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January 28, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 73363-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

OTIS BRYANT, JR.,

Appellant.

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

The Honorable Dean S. Lum, Judge

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BRIEF OF APPELLANT

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CHRISTOPHER H. GIBSON  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting improper opinion evidence over defense objection and in violation of a pretrial ruling.

2. The trial court erred by failing to file written findings of fact and conclusions of law following a CrR 3.5 hearing.

Issues Pertaining to Assignments of Error

Appellant denied committing the charged arson and provided an exculpatory statement that was introduced at trial.

1. Did the trial court err in admitting over defense objection and in direct conflict with a pretrial ruling, a law enforcement officer's opinion that Appellant, was "just being difficult" about revealing which apartment he was staying at in the apartment complex?

2. Did the erroneous admission of the "just being difficult" opinion evidence prejudice Appellant because it tended to refute his claim that his cooperativeness with law enforcement showed he was not guilty?

3. Pretrial, the court held a hearing to determine the admissibility Appellant's statement to law enforcement. Did the trial court err in failing to file written findings of fact and conclusions of law memorializing its decision as required by CrR 3.5?

B. STATEMENT OF THE CASE

1. Procedural Facts & Pertinent Pretrial Rulings

On October 27, 2014, the King County Prosecutor charged appellant Otis Bryant, Jr., with first degree arson and fourth degree assault, both allegedly committed as acts of domestic violence. CP 1-2. The prosecution alleged that on August 21, 2014, Bryant assaulted Monica Bissell, a woman with whom he was romantically involved, by throwing "a drinking glass at her which [sic] shattered and cut her foot." CP 3. The prosecution further alleged that on August 30, 2014, Bryant used an accelerant to set fire to the entryway of Bissell's apartment. CP 3-4.

The prosecution's request to amend the assault to third degree was denied, and a subsequent defense motion to sever the charges was granted. RP 52, 156.<sup>1</sup> The trial court held, however, that evidence of the assault was admissible at the arson trial to show state-of-mind for both Bissell and Bryant on the night of the fire. RP 71-73, 157. The assault charge was eventually dismissed with prejudice. CP 268; RP 823.

A hearing was held pretrial to determine the admissibility of Bryant's statements to law enforcement. RP 107-224. The court concluded all of Bryant's statements were admissible because they were

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<sup>1</sup> There are five consecutively paginated volumes of verbatim report of proceedings collectively referenced as "RP."

not made while in custody. RP 224-29. To date, written findings of fact and conclusions of law have not been filed.

At the defense's pretrial request, and over prosecution objection, the court ruled King County Sheriff's Deputy Robert Nishimura was precluded from offering an opinion about whether "Bryant was stalling or attempting prevent verification of his address." RP 237-38. The prosecution assured the court and defense it would advise Deputy Nishimura accordingly. RP 239.

A jury found Bryant guilty following a trial held March 2-6, 2015, before the Honorable Dean S. Lum. CP 238-40; RP 244-821. On April 10, 2015, the court imposed a standard range sentence of 45 months incarceration, 18 months community custody, and ordered Bryant not to have any contact with Bissell for 100-years. CP 388-96; RP 876. On April 29, 2015, the court entered a restitution order for \$5,674.09, and on September 9, 2015, another restitution order was entered for the amount of \$22,149.09. CP 412; Supp CP \_\_ (sub no. 109, Additional Order Setting Restitution, filed 9/25/15).

Bryant appeals. CP 398-408.

2. Substantive Facts

On the evening of August 21, 2014, King County Sheriff's Deputy Jaron Smith responded to an alleged domestic dispute at the Creston Point

Apartments, a large multi-building complex off Martin Luther King Way in South Seattle. RP 282-84, 419. On his way to Monica Bissell's fourth floor apartment, Smith noticed a trail of blood beginning on the stairs leading into her apartment. RP 285-86. When Smith encountered Bissell in her apartment, she was intoxicated and Bryant was nowhere around. RP 287.

