IN THE HUALAPAI TRIBAL APPELLATE COURT
HUALAPAI JURISDICTION
PEACH SPRINGS, ARIZONA

HUALAPAI TRIBE, Plaintiff/Appellee v. HERBERT DINI III, Defendant/Appellant	Appellate Case No. 2012-AP-007 RE: No. 2012-CR-116 **OPINION AND ORDER**

Before Justice Robert N. Clinton (Lead), Chief Justice Wes Williams Jr. and Justice Carole Goldberg.

This matter is before the Court on the timely appeal of Herbert Dini III (Dini), Defendant/Appellant, from a Judgment of Guilt and Sentencing Order, dated March 8, 2012, finding Dini guilty of Battery (VIO) in violation of Section 6.72(A) of the Hualapai Law & Order Code. The Tribal Court entered the judgment pursuant to a "no contest" plea and sentencing Dini to one year in jail and $1,000 fine under the enhanced sentencing provisions of Section 7.4(A)(3) of the Hualapai Law & Order Code, part of the Domestic Violence Code. For the reasons stated below, finding no error in Dini's conviction, this Court affirms that conviction and sentence.

Background

On February 22, 2012, the Hualapai Tribe (Tribe) filed a Criminal Complaint charging that Dini, an Indian, had within the Hualapai Reservation at 3:28 PM on February 19, 2012 used force or violence toward his girlfriend when he got on top of her and hit her in the mouth. The Criminal Complaint expressly advised the Defendant of the Maximum Penalty as follows:

> The MAXIMUM PENALTY: The penalty provisions of the domestic violence code at 7.4 A through E applies, furthermore: 1st offense domestic violence carries a penalty of imprisonment not to exceed six months and a fine not less than $200 or more than $1,000, or both with costs and restitution to the victim, mandatory counseling shall be part of the sentencing; 2nd offense domestic violence within 5 years carries a maximum penalty of imprisonment for a term not less than 60 days or

more than $3,000, or both mandatory counseling shall be part of the sentence; 3rd or subsequent offense of domestic violence within five years carries a maximum penalty of imprisonment for a term of not less than one year and fine in the amount of not less than $1,000 or more than $5,000, or both such imprisonment and fine, mandatory counseling shall be part of sentencing. A person convicted on a 3rd or subsequent offense 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.

A warrant thereafter issued for Dini's arrest and, following his arrest on March 7, 2012, he was taken to the Tribal Court on March 8, 2012 for arraignment. Dini was not represented by counsel at the arraignment and entered a plea of "no contest" to the charges.[1]

Thereafter, the Court sought to ascertain how many prior convictions for domestic violence Dini had over the past five years. Finding this conviction constituted his third such conviction, the Tribal Court believed that a one year jail term was mandated by Section 7.4(A)(3) of the Hualapai Law & Order Code, part of the Domestic Violence Code. Accordingly, on the same date, the Tribal Court entered a Judgment of Guilt and Sentencing Order, finding Dini guilty of Battery (VIO) in violation of Section 6.77(A) of the Hualapai Law & Order Code and sentenced him to one year in jail and $1,000 fine under the enhanced sentencing provisions of Section 7.4(A)(3) of the Hualapai Law & Order Code, part of the Domestic Violence Code. Both the Tribe and the Tribal Court believed that the one year sentence was mandated by that provision for anyone for whom this was the third domestic violence conviction within five years.

Dini, who subsequently secured legal representation though the Public Defender, filed a timely Notice of Appeal. He also unsuccessfully sought a stay of his sentence, first from the Tribal Court, and then from this Court.

While divided somewhat differently, in his Notice of Appeal and in his Brief, Dini basically makes two arguments. First, he argues in varying ways that the Court or the Tribe had an obligation to advise him of his number of prior domestic violence convictions and that the entry and acceptance of his "no contest" plea without receipt of such information or, alternatively, the failure of the Court to afford him the opportunity to withdraw his plea once the number of prior domestic violence convictions became known, meant that his plea was not knowingly and voluntarily entered. Second, he argues that the Tribal Court and the Tribe misconstrued Section 7.4(A)(3) of the Hualapai Law & Order Code as mandating, rather than permitting, a year prison sentence on the third conviction for domestic violence.

---

1 While not extensively discussed, a plea of "no contest" is expressly contemplated by the Section 5.10(C)(1) of the Hualapai Law and Order Code and, based on that provision, is otherwise procedurally treated as a guilty plea.

