into Hualapai law a criminal defendant's right to present a case); *Walker v.*

Hualapai Tribe, 2005-AP-009, 5 (Jul. 23, 2007) (concluding that the denial of a reasonable request for a continuance compromised the fundamental fairness of the defendant's trial). While not explicitly mandated by Hualapai law, when applied to the right to a trial by jury, this concept of fairness would seem to require, at minimum, that the defendant have the opportunity to select a fair and impartial jury.

As to Gala's alleged deceptiveness, Gala could have answered all the general questions asked by the Tribal Court Judge truthfully.[8] Appellant had the opportunity to ask Gala more specific questions. Without further inquiry or elaboration from Appellant, it was not unreasonable for Gala to believe that she could be fair and impartial and her answers to that effect were therefore not facially deceptive. That Gala did not affirmatively volunteer personal information on her own accord cannot be viewed as untruthful. Finally, assuming that Gala is in relationship with a registered sex offender, Appellant offers no evidence indicating that her presence on the jury prejudiced his case. Rather it is entirely possible that her relationship would bias her in Appellant's favor.

While the presence of a juror with a possible familial relationship to one of the parties is problematic (indeed the Tribe removed many potential jurors based on such a relationship), given the Hualapai community's size and familial connections, it would be impossible to have a "perfect" jury composed of entirely unrelated individuals. Hualapai law recognizes this demographic limitation in the context of judge bias in providing that "[n]o Judge shall be qualified to act in any case wherein . . . any relative by marriage or blood in the first degree are a party." HUALAPAI CONST., Art. VI, § 10. While there is no similar provision for juror bias, Appellant stated that while any blood relative of a party should not be barred from serving as a juror, a first degree blood relationship was an absolute limit. At oral argument Appellant communicated to the Court that Gala is the first cousin of the Appellant's father; therefore Gala was not related to Appellant in the first degree.

8. Were the Tribal Court Judge's communications with the jury appropriate?

During its deliberations, the jury asked the Tribal Court Judge whether it was required to return the same verdict on all three charges. The Judge informed the Tribe and Appellant's counsel of the jury's question. The jury remained sequestered while the Judge heard arguments from both parties on what instruction should be given to the jury. After deciding that he would tell the jury that an identical verdict on all three charges was not required, the Judge left the courtroom to convey this information to the jury.

[8] The questions were: (1) have any of you heard anything about this case prior to today?; (2) are any of you closely related to Mr. Selana?; (3) are any of you relatives in the first degree: cousin, uncle, nephew?; (4) have any of you or any of your family or close friends ever been involved in any case such as this: violation of Section 6112A5, Sexual Assault; Section 6114B, Unlawful Sexual Acts; and Section 6201A1, Endangering the Welfare of a Minor?; (5) are there any of you for whom the nature of these charges would make it difficult for you to serve and be fair and impartial in this case? Recording of Trial, April 28, 2008. Under Hualapai Law & Order Code, section 6.126, an individual may be required to register as a sex offender if found guilty of a number of crimes not limited to those with which Appellant was charged.

HLOC, section 3.13, provides that "[p]rior to rendering the verdict, the jury is prohibited from communication with any person concerning the state of their deliberations or the agreed upon verdict." Appellant argues that the Court should adhere to the plain language of the Code and find that "any person" includes the Tribal Court Judge. However such a finding would be nonsensical and unworkable as the jury would be prevented from asking questions of the judge and even communicating to the judge that it was deadlocked.

As the language of the Law & Order Code itself does not resolve the issue of jury communications, other jurisdictions may provide guiding, though not binding, direction. *Bender*, 2005-AP-011, at 5. Arizona state courts permit the jury to ask questions of the judge after deliberations have begun. *See* 17 A.R.S., R. CRIM. P. 22.3 ("[T]he court may recall [the jury] to the courtroom and order the testimony read or give appropriate additional instructions."). But Arizona courts have found that such communications require that "defendant and counsel have been notified and given an opportunity to be present." *State v. Benenati*, 52 P.3d 804, 805 (Ariz. Ct. App. 2002); *State v. Rich,* 907 P.2d 1382, 1383 (Ariz. 1995). Nonetheless, Arizona courts have also found that "where it can be said, beyond a reasonable doubt, that there was no prejudice to the defendant, [such] communication . . . is harmless error." *State v. Sammons*, 749 P.2d 1372, 1378 (Ariz. 1988).

Here, the communication to the jury essentially consisted of the Judge's findings on a question of Hualapai law, with the Tribe and Appellant's counsel's input, and did not touch on "the state of their deliberations or the agreed upon verdict." While the Judge's communications with the jury did not occur in the presence of Appellant and his counsel, this Court finds beyond a reasonable doubt that there was no prejudice to Appellant and that the Judge's failure to bring the jury into the courtroom was harmless error. The record shows that the Judge affirmatively discussed his intended response to the jury with Appellant's counsel. At that time, Appellant did not request that the jury return to the courtroom, thereby implicitly waiving his right to be present during the Judge's communication to the jury. Additionally, when counsel pressed the Judge for information about the particular charges on which the jury was not unanimous, the Judge stated that he had not and would not discuss the substance of the verdict with the jury nor how far they had progressed in their decision-making. The Judge's communications with the jury therefore appear to be consistent with the mandates of Section 3.13 and were not coercive or prejudicial to Appellant. However, the Tribal Court should take notice that all future communications between Judge and jury should take place only in front of counsel, unless the defendant expressly waives the right to be present.

9. Did the Tribal Court fail to issue Appellant's subpoenas in a timely manner?

Appellant contends that the Tribal Court failed to serve his witnesses in a timely manner and the Trial Court Judge's failure to continue the trial on that basis violated the Law & Order Code and Constitution of the Hualapai Tribe. On April 24, 2008, Appellant moved to continue the jury trial both because of unserved subpoenas and because one witness, Jonelle Tapija

("Tapija"), could not attend trial due to bereavement leave.[9] Relying on HLOC, section 3.9,[10] the Tribal Court Judge denied the motion, finding that Appellant's witnesses could appear voluntarily and that Tapija's testimony could be presented in some manner other than oral testimony. The Judge also found that the Tribe had proper notice of Appellant's witnesses and did not object to Tapija's statements being communicated to the jury in an alternative manner. Appellant's witnesses were subpoenaed thereafter and most appeared at trial. However Tapija did not appear.

Article VI, section 13(c) of the Hualapai Constitution provides that the Hualapai Tribe "shall not . . . deny to any person in a criminal proceeding the right . . . to have compulsory process for obtaining witnesses." HLOC, section 3.9, permits a defendant to call witnesses to testify at trial. Such witnesses may appear voluntarily or by court order. *See* HLOC, § 3.10. Section 3.11 criminalizes the failure to appear pursuant to a court-ordered subpoena. Sections 3.9, 3.10, and 3.11 therefore provide the "compulsory process for obtaining witnesses."

As there are no Hualapai court decisions interpreting the scope of the right to compulsory process, this Court looks to other jurisdictions for examples of how this type of right has been construed. Similar to the Hualapai Constitution, both the U.S. and Arizona Constitutions provide that in all criminal prosecutions the defendant has the right to a compulsory process for obtaining witnesses in his favor. U.S. CONST., Amend. VI; ARIZ. CONST., Art. II, § 24. Arizona has qualified this right to mean "the right to compel the attendance of witnesses whose testimony is both material and favorable to the defense." *State v. Mills*, 995 P.2d 705, 712 (Ariz. Ct. App. 1999).

Arizona state cases support the principle that the right to compulsory process is not unlimited or absolute but requires a certain degree of exertion and flexibility on the defendant's part. On the other hand, courts recognize their own duty to ensure that their officers are not flagrantly failing to exercise diligence in serving criminal defendant's warrants. *Clark*, 693 P.2d at 993 ("We do not make light of the sheriff's duty to diligently serve subpoenas for the defense. We are aware that officers may naturally be tempted to exercise less effort on behalf of criminal defendants than is required."). The need to balance such concerns exists within the Hualapai court system as well.

Here, the Tribal Court was at least partially at fault in not serving Appellant's subpoenas in a timely fashion. However, assuming that Appellant's subpoenas were not served in at timely manner this Court must still decide whether the Judge's decision not to grant a continuance on that basis was an abuse of discretion. This Court has found that an abuse of discretion would occur if a Judge were to deny a continuance where "[t]here had been no previous requests for a

[9] Jonelle Tapija is identified as being associated with Hualapai social services. Appellant describes Tapija's potential testimony as follows: "relevant to the [Appellant's] case; testimony will reflect on her relationship with Pamela Jane The mother and Mr. Selana; testimony will be on the allegations raised against Mr. Selana in this criminal case; testimony will be about Pamela Jane The mother's and Mr. Selana's character. Amended Notice of Disclosure of Defendant's List of Witnesses, p. 2, Mar. 7, 2008.

[10] "Except as otherwise provided by Tribal Law, any party to a proceeding may call witnesses to testify at the trial of the matter. Witnesses may appear voluntarily, and must appear if duly served with a subpoena issued pursuant to Section 3.11 [court-issued subpoenas] below. Oral testimony shall be given in open court and under oath unless the Court directs otherwise for good cause." HLOC, § 3.9.

continuance, and a continuance was essential in order for Appellant to receive any defense at all." *Bender*, 2005-AP-011, at 7. On the other extreme, the Court has found that a Judge would be within his discretion to deny a continuance if the request had "been one of several made over a sustainable period of time." *Walker*, 2005-AP-009, at 5. Here, Appellant had already been granted one continuance. This suggests that the denial of Appellant's request was not an abuse of discretion, but it is not dispositive. What leads this Court to find that the Judge's denial was not in error is that Appellant did not alert the Judge to the non-served subpoenas at the March 24 motions hearing, but waited until April 24, 2008, four days before the scheduled trial and well after the April 11 court-mandated deadline to file a motion to extend. Appellant responds that he was not aware that Tapija was on bereavement leave until on or around April 24. This argument is unavailing however, because Appellant should have been aware at the March 24 hearing that his subpoenas to *all* his witnesses, including Tapija, had not been served.

Alternatively, even if the Judge erred in denying the motion to continue based on the subpoenas not being served, the error was harmless. First, it appears that the Tribal Court did serve most of Appellant's witnesses prior to or on the day of trial, and those witnesses testified at trial. While Appellant continues to object to Tapija's failure to appear, he does not provide any explanation as to why her testimony would have been "material and favorable to the defense." Appellant's disclosure of the intended content of her testimony suggests that it would have been redundant with Appellant's other witnesses who did testify. Furthermore, Appellant did not avail himself of the Judge's and the Tribe's consent to have Tapija's testimony introduced in some other manner.

This Court does note that despite the current unavoidable limitations on tribal courts' infrastructure and resources, defendants are nevertheless entitled to reliable and transparent procedures during the trial process. Thus, although fundamental error did not occur in this instance, by not exercising reasonable diligence in serving Appellant's witnesses the Tribal Court came perilously close to creating circumstances which would have required a new trial.

10. Should each charge in a criminal case be construed as a separate case?

Appellant argues that according to the plain language of HLOC, section 5.17 (Jury Verdict),[11] the jury must reach a unanimous verdict on all charges included in one "case" and therefore, because the jury returned an "inconsistent verdict," the entire case against Appellant must be declared a mistral.

The jury returned a verdict of guilty for Unlawful Sexual Acts and Endangering the Welfare of a Minor, but could not reach a unanimous verdict for Sexual Assault.[12] All three

[11] Hualapai Law & Order Code, section 5.17 provides that:

> In every criminal case tried to a jury, the jury must reach a unanimous verdict of guilty or not guilty. If the jury in a criminal case is unable to reach a unanimous verdict after due deliberation, the Trial Court shall declare a mistrial and the case may be re-tried at the option of the Tribal Prosecutor upon written request to the Tribal Court within 90 days of the Tribal Court's declaration of mistrial.

[12] **Sexual Assault** (6.112A5)
It shall be unlawful for any person to engage in a sexual act or attempt to do so with another:

charges stemmed from the same incident: the molestation of A.S. in the fall or winter months of 2006. Appellant objects to the Judge entering the guilty verdicts because he claims that the plain language of Section 5.17 requires that "case" be interpreted as all charges against a defendant. The Tribal Court Judge relied on a General Administrative Order ("GAO") stating that "[e]ach criminal complaint shall be assigned only one docket number, regardless of the number of counts alleged in the complaint." GAO 2000-006. GAOs are rulings previously promulgated by the Hualapai Tribal Court and were vacated prior to the enactment of the 2004 Revised Law and Order Code. GAO 2007-001. However the Tribal Court may look to such GAOs for "guidance." *Id.* Following GAO 2000-006 the Judge concluded that "case" in Section 5.17 referred to a single charge or offense and entered the verdict rendered by the jury in full.

Neither the Constitution nor the Law & Order Code of the Hualapai Tribe provides a definition for the term "case." The term does occur in elsewhere in the Law & Order Code chapter on criminal procedure. The most informative references are at Section 5.3(A): "Every criminal case shall be initiated by the filing of a written complaint . . ." and 5.3(B): "The complaint shall set forth in plain terms the act(s) of the defendant alleged to constitute the offense(s) charged, the date, time, and place of such act(s), the provision(s) of Tribal Law alleged to have been violated." The use of optional plurals indicates that the Code contemplates the inclusion of more than one charge in a single case.

This Court has not directly addressed whether several different charges, included as part of a single case, require a unanimous verdict on all charges; however, in the related double jeopardy context, this Court recently found that "so long as at least one element was different, the court could convict a defendant of both offenses without running afoul of the Hualapai Constitution's double jeopardy protection." *Davis v. Hualapai Tribe*, 2008-AP-002, 8 (May 23, 2008), *citing Gene v. Hualapai Tribe*, 2006-AP-003 (February 27, 2008).

While the Court should not look lightly to other jurisdictions for guidance, here the Hualapai Law & Order Code is apparently borrowed from other jurisdictions' rules. Arizona's Rule of Criminal Procedure, rule 23.2 provides that "[e]xcept as otherwise specified in this rule,

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5. With a child under the age of 12 years.

Any person found guilty of this offense may be sentenced to imprisonment for a period not to exceed one year, or a fine not to exceed $5,000, or both.

Mandatory sentencing. Any person convicted of an offense defined in this Section shall be sentenced to imprisonment and shall not be eligible for suspension of sentence, probation, parole, or any other release from custody until the sentence imposed by the Court is served.

Unlawful Sexual Acts (6.115B)

It shall be unlawful for any person who is over the age of 18 to:

B. Engage in a sexual act with a child under the age of 16 years or attempt to do so.

Any person guilty of this offense may be sentenced to imprisonment for a period not to exceed six months, or a fine not to exceed $4,000, or both.

Endangering the Welfare of a Minor (6.201A1)

A. It shall be unlawful for any person to knowingly;

1. Induce, cause or permit an unmarried person under 16 years of age to witness a sexual act.

Any person guilty of this offense may be sentenced for a period not to exceed six months, or a fine not to exceed $4,000, or both.

the jury shall in all cases render a verdict finding the defendant either guilty or not guilty." 17 A.R.S., R. CRIM. P. 23.2(a). If this is indeed the source of Section 5.17, the Law & Order Code drafter failed to include a critical comment to the Rule which "makes clear . . . [that] its purpose is to abolish special verdicts, not inconsistent verdicts." *State v. Webb*, 925 P.2d 701, 704 (Ariz. Ct. App. 1996); Comment, Rule 23.2 ("This rule abolishes special verdicts of former conviction or acquittal, or once in jeopardy."). Numerous Arizona state court decisions affirm that inconsistent verdicts on different counts are permissible. *See, e.g., Webb*, 925 P.2d, at 704; *Gusler v. Wilkinson ex rel. County of Maricopa*, 18 P.3d 702, 707 (Ariz. 2001). Provided that the charges stem from the same underlying incident and that each separate offense is charged in a separate count, the jury may return a guilty verdict on a lesser included charge and not guilty on a greater offense. 16A A.R.S., R. CRIM. P. 13.3(a);[13] *State v. Kelly*, 716 P.2d 1052, 1053 (Ariz. Ct. App. 1986); *State v. Solano*, 930 P.2d 1315, 1323 (Ariz. Ct. App. 1996) ("[D]efendant's right to a unanimous jury verdict . . . does not apply where a series of acts form part of one and the same transaction, and as a whole constitute but one and the same offense.").

Appellant asserts that the plain language of Section 5.17 compelled the Tribal Court Judge to find that the verdict in his case was not unanimous and declare a mistrial of the entire case. Notwithstanding the persuasive authority of the now-defunct GAOs, such a result would prevent the Tribal Court from functioning effectively, and should be avoided on that basis alone. Requiring the Tribal Prosecutor to try each charge separately would be redundant, time-consuming, and inefficient. Additionally, the presumed source of the Law & Order Code explicitly permits the possibility of inconsistent verdicts by recognizing that a single criminal act can violate multiple laws.

Arguably, the elements of Section 6.112A5 overlap with those of Section 6.115B as applied to the facts of this case, so that it would be "illogical to convict [Appellant] of one and not the other." *Davis*, 2008-AP-002, at 6. In this case, the jury found that Appellant, who is over the age of 18, was guilty of engaging in or attempting to engage in a sexual act with A.S., a child under the age of 16 (Section 6.115B). A defendant found guilty of Section 6.112A5 must have engaged or attempted to engage in a sexual act with a child under the age of 12. It was undisputed that A.S. was age 9 at the time of the underlying incident. Therefore if Appellant was found guilty of the former crime he must logically be guilty of the latter.

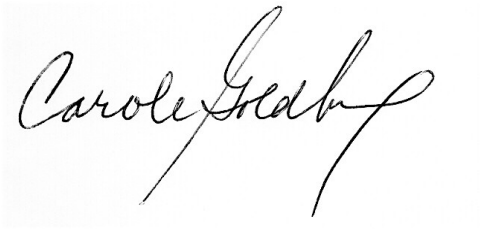
However, the penalty for Section 6.112A5 is twice that of Section 6.115B. Thus a juror could reasonably infer that the former was a more serious offense than the latter. Furthermore, in *Davis* this Court found that "even if [the two offenses"] completely overlap as applied to Appellant's conduct, making it inconsistent to convict of one and acquit of the other, [the Judge] was justified in doing so" due to the Hualapai statutory mandate that penalties be "proportionate to the seriousness of the offense." *Davis*, 2008-AP-002, at 9-10, *citing* HLOC, § 6.2(C). Thus a "case" means each charge within a larger criminal complaint. Moreover, in this instance the

[13] Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if they:
(1) Are of the same or similar character; or
(2) Are based on the same conduct or are otherwise connected together in their commission; or
(3) Are alleged to have been a part of a common scheme or plan.

absence of a unanimous verdict prevented a violation of the Hualapai Constitution's prescription against double punishment.

Conclusion and Order

This Court finds that Appellant was not denied due process by the Tribal Court. Because the Tribal Court did not commit error in entering the verdicts of guilty for Unlawful Sexual Acts and Endangering the Welfare of a Minor, Appellant's convictions are AFFIRMED.



December 17, 2008

Justice Carole Goldberg
Hualapai Court of Appeals