According to Bissell, she and Bryant, with whom she had been sexually involved for several months, had been arguing about something outside her apartment. RP 540-41, 563. Bissell claimed Bryant eventually threw a cocktail glass, which shattered and cut her leg enough to require stitches. RP 541-43. Bissell did not think Bryant had intended to hit her with the glass. RP 573. Bissell still wanted a relationship with Bryant after the incident. RP 562.

Smith's next encounter with Bissell was the evening of August 29, 2014. RP 293. Like before, Bissell appeared to be "quite intoxicated." RP 294. After speaking with her at a neighbor's apartment, Smith went to Bissell's apartment to remove Bryant, who was asleep in Bissell's bed. RP 293-95. Smith had difficulty waking Bryant, who eventually stirred, but had slurred speech and poor balance. RP 295.

Smith informed Bryant he was not supposed to be in Bissell's apartment and escorted him out. He watched Bryant leave the area. RP

295. Smith recalled Bryant being cooperative, as always, not upset, and not berating Bissell for any reason. RP 300. When Bryant was interviewed by Fire Investigator George Kenny the following morning, however, he claimed he was passed out in Bissell bed only because she had drugged him by spiking his drinks and then stole his money and drugs. RP 661; Ex. 57 at 3-4.<sup>2</sup>

Later that night, at approximately 12:45 a.m. on August 30, 2014, Sheriff's Deputies Devon Stratton and Robert Nishimura were summoned to Bissell's apartment based on a claim Bryant was back. RP 308, 327, 549. Stratton recalled Bissell appeared to be "spastically high," like a "tweaker." RP 310-11. Given her condition, Stratton did not think Bissell was capable comprehending simple concepts, or acting calm and rationally. RP 311. Nishimura similarly described Bissell as "drunk," "argumentative," and spouting "nonsensical phrases." RP 332. Nishimura also recalled Bissell being very upset with law enforcement for not "doing anything" about Bryant. RP 332.

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<sup>2</sup> Exhibit 57, the transcript of a taped interview of Bryant (Ex. 56) by Fire Investigator George Kenny, was admitted for illustrative purposes only, but was provided to the jury when the recording was played. RP 663-64. Both exhibits have been designated for appeal, but for purposes of specificity counsel will cite to Ex. 57 when referring to specific portions of the interview.

After speaking with Bissell, Stratton and Nishimura contacted Bryant in a stairwell of the building where Bissell's apartment is located. RP 311, 327-28. According to Nishimura, Bryant denied having any altercation with Bissell. RP 330. Nishimura eventually notified Bryant that Bissell did not want him in her apartment, and then inquired if he had anywhere else he could stay. RP 333-34. Bryant told Nishimura he was staying with a friend in another building in the complex. RP 334.

According to Stratton, he and Nishimura simply released Bryant at that point and watched him walk away, "deeper in the complex." RP 311-12. Nishimura, however, remember things differently, as revealed by the following colloquy:

Q. Did you talk to Mr. Bryant about whether he had another place he could stay?

A. Yes.

Q. What did he tell you?

A. He told me that he lived basically across the complex at the K-King building.

Q. Was it your understanding that this was his apartment or what was your understanding of the living arrangements in the K building?

A. He was staying with a friend.

Q. So after he gave you that information, what did you do with the defendant next?

A. We verified his residency by -- and we walked him over to escort him away from Monica.

Q. Did he tell you the name of the person he was staying with?

A. No. We asked him. He couldn't tell me the name.

Q. Okay. Did you go directly from Monica's building to the K building?

A. No, he wanted to go move his car.

His car was by the -- I want to say the D building and we told him that we wanted him to go show us where he lived, and he told us he didn't have a key for the building, and that he didn't know the name of the person he was living with. And then he didn't know the unit. And he was just being difficult, so we finally get to the apartment and --

[Defense Counsel]: Objection. Opinion -- "being difficult"?

THE COURT: Okay, overruled. Proceed.

Q. (By [Prosecutor]) So you got to the apartment?

A. We got to the apartment. He knocks on the door; nobody answers.

At that point he told us he didn't have a key to the apartment and he said that Monica had the key.

Q. Were you able to get that key back from Monica?

A. So I went back to Monica and Monica produced me a single key for his apartment and verified that he lived in the K405 unit.

RP 334-35.

Bryant's version of what occurred was closer to Nishimura's than Stratton's, when he told fire investigator Kenny that deputies Stratton and Nishimura escorted him first to his car, and then all the way to his "front door." Ex. 57 at 7-8. According to Nishimura, he and Stratton left the apartment complex sometime between 1 and 2 am on August 30, 2014. RP 339.

According to 19-year old Alexander Uth, he was at the Creston Point Apartments to visit a friend at about 2 am on August 30, 2014. RP 252, 257. At trial, Uth recalled that after getting out of his car he saw a man apparently cleaning out a car and mumbling something about "being rufied" and also stating "that he would get revenge on a girl or something." RP 255. Uth described the man as "between 6' to 6'5" and an "African American."<sup>3</sup> RP 256. Uth admitted, however, never seeing the man's face and did not think he had ever seen him before. Id. Uth also recalled that about a half hour later he saw smoke rising out of one of the buildings at the complex. RP 257. Uth eventually helped Bissell and two young children escape the burned apartment. RP 265-66. Uth recalled the strong odor of gasoline in the apartment. RP 267. On cross examination Uth

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<sup>3</sup> According to the charging documents, Bryant is a six-foot, 260 lb. black man. CP 18 ("Superform").

admitted he was aware of a reward associated with the arson investigation. RP 268.

After their initial encounter with Bissell and Bryant, Deputies Stratton and Nishimura returned to the apartment complex again the same night in response to the fire in Bissell's apartment. RP 312, 339. Their involvement at that point was limited to crowd control and helping with the evacuation of other apartment units. RP 315-17, 340.

Nishimura testified, however, that after the fire was out he went with fire investigator Kenny to see Bissell's apartment. RP 340. Nishimura described finding the front door busted off its hinges, melted vinyl siding outside the apartment, and a burned couch and extensive soot, smoke and water damage inside the apartment. RP 341, 345-47. After refreshing his memory with his report, Nishimura also recalled that the apartment "smelled overwhelmingly of the smell of gasoline." RP 349.

According to fire investigator Kenny, the fire at Bissell's apartment was most likely started by someone igniting about "a water bottle full" of gasoline that had been poured beneath the front door and onto the mats outside the door. RP 651-52. Items collected from the scene tested positive for partially evaporated gasoline, including debris from inside the apartment, wood splinters off the broken front door frame and a piece of carpeting found outside the front door. RP 446, 448-49.

After documenting the fire, Kenny interviewed Bissell from 7:35 am to 7:46 am on August 30, 2014. RP 656. About ten minutes after he finished the interview of Bissell, Bryant approached him and stated, "'I hear you're looking for me,' or 'you need to talk to me?'" RP 659. After learning who he was, Kenny got Bryant's permission to record the interview. RP 661-62.

Bryant explained to Kenny he was "couch surfin'" and agreed he was currently staying in apartment K405 in the Creston Point Apartment complex. Ex. 57 at 2. Bryant also agreed that he and Bissell had a "casual relationship." Id. at 2-3. Bryant told Kenny that he and Bissell started seeing each other after he had comforted her when he saw her crying about another man. Id. at 3.

Bryant explained to Kenny that the evening before the fire Bissell made him a couple of drinks, which Bryant later concluded had been spiked with something to knock him out. Id. at 3-4. Bryant claimed Bissell used it as an opportunity to steal his money and drugs. Id. at 4. Bryant recalled awaking to police officers, who escorted him first to his car and then back to the apartment where he was staying. Id. at 6-8.

When Kenny told Bryant that he was suspected of starting the fire at Bissell's apartment, the following exchange occurred to end the interview:

[Bryant]: I ain't, I ain't do no shit like that. This thing about, this thing about people, when people think that you say if am I do somethin' I'm gonna go all the way, um, um, I'm gonna lay it, um, do everything I can to hurt everybody 'cause I've been hurt. But other than that I never do dumb shit like that. Ah, I ain't, ah, uh, I don't have gasoline to put, put out and the dude say, he says smell like gasoline.

[Kenny}: Which dude?

[Bryant]: Um, I really don't know man, the guy we seen I speak to him and he say man he say it was gasoline, ah --

[Kenny] What's that guy's name?

[Bryant]: Youngster.

[Kenny]: The guy that you stay with or--?

[Bryant]: No, no, no. Youngster. Ah, uh, I can't tell you where he live, who he is, or if he will come out right now you know what I'm sayin', I don't know. But he's, that's what he said, and I was like [unintell]

[Kenny]: Cause I never said it was gasoline used--

[Bryant]: I didn't say you said, I said, I said that he said --

[Kenny]: All right.

Ex. 57 at 8-9.

In the days following the fire, Bissell and Bryant were seen interacting without any apparent animosity towards each other. RP 486-87. And Bissell admitted calling Bryant after the fire and spending time with him, noting that their relationship was not a simple one. RP 580-82.

C. ARGUMENTS

1. THE COURT ERRED IN ADMITTING DEPUTY NISHIMURA'S OPINION THAT BRYANT WAS "JUST BEING DIFFICULT" OVER DEFENSE OBJECTION AND IN VIOLATION OF A PRETRIAL RULING.

Despite a pretrial ruling excluding Deputy Nishimura from opining at trial that "Bryant was stalling or attempting prevent verification of his address," and a timely objection at trial when the deputy nonetheless testified Bryant was "just being difficult" about revealing his home address, the trial court allowed the offending testimony to stand. RP 237-38, 335. Because the improper admission of Nishimura's opinion that Bryant was not being cooperative deprived Bryant of his constitutional right to a fair trial, this Court should reverse.

A defendant's right to a fair trial under the Sixth Amendment and article I, section 21 of the Washington Constitution is violated when a witness is permitted to express his or her opinion as to guilt. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007); State v. Johnson, 152 Wn. App. 924, 931-35, 219 P.3d 958 (2009). The evil sought to be avoided by prohibiting a witness from expressing an opinion as to the defendant's guilt or innocence is having that witness tell the jury what result to reach, rather than allowing the jury to make an independent evaluation of the facts. 5A K. Tegland, Wash.Prac., Evidence, § 309, at

470 (3d ed. 1989): Consequently, no witness may express an opinion as to the guilt of a defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

As the Washington Supreme Court has held, it is clearly inappropriate for the State to offer opinion testimony in criminal trials that amounts to an expression of personal belief as to the guilt of the defendant. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (citation omitted). Such an opinion is not helpful to the jury and is highly prejudicial; thus it offends both constitutional principals and the rules of evidence. Id. at 591, n. 5.

To determine whether a statement constitutes improper opinion testimony, courts consider the following five factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) and the other evidence before the trier of fact. State v. Quaale, 182 Wn.2d 191, 200, 340 P.3d 213 (2014); Montgomery, 163 Wn.2d at 591. When applied here, it is clear Nishimura's testimony that Bryant was "just being difficult" constituted an improper opinion on guilt that so prejudiced Bryant a new trial is warranted.

(a) Factor 1; the type of witness involved

Nishimura is a King County Sheriff's Deputy. RP 321. Opinion testimony given by law enforcement officers is recognized as carrying an "aura of reliability" that can be unduly influential on jury. Quaale, 182 Wn.2d at 207 (Owens, J. dissent, quoting State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Thus, this factor weighs against admissibility. Id.

(b) Factor 2; the specific nature of the testimony

Anticipating Nishimura would attempt at trial, as he had at the pretrial hearing, to opine Bryant was trying to prevent officers from learning where he lived, defense counsel moved to exclude such testimony. RP 166-67, 237-38. Over the prosecution's objection, the trial court granted the motion, finding such opinion testimony from a law enforcement officer improper at trial, although it noted Nishimura was free to testify about what he and Stratton had to do in establishing where Bryant lived, which would allow a jury to conclude, if it thought appropriate, that Bryant was being evasive with police. RP 238.

The trial court correctly recognized that although there may be evidence to support a conclusion that Bryant was being uncooperative with police, it was one the jury should reach on its own rather than having a law enforcement officer reach it for them. Id. The trial court also likely

recognized that an opinion that Bryant was uncooperative with law enforcement officers was an issue central to the case given the lack of any eyewitnesses or physical evidence linking Bryant to the setting of the fire and Bryant's exculpatory recorded statement to Kenny. As such, if the jury concluded Bryant was uncooperative with police, it would be more likely to convict because a lack of cooperation can be interpreted as an indication of guilt. See State v. Romero, 113 Wn. App. 779, 794, 54 P.3d 1255 (2002) (noting a "lack of cooperation 'was more consistent with guilt than with innocence.'" quoting State v. Curtis, 110 Wn. App. 6, 14, 37 P.3d 1274 (2002)).

Nishimura's testimony that Bryant was "just being difficult" constituted an opinion, at least by inference, that he was guilty. Therefore, this factor also weighs against admissibility.

(c) Factor 3; the nature of the charges

The prosecutor charged Bryant with first degree arson under the "Causes a fire or explosion which damages a dwelling" prong. CP 1; RCW 9A.48.020(1)(b). To find Bryant guilty of the arson, the prosecution had to prove beyond a reasonable doubt;

(1) That on or about the 30<sup>th</sup> of August, 2014, the defendant caused a fire;

(2) That the fire damaged a dwelling;

(3) That the defendant acted knowingly and maliciously; and

(4) The acts occurred in the State of Washington.

...

CP 264 (Instruction 16).

This factor does not appear to weigh for or against admission of Nishimura's opinion testimony.

(d) Factor 4; the type of defense

Bryant's defense, as revealed in his counsel's closing argument, was general denial. RP 775-94. More specifically, however, counsel pointed out that no one saw Bryant set the fire, no one saw him near Bissell's front door when the fire was set, and no one even saw him near Bissell's building when the fire was set. RP 777.

Another theme for the defense was that the State had failed to show that Bryant was an unreasonable, angry, vindictive and revengeful man obsessed with Bissell. Counsel noted unlike Bissell's claims of irrational behavior by Bryant, all of the law enforcement officers who had contact with him testified he did not appear "angry, upset, irritated and so on." RP 783.

Bryant's counsel also emphasized in closing the generic description of the man Uth claimed he saw shortly before the fire, and how there were

probably many others in the apartment complex that met that description. RP 785. Counsel also noted that Uth may have made up the claim in hopes of collecting the offered reward. RP 785-86.

The potential success of Bryant's general denial defense hinged in large part on how the jury assessed the credibility of his statement to Kenny. We know this because the jury specifically asked for and was allowed to listen to the recording of that interview during deliberations. CP 241-42 (jury inquiry and trial court's reply).

The nature of the defense, general denial and lack of evidence to link Bryant to the setting of the fire, weighs against admission of Nishimura's opinion that Bryant was "just being difficult." It struck directly at the heart of the defense, which was that Bryant was a reasonable individual who cooperated fully with the investigation, including giving a truthful statement to Kenny denying any involvement.

(e) Factor 5; other evidence before the trier of fact

The evidence against Bryant was not overwhelming, and was all circumstantial, there being nothing directly linking him to setting the fire, such as fingerprints, a gas can in his possession or an eyewitness.

There was evidence of an altercation between Bissell and Bryant occurring a week before the fire. RP 541-43. And there was also evidence that Bryant thought he had been drugged and robbed by Bissell

the evening before the fire. Ex. 57 at 3-4. This evidence was sufficient for a juror to conclude Bryant had a motive to cause Bissell harm, but it does not constitute overwhelming evidence that he acted on that motive by setting fire to her apartment.

Moreover, there was evidence that Bissell and Bryant had at least cordial relations after the fire. RP 486-87, 580. And there was ample evidence that Bissell was not well liked at the complex given her propensity for drama. See RP 484-85 (Creston Point Apartment security guard Chad Mathis testified that Bissell tends to be "loud and boisterous" and has had altercations with teenagers in the complex) and RP 501-02 (Creston Point Apartments assistant manager Tess Hayden testified Bissell is routinely under the influence of drugs or alcohol, was known for getting into physical altercations with other residents, and was disliked by many). This evidence, in conjunction with Bryant's exculpatory statement to Kenny, support finding someone other than Bryant could have been responsible for the fire and therefore there was a reasonable doubt as to Bryant's guilty. For example, the individual Uth saw in the parking lot talking about getting revenge could have been someone other than Bryant, and potentially the person who set Bissell's front door ablaze. RP 255-57.

The other evidence presented reveals the case against Bryant was not overwhelming. As such, this factor also weighs against admissibility.

(f) Under the 5 factor test, Nishimura's opinion should have been excluded

As discussed, factors 1, 2, 4 and 5 weigh against admissibility of Nishimura's opinion, and factor 3 is neutral. Therefore, admission of the opinion was error that warrants reversal if it prejudiced Bryant.

(g) Bryant was prejudiced

Admission of evidence in violation of a defendant's constitutional right to a fair trial requires reversal unless the State can prove it was harmless beyond a reasonable doubt. Quaale, 182 Wn.2d at 202. The State cannot meet its burden here.

As discussed, the evidence against Bryant was not overwhelming. And it was apparent the reliability of his statement to Kenny was a critical aspect to the jury's deliberation as they asked to hear the recording during deliberations. CP 241-42. Nishimura's opinion that Bryant was "just being difficult" struck at the heart of Bryant's defense, which was that he was not guilty as shown by his cooperativeness with law enforcement.

That the prosecution recognized this is apparent from its closing remarks. For example, early in the prosecutor's closing she referred the jury to the offending testimony;

And they asked him where he was staying. He says he is in the K building, and you heard the description of how it took a little while for the defendant to explain where he was going. He could never name his roommate. He

could never name where he was going, but they eventually got him there.

RP 752.

And more to the point, toward the conclusion of the prosecutor's closing, she referred the jury to Bryant's interview with Kenny, noting the jury would need to assess its credibility. RP 771. The prosecutor also claimed that it represented an attempt by Bryant at "controlling the situation," by only providing the information he wanted Kenny to have.

RP 771-72.

Finally, in rebuttal the prosecutor reemphasized Nishimura's opinion testimony:

Think about the defendant's credibility or lack of credibility when he is dealing with Deputy Nishimura. That is the 12:45 contact where Deputy Nishimura is trying to escort him and the defendant clearly did not want to tell him where he was going. He didn't tell them his roommate's name, he didn't go directly to the K building, he went over to move his car and kept making excuses to avoid going there.

There was no one there. He didn't have his key.

Now he had a key, but he clearly had something that he was trying to hide.

RP 801.

The prosecution recognized that the credibility of Bryant's exculpatory statement to Kenny would determine the verdict. By referring

repeatedly to Nishimura's testimony that Bryant was uncooperative, the prosecution used the improper opinion testimony to make Bryant seem less credible in general, and by inference less credible in his statement to Kenny. Clearly, the offending testimony prejudice Bryant and therefore reversal is warranted.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5.

Before trial, the court held a hearing under CrR 3.5 to determine admissibility of Bryant's statements to various law enforcement officers. RP 107-229. The court, however, failed to enter written findings or conclusions as required by CrR 3.5. That court rule provides in part:

(c) Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision, but failed to enter the required written findings and conclusions.

The oral decision is "no more than a verbal expression of [the court's] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely

abandoned.” Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963). Consequently, the court’s decision is not binding “unless it is formally incorporated into findings of fact, conclusions of law, and judgment.” State v. