

NO. 66059-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

Carol Anne Magee,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie I. Churchill, Judge
Superior Court Cause No. 10-1-00100-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

(1) The Court's oral findings from the CrR 3.5 hearing are sufficient to allow appellate review and the absence of written findings of facts and conclusions of law required under CrR 3.5(c) constitute harmless error.

(2) The Statement of Additional Grounds was not timely filed so long as Ms. Magee received a copy of the Brief of Appellant at the same time as the Respondent.

(3) The Honorable Vickie Churchill was the assigned judge for this case and Ms. Magee failed to file a motion and affidavit with the court as required under CrR 8.9 and therefore her right to seek disqualification of a judge pursuant to RCW 4.12.050 was waived.

(4) The restitution amount ordered was proper.

(5) The trial transcript submitted by Karen Shipley is properly certified and accurate.

(6) The record clearly reflects that Ms. Magee was properly informed that she had thirty (30) days to appeal her conviction.

II. STATEMENT OF THE CASE

On the morning of January 21, 2010, Ms. Carol Magee (“Ms. Magee”) was observed ramming her white dodge truck at least a half dozen times into a Puget Sound Energy electric transformer, moving the transformer off of the power pedestal. CP 171. The neighbors, Lawrence and Mary Leonard, observed Ms. Magee ramming her white truck into the electric transformer. Mary Leonard video taped the incident which was later played to the jury and marked as State’s Exhibit 1. CP 146. Lawrence Leonard telephoned 911 emergency dispatch to report the incident and also contacted Puget Sound Energy emergency dispatch. CP 176. In addition, Lawrence Leonard took preventative measure to shut the power off to his house. CP 176.

In response, line trucks were sent to the scene by Puget Sound Energy and Verizon. In addition, a fire truck arrived, and law enforcement officials responded from the Washington State Patrol and Island County Sheriff’s Office. CP 177.

Sergeant Russ Lindner from the Island County Sheriff’s Office responded to the 911 dispatch and proceeded first to the Leonard residence to investigate as that is where the call originated. CP 194. Lawrence and Mary Leonard explained to Sgt. Lindner that they had observed Ms.

Magee “using her vehicle to ram the power pedestal that was on the ingress/egress road that comes into their residence.” CP 195. They had indicated that Ms. Magee had already driven home. CP 196.

Sgt. Lindner then proceeded to Ms. Magee’s property adjacent to the Leonards and pulled into her driveway. CP 196. Sgt. Lindner observed that the gates were closed and that there was a chain and padlock on the gate. CP 196. Sgt. Lindner was able to get Ms. Magee’s attention and spoke with her through the gate while she was inside the gate and Sgt. Linder was outside the gate. CP 196; See also CP 98.

Sgt. Lindner testified that he began the conversation by informing Ms. Magee why he was there, and that he asked if she had any information from her side of the event as to what had occurred. CP 196; CP 98; CP 106. Sgt. Lindner stated that Ms. Magee’s response was that the power box was illegally on her property and that she had told Puget Sound Energy to remove the box. CP 196. Sgt. Lindner said that Ms. Magee continued on without interruption indicating that she had a phone call with a representative of Puget Sound Energy and that they had advised her that if she compensated them for the costs of moving the box, then they would move the box. CP 196-97. Sgt. Lindner went on to say that at that point, Ms. Magee said, as in responding to this person from Puget Sound Energy

she was speaking with on the phone, that, you know “You move the box or I’ll move it for you.” CP 197. Finally, Sgt. Lindner testified that Ms. Magee ultimately drove herself to the station for booking purposes. CP 197.

Ms. Magee testified in the CrR 3.5 hearing and acknowledged that the statements that she made to Sgt. Lindner were voluntary. CP 112. Although no written findings of facts and conclusions of law were entered after the CrR 3.5 hearing, the court issued an oral decision with findings of fact and conclusions of law. CP 115.

The Court ruled as follows on the CrR 3.5 hearing:

When Sgt. Lindner came up to the fence, he testified that he believed that the fence was chained and padlocked. You were on one side of it; he was on the other side. And he asked you what your version of events were.

Whatever the statements were made were made while you were not under arrest. You were not in custody. And no Miranda warnings were necessary until you were under arrest.

We’re not talking about any statements that were made after arrest; we’re talking about statements that were made while you were on one side of the fence and he was on the other.

I will find that those statements were voluntary. That you were free to leave. That any answers made to the questions of what – what is your version, I believe that is, of events that were made without any threats or promises and are admissible.

CP 115.

In presenting her case during the trial, Ms. Magee testified that she backed into the transformer. CP 238; CP 240. Ms. Magee, in her closing argument, also admitted to moving the transformer. CP 260.

III. ARGUMENT

A. The Court's oral findings from the CrR 3.5 hearing are sufficient to allow appellate review and the absence of written findings of facts and conclusions of law under CrR 3.5(c) constitute harmless error.

Under CrR 3.5(c), the trial court is required to enter written findings of facts and conclusions of law after a CrR 3.5 hearing. The State concedes that no written findings of fact and conclusions of law were ever entered, and that the State should have entered such written findings of fact and conclusions of law pursuant to CrR 3.5(c).

However, the Court in *State v. Miller* clearly provides that such error is harmless if the court's oral findings after a CrR 3.5 hearing are sufficient to appellate review. *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998). The Court in *State v. Trout* followed *Miller* and determined that the absence of findings of fact after a CrR 3.5 hearing is harmless if the trial court's oral opinion is clear and comprehensive and written findings would be just a formality. *State v. Trout*, 125 Wn. App.

403, 415, 105 P.3d 69 (citing *State v. Cruz*, 88 Wn. App. 905, 907-08, 946 P.2d 1229 (1997)). If substantial evidence in the record supports the trial court's [oral] findings of fact, the findings will be considered verities on appeal. *Miller*, 92 Wn. App. 693 at 703-704.

Here, the court's oral findings of fact are clear and comprehensive and there is substantial evidence in the record to support the trial court's findings of fact and therefore the findings should be treated as verities on appeal.

First, the court found that Ms. Magee was not under arrest and not in custody. CP 115. The facts that the court based its finding on was Sgt. Lindner's testimony in which he came up to a fence on Ms. Magee's property and he observed the fence was chained and padlocked. That he was on one side of it and Ms. Magee was on the other side. CP 115.

The Court found that Sgt. Lindner asked what Ms. Magee's version of the events were, while he was on one side of the fence and Ms. Magee was on the other. CP 115. Ms. Magee asked Sgt. Lindner in her cross examination of the witness: "When you showed up at Mrs. Magee's gate, what did you ask her?" CP 105. Sgt. Lindner answered: "I asked her her version of the events that had just occurred that had brought me there." CP 106.

Ms. Magee's version of the events seemed to differ from Sgt. Lindner's testimony. Ms. Magee testified that Sgt. Lindner, after first informing her that he was called out because of the damage to the transformer, said to her "Either you can come down to the Coupeville Jail with me or I will come back with a SWAT team." CP 110. On the other hand, Sgt. Lindner testified that when Ms. Magee was on the inside of the padlocked fence and he was on the outside, he had asked her if she could explain her version of the events. CP 98. The Court weighed the evidence and testimony from the witnesses and made a finding that Sgt. Lindner asked Ms. Magee what her version of the events were. CP 115.

Further, Sgt. Lindner testified that Ms. Magee was not arrested at the time she was on one side of the fence and he was on the other, nor was she handcuffed or in any way restrained. CP 98-99. Also, Sgt. Lindner testified that no threats were made to Ms. Magee nor were any promises made regarding her statements. CP 99. In fact, Ms. Magee acknowledged that the statements that she made to Sgt. Lindner were voluntary. CP 112.

Accordingly, the Court found that Ms. Magee's statements to Sgt. Lindner that were made while she was on one side of the fence and he was on the other were voluntary, that she was not in custody at that time and that she was free to leave. The Court also found that the statements were

made without any threats or promises. CP 115. The Court concluded that the statements were admissible. CP 115.

State v. Hescoek and *State v. Head* are clearly distinguishable as they as they involve cases in which a court failed to enter written findings of fact and conclusions of law pursuant to CrR 6.1(d) after a criminal bench trial. See *State v. Hescoek*, 98 Wn. App. 600, 989 P.2d 1251 (1999); See also *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). These cases both involved violations of CrR 6.1(d), not CrR 3.5(c). CrR 6.1(d) states that in a case tried without a jury, the court shall enter findings of fact and conclusions of law. The Court in *Head* provides that “we have frequently held that the failure to enter written findings and conclusions **following a criminal bench trial** requires remand for entry of findings and conclusions, and we have refused to address issues raised on appeal in the absence of such findings and conclusions.” *Head*, 136 Wn.2d 619 at 624 (1998). (emphasis added). Accordingly, the clear remedy in cases in which the Court fails to enter written findings and conclusions pursuant to CrR 6.1(d) following a criminal bench trial is remand.

However, *Miller* and *Trout* provide that not entering written findings of fact and conclusions of law pursuant to CrR 3.5(c) following a CrR 3.5 hearing does not necessarily require remand, but would result in

harmless error if the trial court's oral opinion is clear and comprehensive and written findings would be just a formality. *State v. Trout*, 125 Wn. App. 403, 415, 105 P.3d 69 (citing *State v. Cruz*, 88 Wn. App. 905, 907-08, 946 P.2d 1229 (1997)). If substantial evidence in the record supports the trial court's [oral] findings of fact, the findings will be considered verities on appeal. *Miller*, 92 Wn. App. 693 at 703-704. Here, substantial evidence in the record supports the court's oral findings of fact and conclusions of law following the CrR 3.5 hearing, and therefore remand is not necessary.

B. Pursuant to RAP 10.10(d), the Statement of Additional Grounds for review was not timely filed so long as the Appellant received a copy of the Brief of Appellant at the same time that the Respondent received a copy.

RAP 10.10(d) provides in relevant part:

The statement of additional grounds for review should be filed within 30 days after service upon the defendant/appellant of the brief prepared by a defendant/appellant's counsel and the mailing of a notice from the clerk of the appellate court advising the defendant/appellant of the substance of this rule.

Here, the defendant/appellant's brief was filed on May 18, 2011 and was received by the Island County Prosecuting Attorney's Office by mail on May 18, 2011. The defendant/appellant did not file a Statement of

Additional Grounds (“Statement”) for review until June 21, 2011, more than thirty days from the date that the Brief of Appellant was filed and served on the Respondent. Accordingly, if the defendant/appellant was also mailed a copy of the Brief of Appellant on the same day that the defendant/appellant’s attorney mailed a copy to the Respondent, then the defendant/appellant did not timely file the Statement as the Statement would have then been filed more than thirty days after the defendant/appellant received the Brief of Appellant from her attorney.

In the alternative, the Respondent responds below to the arguments asserted in the Statement.

C. The Honorable Vickie Churchill was the assigned judge for this case and Ms. Magee failed to file a motion and affidavit with the court as required under CrR 8.9 and therefore her right to seek disqualification of a judge pursuant to RCW 4.12.050 was waived.

Ms. Magee asserts in her Statement under additional ground 1 that Judge Hancock was the original judge. However, this is not correct. A review of SCOMIS clearly shows that Judge Churchill was the assigned judge to this case. In fact, prior to the trial, Judge Churchill presided over the omnibus hearing and signed the omnibus application order.

Importantly, CrR 8.9 provides in full:

Any right under RCW 4.12.050 to seek disqualification of a judge will be deemed waived unless, in addition to the limitations in the statute, the motion and affidavit is filed with the court no later than thirty days prior to trial before a pre-assigned judge. If a case is re-assigned to a different judge less than forty days prior to trial, a party may then move for a change of judge within ten days of such reassignment, unless the moving party has previously made such a motion.

Under RCW 4.12.050, any party in any action in a superior court may establish by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney, cannot, or believes that he or she cannot, have a fair and impartial trial before such judge. However, RCW 4.12.050 goes on to require that any such affidavit of prejudice must be filed and called to the attention of the judge before he or she shall have made any ruling whatsoever in the case.

Accordingly, since Ms. Magee did not file an affidavit of prejudice in this case, RCW 4.12.050 provides that it is now too late for Ms. Magee to raise such issues on appeal, and CrR 8.9 provides that Ms. Magee's right to disqualification of a judge should now be deemed waived.

Importantly, Judge Churchill was not biased and the defendant received a fair and impartial trial. Judge Churchill had earlier presided

over a civil matter in which Ms. Magee's neighbors requested an injunction barring Ms. Magee from prohibiting the neighbors' ingress/egress of their easement. This earlier civil action is completely separate from the present criminal action in which Ms. Magee was charged with Malicious Mischief in the Second Degree for the damage that she caused to the Puget Sound Energy electricity transformer.

Nonetheless, it was a right of Ms. Magee to have filed an affidavit of prejudice, if she believed that she would have been prejudiced by the judge preventing her from a fair and impartial trial. Because Ms. Magee did not file such an affidavit of prejudice within the allotted time to file such an affidavit, her right to seek disqualification of a judge is waived under CrR 8.9.

D. The amount of restitution ordered was proper.

Ms. Magee in her Statement under Additional Ground 2 asserts that "The Prosecuting Attorney proceeded as if no arrangement had begun for restitution of the damage to transformer. It was on my regular power bill – paid on monthly."

However, Ms. Magee had at no time before the trial, during the trial, or at the sentencing hearing provided any argument or factual information that Puget Sound Energy had already billed Ms. Magee for the

damage she caused to the electrical transformer, nor did she raise any concerns that if victim restitution was ordered –she’d effectively pay it twice.

At sentencing, the State recommended that restitution in the amount of \$1,382.00 be ordered based on the testimony provided by Jan K. Thornton from Puget Sound Energy. CP 272; See also CP 203-213. Ms. Thornton described State’s Exhibit No. 4 to be a cost breakdown and state’s Exhibit No. 3 which was a memorandum from Puget Sound Energy sent to Sgt. Lindner letting him know that a bill of \$1,382.80 cents would be mailed with a cover letter to Ms. Magee and that for our procedure we were forwarding them out to them for restitution. CP 206. The State asked for restitution in the amount of \$1,382.80 simply because that was the cost of the intentional damage that was done to the electric transformer by Ms. Magee on the morning of January 21, 2010.

E. The trial transcript is properly certified and accurate.

Ms. Magee asserts in her Statement that the transcription omitted portions of a conversation during Vior Dire, between a potential juror and the Judge took place that was not included in the transcription.

The State does not specifically recall the conversation taking place that Ms. Magee is asserting was omitted from the Verbatim Report of

Proceedings. However, the Verbatim Report of Proceedings were properly certified and Karen P. Shipley certified that “the foregoing Verbatim Report of Proceedings was taken by me to the best of my ability and completed on Tuesday, August 17, 2010, and thereafter transcribed by me by means of a computer-aided transcription. . .” CP 218; See also CP 276.

Nonetheless, for the sake of argument, even if the Court were to take Ms. Magee’s assertion as true and that “Easement” was not defined to the jury, this would not be an error since the definition of “Easement” has absolutely nothing to do with the elements of the crime of Malicious Mischief in the Second Degree.

Importantly, Ms. Magee did not raise an objection to the jury instructions that were proposed, nor did she request that a definition of “Easement” be included as a jury instruction. CP 223-225. The Court specifically asked “Do you have any objections Ms. Magee?” and Ms. Magee replied “No.” CP 225. Accordingly, having failed to object at trial to the absence of a jury instruction, Ms. Magee may not raise the objection for the first time on appeal unless it relates to a manifest error affecting a constitutional right. See *State v. Scott*, 110 Wn.2d 682, 684, 757 P.2d 492 (1988); See also RAP 2.5(a)(3). 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 685-686. The absence of a jury instruction defining “Easement” does not relate to a manifest error affecting a constitutional right.

Ms. Magee asserts in her Statement that “When the Judge told us we could not define Easement she took away my right to defend myself with free speech.” However, upon review of the Verbatim Report of Proceedings, no request to define “Easement” was raised by Ms. Magee during the jury instruction conference. CP 223-225. Further, the Judge did not refuse defining “Easement” to the jury since no request was ever made to have “Easement” defined to the jury. CP 223-225. Accordingly, Ms. Magee’s rights to free speech were not implicated here since Ms. Magee’s speech was in no way limited. Ms. Magee did not propose a jury instruction defining “Easement” and therefore no such jury instruction was given.

F. The record clearly reflects that Ms. Magee was properly informed that she had thirty (30) days to appeal her conviction.

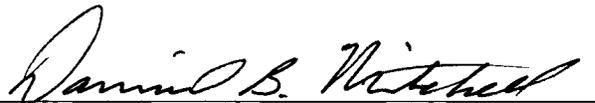
The Judge advised Ms. Magee after sentencing that “[U]nless a Notice of Appeal is filed within 30 days after the entry of this Judgment or Order appealed from, your right to appeal is irrevocably waived.” CP 275. However, this issue is moot since this appeal is currently before this Court.

IV. CONCLUSION

For the reasons set forth above, the State requests that this Court find it harmless error that no written findings of fact and conclusions of law were entered with the court since the oral ruling following the CrR 3.5 hearing was clear and comprehensive and that substantial evidence in the record supports the trial courts findings and conclusions. Further, the State requests that the Court find that the Statement of Additional Grounds presented by the Defendant is either untimely, or without merit, and therefore uphold the trial court's decision.

Respectfully submitted this 18th day of August, 2011.

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