NO. 46523-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

JUSTIN SCOTT FESSEL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.13-1-01542-1

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

The defendant was convicted after a jury trial of vehicular assault and hit and run (injury accident). CP 73-74. The trial court gave the reasonable doubt instruction found in WPIC 4.01. CP 41

Prior to trial, the court held a hearing pursuant to CrR 3.5 on the voluntariness and admissibility of the defendant's statements to Detective James Payne of the Clark County Sheriff's Office. RP 56-64. Detective Payne testified that he interviewed Fessel in the Clark County Jail. RP 57. Detective Payne testified he administered *Miranda* warnings to Fessel, and that Fessel waived those rights. RP 58. The trial court found the statements

were voluntary and were made after the defendant waived his Fifth Amendment rights. RP 64. The trial court did not enter written findings of fact and conclusions of law.

This timely appeal followed sentencing. CP 102.

C. ARGUMENT

I. THE JURY WAS PROPERLY INSTRUCTED BY THE TRIAL COURT WHEN IT GAVE THE REASONABLE DOUBT INSTRUCTION BECAUSE THE REASONABLE DOUBT INSTRUCTION, WPIC 4.01, WHICH PROVIDES THAT "[A] REASONABLE DOUBT IS ONE FOR WHICH A REASON EXISTS AND MAY ARISE FROM THE EVIDENCE OR LACK OF EVIDENCE" IS A CORRECT STATEMENT OF THE LAW.

Fessel did not object to this instruction at trial. RP 663-669. Fessel advances no argument as to why he can raise this instructional issue for the first time on appeal. The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This "rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might

have been able to correct to avoid an appeal and a consequent new trial." *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

The rule has additional force when applied to criminal cases in which claimed errors in jury instructions are raised for the first time on appeal because "CrR 6.15(c) *requires* that timely and well stated objections be made to instructions given or refused 'in order that the trial court may have the opportunity to correct any error.'" *Id.* at 685-86 (emphasis added) (quoting *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976)). Accordingly, our Supreme Court has "with almost monotonous continuity, recognized this procedural requirement and adhered to the proposition that, absent obvious and manifest injustice, we will not review assignments of error based upon the giving or refusal of instructions to which no timely exceptions were taken." *State v. Louie*, 68 Wn.2d 304, 312, 413 P.2d 7 (1966) (citing cases). Thus, it is unsurprising that "[c]iting this rule or the principles it embodies" our Supreme Court "on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial." *Scott*, 110 Wn.2d at 686 (citing cases).

Because Fessel advances no argument as to why he should be able to raise this issue for the first time on appeal this court should decline to consider it.

If this court decides to reach the merits of the issue, Fessel's argument still fails. Fessel asserts that the trial court instructed the jury on an incorrect definition of reasonable doubt. Br. of App. at 3-12. He claims that WPIC 4.01, the pattern instruction used in this case, misstates the burden of proof by defining a reasonable doubt as "one for which *a* reason exists." WPIC 4.01 (emphasis added); CP 41 (Instruction 3) ("A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence."). This, he claims, improperly requires the jury to articulate a reason for its doubt.

The Washington Supreme Court, however, has expressly approved this instruction. *State v. Bennett*, 161 Wn.2d 303, 317-18, 165 P.3d 1241 (2007). There, the court noted that the instruction was adopted from well-established language in *State v. Tanzymore*, 54 Wn.2d 290, 340 P.2d 178 (1959), in which the court, nearly sixty years prior, observed that "[t]his instruction has been accepted as a correct statement of the law for so many years, we find the assignment [of error criticizing the instruction] without merit." *Bennett*, 161 Wn.2d at 308 (quoting *Tanzymore*, 54 Wn.2d at 291 (alterations original as quoted)). Indeed, the court in *Bennett* approved so

strongly of WPIC 4.01 that it exercised its inherent supervisory authority to require trial courts in this state to issue WPIC 4.01—and *only* WPIC 4.01—in defining reasonable doubt. *Bennett,* 161 Wn.2d at 318.

Fessel has provided this court with no convincing basis upon which to depart from the holding of *Bennett*. *See State v. Watkins*, 136 Wn.App. 240, 246, 148 P.3d 1112 (2006) (observing that the Court of Appeals will follow the precedent of the Washington Supreme Court). Even if this court were inclined to entertain such a challenge, Fessel bears the burden of making a "clear showing" that WPIC 4.01 is "incorrect and harmful." *In re Stranger Creek & Tributaries in Stevens Cnty.*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). He has not met his burden.

Moreover, Fessel's argument has also been raised and rejected in the Court of Appeals. In *State v. Thompson*, 13 Wn.App. 1, 4-5, 533 P.2d 395 (1975), the defendant argued that the phrase, "'a doubt for which a reason exists[,]'. . . misleads the jury because it requires them to assign a reason for their doubt, in order to acquit[.]" *Thompson* rejected this argument because "the particular phrase, when read in the context of the entire instruction does not direct the jury to assign *a reason* for their doubts, but merely points out that their doubts must be based on reason, and not something vague or imaginary." Id. at 5 (emphasis added).