Discussion

1. **Dini's Entry of a No Contest Plea was Knowing and Voluntary Despite the Failure of the Tribe or Tribal Court to Advise Him of the Number of Prior Domestic Violence Convictions or To Permit Him to Withdraw His Plea Once That Number was Known**

The Criminal Complaint filed against Dini clearly advised the defendant that the number of prior domestic violence convictions he had could affect the severity of his sentence. It accurately summarized the sentencing regime created for domestic violence crimes by Section 7.4(A)(3) of the Hualapai Law & Order Code. Specifically, the Criminal Complaint provided in relevant part:

> 3rd or subsequent offense of domestic violence within five years carries a maximum penalty of imprisonment for a term of not less than one year and fine in the amount of not less than $1,000 or more than $5,000, or both such imprisonment and fine, mandatory counseling shall be part of sentencing. A person convicted on a 3rd or subsequent offense 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.

Thus, having received a copy of the Criminal Complaint, before entering his "no contest" plea, Dini was placed on actual notice that the number of prior domestic violence convictions he had would affect the severity of his sentence. Yet, at no time prior to the entry of his plea did he make any inquiry as to how many prior domestic violence convictions he had on his record. Without any such inquiry, the Tribe and the Tribal Court reasonably could have believed that Dini was fully aware of his prior record and that he entered his "no contest" plea with full knowledge of its consequences. Indeed, even after Dini allegedly discovered for the first time that he had two prior domestic violence convictions and that this third conviction would result in a mandatory one year jail term, he made no motion to withdraw the entry of his "no contest" plea nor did he file any application for post-conviction relief with the Tribal Court attacking the knowing and voluntary nature of his plea. In short, Dini has never offered to the Tribal Court any of the arguments made to this Court in support of his appeal.

As this Court has noted many times, its primary role is to correct errors made by the Tribal Court, not to revise decisions below based on this Court's own sense of justice. Absent plain error, this Court generally will not intervene and reverse a decision made by the Tribal Court on a claimed error never presented to that Court. *E.g. Hualapai Tribe v. Pablo,* No. 2010-AP-011 (Jan. 3, 2011); See also, Hualapai Rules of Appellate Procedure, Rule 2(c). Given that role, it is generally the obligation of any party seeking to appeal to first present the arguments on which they rest their appeal to the Tribal Court. Dini did

not do that here and, in fact, never made any motion to the Tribal Court seeking to vacate his conviction based on his "no contest" plea.

Even had Dini properly preserved error in the Tribal Court (which he did not), this Court would does not regard the process followed in the Tribal Court to constitute error. It is reasonable for both the Tribe and the Tribal Court to presume that an accused knows how many prior convictions (s)he has for domestic violence. In fact, of the parties in the courtroom, the accused is far more likely to know the number of times he was previously convicted than either the Prosecutor or the Tribal Court, both of which process so many cases that they are unlikely to have such information readily available without searching, as was done in this case. In the event that a defendant does not know the number of prior domestic violence convictions he has, the burden should rest on the accused to request that information *prior to entering his guilty or no contest plea.* Dini made no such request in this case and did not even challenge either the information or the plea once it was learned.

Unlike exculpatory material of the type required to be disclosed by Prosecutors by *Brady v. Maryland*, 373 U.S. 83 (1963), the number of prior domestic violence convictions is not information uniquely held by the prosecutor and unknown to the the accused. Rather, such information is not only equally known to or available to the accused, it may actually be more readily available to the accused since it is specific to the accused who was presumably personally involved in each such conviction. For these reasons, even had Dini properly preserved the errors he asserts for review, this Court would reject Dini's arguments. His plea was knowingly and voluntarily entered even without specific advice of the number of prior domestic violence convictions.The Prosecutor had no legal obligation to advise him of that number.[2] Finally, without any motion on his part, The Tribal Court had no independent obligation to permit him to withdraw his plea once he learned that the actual number of prior domestic violence convictions mandated a one year jail term.

In short, this Court finds no procedural legal errors in the procedures leading to Dini's conviction and sentence based on his entry of a "no contest" plea.