Because the jury was properly instructed this court should affirm Fessel's convictions.

II. REMAND FOR ENTRY OF WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE CrR 3.5 HEARING IS UNNECESSARY. THE DEFENDANT'S STATEMENTS WERE VOLUNTARILY MADE.

Fessel generally complains that the trial court did not strictly comply with CrR 3.5 and enter written findings of fact and conclusions of law on the CrR 3.5 hearing. Fessel does not assign error to the trial court's admission of his statements, nor does he claim that his statements were not voluntary. The trial court erred in not entering written findings of fact and conclusions of law on the CrR 3.5 hearing, but the error does not necessitate remanding this case for entry of written findings and conclusions. Although failure to enter written findings of fact and conclusions of law pursuant to a CrR 3.5 hearing is error, such error is harmless so long as the trial court's oral findings of fact are sufficient to permit appellate review. *State v. Hickman*, 157 Wn.App. 767, 776, n.2, 238 P.3d 1240 (2010); *State v. Riley*, 69 Wn.App. 349, 352-53, 848 P.2d 1288 (1993); *State v. Clark*, 46 Wn.App. 856, 859, 732 P.2d 1029, *review denied*, 108 Wn.2d 1014 (1987); *State v. Haynes*, 16 Wn.App. 778, 788,

559 P.2d 583, *review denied*, 88 Wn.2d 1017 (1977); *State v. Thompson*, 73 Wn.App. 122, 867 P.2d 691 (1994).

When CrR 3.5 has not been strictly followed by the entry of written findings of fact, "the appellate court must examine the record and make an independent determination of voluntariness." *State v. Davis*, 34 Wn.App. 546, 550, 662 P.2d 78 (1983); *State v. Hoyt*, 29 Wn.App. 372, 628 P.2d 515 (1981); see also *State v. Daugherty*, 94 Wn.2d 263, 616 P.2d 649 (1980), *cert. denied*, 450 U.S. 958 (1981); *State v. Coles*, 28 Wn.App. 563, 625 P.2d 713 (1981); *State v. Mustain*, 21 Wn.App. 39, 42-43, 584 P.2d 405 (1979); *State v. Vickers*, 24 Wn.App. 843, 845-46, 604 P.2d 997 (1979).

> In determining voluntariness the crucial inquiry is "whether the confession was 'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.'"

Davis at 550, quoting *Vickers* at 846, *Malloy v. Hogan*, 378 U.S. 1, 7, 84 S.Ct. 1489 (1946). "Whether the statements were voluntary, not whether findings as to voluntariness were made, determines the statements' admissibility." *Vickers* at 845, *State v. Shelby*, 69 Wn.2d 295, 301, 418 P.2d 246 (1966). The standard of proof for determining voluntariness is preponderance of the evidence. *State v. Braun,* 82 Wn.2d 157, 509 P.2d 742 (1973); *Davis*, supra, at 550.

Here, the trial court made clear and detailed oral findings of fact which are more than adequate to permit appellate review. The Court said:

> The Court's ruling is that on August 15th 2013, Mr. Fessel was contacted in the Clark County Jail in a public interview room, and that at that time Mr. Fessel was in custody. Detective Payne did advise Mr. Fessel of his Miranda rights. There is no indication from the testimony given that Mr. Fessel was under the influence of any type of substance or that he did not understand his rights. His answers were responsive to the questions asked. It's the Court's finding, based on all of the facts, that the statements were knowingly, intelligently and voluntarily given without any request for Counsel, and that Miranda rights were properly given before the statements. So the statements are admissible.

RP 64.

The oral findings of the Court were more than sufficient for Fessel to make any assignments of error he deemed worthwhile. Written findings would likely not have varied much, if at all, from the oral recitation. Fessel could not have been prejudiced by the trial court's failure to reduce these crystal-clear oral findings into written ones.

The cases cited by Fessel for his claim that remand is required are inapposite because they were cases that dealt with the trial court's failure to enter written findings of fact and conclusions of law after a *non-jury trial*, not a CrR 3.5 hearing. See *State v. Hesock*, 98 Wn.App. 600, 989 P.2d 1251 (1999); *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1988).

This Court, after independent review, should hold that the statements made by Fessel were made after a knowing, intelligent, and voluntary waiver of his Fifth Amendment rights. Fessel expressed no confusion about the warnings, and he at no time requested an attorney or invoked any of the Constitutional rights he enjoys. RP 60. This Court should conclude that the trial court's failure to enter written findings of fact and conclusions of law was harmless.

D. CONCLUSION

Fessel's convictions should be affirmed.

DATED this 17th day of June, 2015.

Respectfully submitted:

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June 17, 2015 - 10:13 AM

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