---

2 While this Court does not hold that the Tribe must, as a matter of law, advise an accused of the number of prior domestic violence convictions a defendant has on his or her record as part of the charging function, it does note that if ascertaining that number is relatively easy, including the actual number in the Criminal Complaint and tailoring the Maximum Penalty language in the Criminal Complaint to that precise number would be helpful to the administration of justice by assuring that faulty memory or other lack of attention by the accused did not inadvertently mislead him or her on the consequences he faced in the criminal trial. This Court emphasizes, however, that this suggestion is merely that and not a legal requirement.

2. **The Tribal Court and the Tribe Did Not Misconstrue Section 7.4(A)(3) of the Hualapai Law & Order Code as Mandating, Rather Than Permitting, a Year Jail Sentence on the Third Conviction for Domestic Violence.**

Dini also argues that both the Tribal Court and Tribe misconstrued Section 7.4(A)(3) of the Hualapai Law & Order Code as mandating, rather than permitting, a year jail sentence on the third conviction for domestic violence. Section 7.4(A)(3) & (4) provide in relevant part:

> 3. Third and Subsequent Offenses: A person convicted of a third or subsequent offense of domestic violence within five years of the last conviction may be imprisoned for a term of not less than one year and fined an amount not less that $1000 or more than $5,000 or both such imprisonment and fine. Mandatory counseling shall be part of sentencing as provided in Section 7.5 of this Chapter as well as restitution when appropriate. A convicted person under this section 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.
>
> 4. For second and subsequent convictions, upon complete and total compliance with the orders of the Court requiring completion of the domestic violence program and/or counseling as ordered, the Court my suspend up to half of the imposition of fines and imprisonment for domestic violence offenses(s). Provided: the perpetrator is placed on probation for not less than one year. Failure to comply with terms of probation shall result in completion of the original sentence.

Given the confused and internally inconsistent language of these provisions, it is understandable why Dini believes that both the Tribal Court and the Tribe misconstrued the statute since it would appear, on first reading, that the one year sentence of Section 7.4(A)(3) is permissive, given the use of "may," and that Section 7.4(A)(4) seems to authorize suspension of half of any one year sentence even though Section 7.4(A)(3) forbids such suspension. Nevertheless, while there is some force to Dini's claims, unfortunately for him, his argument is foreclosed by this Court's decision in *Hualapai*

Tribe v. Pablo, No. 2010-AP-011 (Jan. 3, 2011). In that case, a unanimous Court[3] expressly rejected similar arguments, writing:

> It appears that the Tribal Council intended to create a mandatory jail sentence of "not less than one year" for persons convicted of a third or more domestic violence offense, and that the "may" and "or" are simply drafting errors. Reading Section 7.4(A)(3) in conjunction with Sections 7.4(A)(1) and (2) supports this interpretation. For the first offense, a convicted person "may be imprisoned for a term not to exceed six months"

---

3 Justice Robert N. Clinton did not sit on the panel in *Hualapi Tribe v. Pablo* and notes his disagreement with the interpretive approach and result of that case insofar as it holds that Section 7.4(A) *mandates* at least a one-year jail sentence and a fine between $1,000 and $5,000 for the third or subsequent domestic violence crime. While *Pablo* decision is certainly correct in noting that Section 7.4 is poorly drafted, internally inconsistent, and requires interpretive harmonization, Justice Clinton disagrees with the manner in which the *Pablo* Court reached its interpretive result.

By suggesting "that the 'may' and 'or' [in Section 7.4(A)(3)] are simply drafting errors," the Court ignored the most basic rule of interpreting criminal statutes, i.e. that criminal laws should be construed in favor of the accused, in order to assure that the statute provides effective notice of both the crime and the penalty – the so-called Rule of Lenity. See generally, Note, *Rule of Lenity*, 122 Harv. L. Rev.. 475 (2008). As Justice Scalia recently explained in a plurality opinion in *United States v. Santos*, 128 S.Ct. 2020, 2025 (2008):

> The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. *See United States v. Gradwell*, 243 U. S. 476, 485 (1917); *McBoyle v. United States*, 283 U. S. 25, 27 (1931); *United States v. Bass*, 404 U. S. 336, 347– 349 (1971). This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

The *Pablo* opinion makes no reference at all to the rule of lenity nor does it acknowledge the special problems of interpreting criminal statutes given due process notice requirements. While this common law rule of statutory construction of criminal statutes does not automatically apply to Hualapai law, see Hualapai Law and Order Code § 3.1B, the policy concerns it addresses, assuring adequate notice in tribal statutes defining crimes and penalties need to be seriously considered. Instead of doing so, the *Pablo* Court simply rewrote the incoherent and internally inconsistent provisions of Section 7.4 to create what it believed was a coherent whole. Even with the *Pablo* Court's creative reconstruction of Section 7.4(3), inconsistencies remain, however. Section 7.4(A)(4), for example, authorizes the suspending of half of the imprisonment or fine for those convicted of a "second *and subsequent* convictions," while the last sentence of Section 7.4(A)(3) expressly prohibits, for those convicted "a third and subsequent" charges of domestic violence, suspending any such sentence until the whole of the sentence is served. Emphasis supplied. As the *Santos* decision makes clear, when it comes to criminal statutes, clarifying ambiguity and harmonizing incoherent statutes is the job of the legislature, not the courts. Until they have been harmonized by the legislature, however, criminal statutes should "be interpreted in favor of the defendants subjected to them." Thus, based on these concerns, Justice Clinton believes *Pablo* was incorrectly resolved.

Chief Justice Williams and Justice Goldberg, who participated in the *Pablo* decision, do not agree with Justice Clinton that federal common law rules of statutory interpretation such as the rule of lenity

> and fined between $200 and $1,000; for the second offense, a person "may be imprisoned for a term of not less than 60 days or more than one year" and fined between $500 and $3,000. The text and structure of these provisions reflect the Tribal Council's intent to increase the penalties with each subsequent offense. *Consequently, we find that the Tribal Court correctly interpreted the statute as requiring at least a one-year jail sentence and a fine between $1,000 and $5,000 for the third or subsequent domestic violence crime.*

Emphasis supplied. Thus, Dini's claims of misinterpretation of Section 7.4(A)(3) are expressly foreclosed by this Court's prior decision in *Pablo* and, for this reason, must be rejected.

Finding no error in the proceedings below, Dini's conviction and sentence must be and hereby are AFFIRMED.

It is so ordered.

Entered this 21st day of August, 2012
on behalf of the entire Court of Appeals panel

By: _____
Robert N. Clinton
Justice

---

should necessarily apply to a Hualapai case. As Hualapai Law and Order Code § 3.1B reminds us, "Except as required by federal law no federal or state law ... shall be applied by the Tribal Court unless specifically incorporated into Tribal law." Section 3.1D of the Code does permit Hualapai courts to "be guided by [non-Hualapai] common law," but that guidance should be informed by arguments from the parties situating the external common law doctrines in a Hualapai context. This Court should not reach out to import common law doctrines from other jurisdictions when the parties do not argue for such incorporation, as the doctrines may function differently in a tribal setting, where sentencing authority is more limited and branches of government function differently than in state or federal systems. No arguments favoring a rule of lenity were raised in the *Pablo* case. Even if such arguments had been made, the case for applying such a rule of statutory interpretation to the sentencing provisions of the Domestic Violence Code is seriously questionable. As many legal commentators have noted, the rule of lenity has fallen out of favor in state and federal courts, which typically avoid its use by applying general methods of statutory interpretation to establish the meaning of the law in question. *See, e.g.*, Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham Law Review 885 (2004). United States Supreme Court cases subsequent to *Santos* have refused to invoke the rule of lenity for that reason. *See, e.g.*, *United States v. Hayes*, 555 U.S. 415 (2009). In *Pablo*, this Court concluded that based on its reading of the Hualapai Domestic Violence Code as a whole, the interpretation given to the sentencing provision was the best possible reflection of legislative intent.

Dini made no argument for overruling *Pablo* and, until it is overruled, *Pablo* is controlling on this Court. Consequently, this case is governed by the *Pablo* interpretation of Section 7.4(A)(3) and that interpretation requires the rejection of Dini's claims.

HUALAPAI TRIBAL APPELLATE COURT
HUALAPAI RESERVATION OF ARIZONA

APP. DIV. CASE NO.: 2012-AP-007
TRIAL COURT CASE NO.: 2012-CR-116

Hualapai Tribe, Appellee –vs- Herbert Dini III, Appellant

I, Tina Crounds for Muriel Coochwytewa hereby certify that I have provided a copy of an Opinion and Order to: Chief Prosecutor, Marie James via in box log this 22nd day of August, 2012 at the time of 3:00 p.m.

Tina Crounds

By: Hualapai Tribal Court, Court Clerk for Chief Court Clerk

HUALAPAI TRIBAL APPELLATE COURT
HUALAPAI RESERVATION OF ARIZONA

APP. DIV. CASE NO.: 2012-AP-007
TRIAL COURT CASE NO.: 2012-CR-116

Hualapai Tribe, Appellee –vs- Herbert Dini III, Appellant

I, Tina Crounds for Muriel Coochwytewa hereby certify that I have provided a copy of an Opinion and Order to: Public Defender, E. Hernandez via in box log this 22nd day of August, 2012 at the time of 3:00 p.m.

Tina Crounds

By: Hualapai Tribal Court, Court Clerk for Chief Court Clerk

APP. DIV. CASE NO.: 2012-AP-007
TRIAL COURT CASE NO.: 2012-CR-116

Hualapai Tribe, Appellee –vs- Herbert Dini III, Appellant

I, Tina Crounds for Muriel Coochwytewa hereby certify that I have provided a copy of an Opinion and Order to: Herbert Dini III via in box log to Adult Detention this 22nd day of August, 2012 at the time of 3:00 p.m.

Tina Crounds

By: Hualapai Tribal Court, Court Clerk for Chief Court Clerk

IN THE HUALAPAI NATION COURT OF APPEALS

HUALAPAI RESERVATION, ARIZONA

HUALAPAI TRIBE, Appellant, v. HOWARD W., Appellee.	App. Court Case No.: 2012-AP-011 Tribal Court Case No.: 2012-JDN-007 **OPINION AND ORDER**

Before Justice Carole Goldberg, Chief Justice Wes Williams, Jr., and Justice Pro Tem Patty Ferguson-Bohnee

This is a dependency proceeding, brought under Hualapai Law and Order Code Chapter 13, sections 13.3(B)-(D), alleging that a minor child, T.W., is both dependent and neglected. In its petition filed on May 2, 2012, the Appellant Tribe [Appellant] alleged that Appellee Howard W.[1] [Appellee], T.W.'s father and legal custodian, beat T.W. with a belt on his face, and then kept T.W. home from school so that the injuries to T.W.'s face would not be discovered. On May 3, 2012, the Tribal Court ordered T.W. into the temporary custody of the Hualapai Human Services Department of Social Services, pending a hearing on the petition. Following a hearing on May 31, 2012, the Tribal Court issued an order, dated June 18, 2012, dismissing the Tribe's dependency petition with prejudice and ordering the immediate return of T.W. to Appellee. The Tribe promptly filed a notice of appeal and moved for a stay of the Tribal Court's order, first in the Tribal Court, which denied the motion, and then in this Court. This Court granted a stay on July 2, 2012.[2]

In support of its appeal, the Tribe argues that the Tribal Court acted arbitrarily and capriciously in finding that Appellee did not beat T.W. on the face with a belt. We do not need to address this argument because we have found that a procedural error occurred in the hearing

[1] Appellee's full name does not appear in order to protect the identity of the juvenile, T.W.

[2] During the hearing before this Court on the motion for a stay, it became evident that T.W. was still not in Appellee's custody. The Tribe had previously filed a criminal complaint against Appellee for the same acts presented in the dependency petition, and one of the conditions of Appellee's release was that he have no contact with T.W. Accordingly, T.W. is currently residing with a paternal relative.

on the petition when the Tribal Court took the testimony of the child, T.W., via telephone rather than in person. That error requires us to reverse the Tribal Court's decision and remand for a new hearing.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case were developed at a hearing held on May 31, 2012. On Wednesday, April 25, 2012, T.W.'s teacher called Appellee to inform him that T.W. had marked another student with a marker. What transpired thereafter is contested. Relying on the testimony of T.W., who is ten years old, the Tribe contends that Appellee was intoxicated when he took T.W. home from school that day, and beat T.W. on the buttocks, face, and arms with a belt, causing T.W.'s face to swell. According to T.W., this was not the first occasion on which Appellee had beaten him with this same belt. T.W. further testified that Appellee did not allow him to attend school the next day because Appellee did not want school officials to see the marks on T.W.'s face resulting from the beating.

T.W. apparently stayed out of general public view until Sunday morning, April 29, 2012, when his mother observed him. T.W.'s mother testified at the dependency hearing that she became concerned when she observed a mark across T.W.'s face. After listening to T.W.'s account of the cause of the mark, she called the police. The investigating police officer who responded to the call, Officer Mitchell, testified at the dependency hearing and wrote in the police report that T.W. had an unusual mark on his face. Officer Mitchell was accompanied by a supervising officer, who was present mainly to observe, and who testified at the hearing that he had not seen the mark. T.W.'s teacher testified at the dependency hearing that when T.W. returned to school after the weekend, she did observe an unusual, discolored mark across T.W.'s face.

In their report of the investigation, the police indicated that Appellee denied having beaten T.W.'s face with a belt, although Appellee did acknowledge having physically disciplined T.W. with a spanking on T.W.'s buttocks. Further, according to the police report, Appellee stated that any marks on T.W.'s face must have come from an injury while playing baseball.

During the dependency hearing, Appellee's advocate argued that Appellee had used only reasonable discipline on T.W., and that T.W. was lying about being beaten on his face with a belt. He contended that poor relations between Appellee and T.W.'s mother led her to promote a false story about Appellee having beaten T.W. Appellee's advocate also placed great weight on a photograph of T.W.'s face that the police had made at the time they responded to the call from T.W.'s mother. Several witnesses who had testified that they had seen a mark on T.W.'s face could not see that mark on the photo. Further, Appellee's advocate brought out evidence that Appellee is a very concerned parent, and has made considerable efforts to find the appropriate educational program for T.W., who, according to his teacher, has difficulties keeping his behavior under control.

A great deal of the dependency hearing was devoted to challenging the credibility of witnesses and the correctness of the accounts put forward by each side. Although Appellee did not testify, his statements in the police report were subjected to intense scrutiny, especially his claim that the marks on T.W.'s face were attributable to a baseball injury and his statement to the

police that he held T.W. back from school because of his misbehavior. Appellee's advocate, in turn, sought to establish that T.W. had a history of lying, that his mother was motivated by ill will towards Appellee, that the investigating officer who reported a mark on T.W.'s face was contradicted by another officer on the scene who did not see the mark, and that the photograph contradicted the testimony of eye-witnesses.

At the outset of the hearing, Appellant moved to have the testimony of the investigating officer provided telephonically, as the officer was no longer employed by the Hualapai Police Department. Appellee's advocate agreed, and the Tribal Court granted the motion. Appellant also moved to have T.W.'s testimony given outside the presence of Appellee, arguing that T.W. was afraid to testify with his father in the courtroom. Appellee's advocate objected that Appellee's right to confront the witnesses against him would be violated if Appellee could not be present in the courtroom for T.W.'s testimony. Appellant responded that Appellee's confrontation rights were more limited in a civil dependency proceeding than in a criminal prosecution, and that the child's interests must be taken into account in establishing a proper format for taking testimony. To protect T.W. from being traumatized, while ensuring an opportunity for Appellee to cross-examine, the Tribal Court ordered that T.W. testify telephonically from another room in the courthouse, with a court clerk present in that room to protect against coaching or other interference with his testimony. Accordingly, the Tribal Court was unable to see T.W. while T.W. was giving his testimony.

II. DISCUSSION

Appellant argues for reversal of the Tribal Court's order, claiming that the findings of fact were arbitrary and capricious. Under Article VI, section 12 of the Hualapai Constitution, "Findings of fact shall be made by the Trial Court and shall be reviewable only when arbitrary or capricious." This Court has previously noted that the Court of Appeals "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 or capricious.'... [T]he Hualapai Constitution ... permit[s] 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." *Querta v. Hualapai Tribe*, 2009-AP-012 (Hualapai Ct. App. 2010). After reviewing the record of the hearing on the dependency petition, we do find it difficult to reconcile the Tribal Court's findings with the testimony presented. The Tribal Court's findings are minimal. Concerning to this Court is that the Tribal Court failed to make a finding as to whether T.W. was beaten (as opposed to a reasonable disciplinary spanking), an essential fact supporting the Tribe's claim in the underlying petition. Because the Tribal Court found that T.W. was not a neglected or dependent child, that court must have assumed that T.W. was not beaten. Yet in order for it to be true that Appellee did not beat T.W., not only would T.W. and his mother have to be lying, but so would the investigating officer and T.W.'s teacher. While Appellee's advocate can supply motives to lie for T.W. and his mother, it is far more difficult for Appellee to explain why the two other witnesses would testify to having seen a mark on T.W.'s face. It is also difficult to understand why Appellee would have tried to explain away a mark on T.W.'s face (with the story of a possible sports injury) if there was indeed no mark because there was no beating.

Nonetheless, this Court does not need to resolve the question whether the Tribal Court's findings were arbitrary or capricious. Instead, we find that the very procedure used to take T.W.'s testimony was insufficient to protect the minor child's interests during a dependency proceeding, and therefore constitutes reversible error. Although the Tribe did not raise this issue before the Tribal Court, under Rule 2(c) of the Hualapai Rules of Appellate Procedure, this Court may reverse a Tribal Court decision even if the error was not objected to below, if the "mistake by the Tribal Court ... seriously prejudices substantial rights, ...[and] must be corrected in order to prevent a miscarriage of justice and to preserve the integrity and the reputation of the judicial process." In determining that the procedure used in this case seriously prejudiced the minor child's rights and impaired the Hualapai judicial process, we are guided by Hualapai Law and Order Code section 13.29, which states: "The Court may make any reasonable orders which are for the best interest of the child ...." and Hualapai Law and Order Code section 13.20A, which states: "Hearings in children's cases shall take place before the Court without a jury and may be conducted in an informal manner .... At the discretion of the Court, the child may be separately interviewed at any time."

For purposes of taking T.W.'s testimony in this case, the Tribal Court chose to place the child outside the courtroom and to leave Appellee and his counsel in the courtroom. As a consequence, the Tribal Court could only hear T.W. telephonically, and was unable to observe T.W. during his testimony in order to gauge T.W.'s credibility as a witness. Given that T.W. was the alleged victim of child abuse, and the object of the dependency proceeding, the Tribal Court should have arranged for T.W. to give his testimony in the presence of the judge. A speakerphone could have been set up in the courtroom so that Appellee could be in another room in the courthouse, and T.W. would be spared having to testify in Appellee's presence. This arrangement would have been no less advantageous to Appellee and his advocate than the procedure actually used in the hearing. Regardless whether it was T.W. or Appellee who was placed in the courtroom, and who was placed elsewhere in the courthouse, Appellee and his advocate would only have been able to *hear* T.W. as he testified, not to *see* him. But the crucial flaw in the procedure actually used in the hearing was that the Tribal Court judge could not see T.W., and thus was hampered in determining whether T.W. was telling the truth. It may be no coincidence that the two witnesses in Appellant's favor who were disbelieved by the Tribal Court, T.W. and investigating Officer Mitchell, were the two witnesses who testified telephonically rather than in person. While Officer Mitchell's absence from the reservation justified the use of telephonic testimony, there was no reason to take the minor child's testimony outside the presence of the Tribal Court judge when T.W. was available in the courthouse. Thus, we hold that when the Tribal Court finds it necessary to take the testimony of a child witness separately in order to protect the child from being traumatized, as the Tribal Court did find in this case, arrangements must be made so that the child's testimony will be taken in the presence of the Tribal Court judge.[3]

---

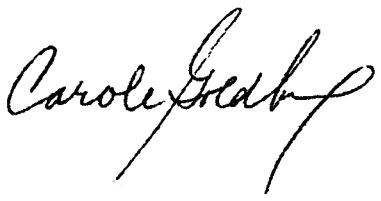
[3] There may be cases where circumstances preclude the taking of the minor child's testimony in person before the judge. This Court is not insisting that a minor child's testimony may never be taken telephonically in a dependency case. However, in situations such as this case, where the child is present and it was just as easy and protective of the child to take the testimony of the child in person as telephonically, the testimony must be taken in the presence of the Tribal Court judge.

During the hearing before the Tribal Court in this case, Appellee objected to T.W. testifying outside his father's presence, invoking his constitutional right to confront the witnesses against him. This confrontation right is guaranteed in Article VI, section 13(c) of the Hualapai Constitution, but only "in a criminal proceeding." We uphold the ruling of the Tribal Court in this case that there is no such absolute right in a civil dependency proceeding. There is, instead, a right to fair process protected by the due process clause of Article IX (d) of the Hualapai Constitution. This Court joins the high courts of several states in finding that due process in a dependency proceeding requires a balancing of the child's interest in psychological and physical well-being against the parent's right to respond to adverse testimony. *See, e.g., In re Brock*, 442 Mich. 101 (1993); *In re James A.*, 404 A.2d 1386 (R.I. 1986). According to these decisions, which we find persuasive, it is consistent with due process to have a child testify before the judge and outside the presence of the parents, especially if parents' counsel is present in the courtroom and there is reason to believe the child will be intimidated/traumatized in the presence of the parents. In more extreme cases of trauma, it can even be consistent with due process to dispense with cross-examination altogether, with the judge conducting the inquiry. Thus, we find that it would not violate Appellee's due process rights to have T.W. testify in person before the Tribal Court judge and to have Appellee in another room, listening telephonically. The Tribal Court should determine in this case whether it would be sufficiently protective of T.W.'s interests to have Appellee's advocate in the courtroom for T.W.'s testimony, or whether the advocate should communicate with T.W. telephonically as well.

Because there was a procedural error in the conduct of the hearing, the judgment of the Tribal Court is reversed, and this case is remanded for a new hearing. The stay shall remain in place until further order by the Tribal Court following the new hearing.

IT IS SO ORDERED

Dated: August 9, 2012



CAROLE GOLDBERG
JUSTICE OF THE HUALAPAI COURT OF APPEALS

HUALAPAI TRIBAL APPELLATE COURT
HUALAPAI RESERVATION OF ARIZONA

APP. DIV. CASE NO.: 2012-AP-011
TRIAL COURT CASE NO.: 2012-JDN-007

Hualapai Tribe, Appellant –vs- Howard Whatoname, Appellee

I, Muriel Coochwytewa hereby certify that I have provided a copy of the Opinion and to: Chief Prosecutor, Marie James via in box 13th day of August, 2012 at the time of 3:30 p.m.

Muriel Coochwytewa

By: Hualapai Tribal Court, Chief Court Clerk

HUALAPAI TRIBAL APPELLATE COURT
HUALAPAI RESERVATION OF ARIZONA

APP. DIV. CASE NO.: 2012-AP-011
TRIAL COURT CASE NO.: 2012-JDN-007

Patricia Cesspooch, Appellant –vs- Hualapai Tribal Election Board, Appellee

I, Muriel Coochwytewa hereby certify that I have provided a copy of the Opinion and to: Public Defender, Estevan Hernandez via in box 13th day of August, 2012 at the time of 3:30 p.m.

Muriel Coochwytewa

By: Hualapai Tribal Court, Chief Court Clerk

Hualapai Tribal Appellate Court - 2012 Docket No(s).

Appellate Docket No.	Appellee	Appellant	Lead Justice	Justices	Disposition
2012-AP-001	Hualapai Tribe	Erica Randall	Sekequaptewa	Williams & Clinton	Affirmed Closed
2012-AP-002	Hualapai Tribe	Candace Fox	William	Clinton & Goldberd	Remnd to trl crt close
2012-AP-003	Hualapai Tribe	Joseph Powsey	Clinton	Goldberg & Sakequaptewa	Waiting for Opinion and Order
2012-AP-004	Waylon Honga	Robert Bravo Jr.	Goldberg	Sakequaptewa & Williams	Dismissed/CLOSED
2012-AP-005	Hualapai Tribe	Brian Suminimo	Sakequaptewa	Williams & Clinton	Remand to Trial Court
2012-AP-006	Hualapai Tribe	Tami Querta	Williams	Clinton & Goldberg	Waiting for Opinion and Order
2012-AP-007	Hualapai Tribe	Herbert Dini III	Clinton	Goldberg & Sakequaptewa	Affirmed Closed
2012-AP-008	H.T. Election Board	Sheri Yellowhawk	Goldberg	Sakequaptewa & Williams	Remand to Trial Court
2012-AP-009	H.T. Election Board	Patricia Cesspooch	Williams	Clinton & Goldberg	Writ-Dismissed
2012-AP-010	H.T. Election Brd.	Patricia Cesspooch	Clinton	Goldberg & Williams	
2012-AP-011	Howard Whatoname	Hualapai Tribe	Goldberg	Williams & Fergurson	Remand to Trial Court Closed
2012-AP-012	GC Skywalk Dev.	Hualapai Nation	Wiliiams	Clinton & Goldberg	
2012-AP-013	Waylon Honga	Hualapai Election	Clinton	Goldberg& Williams	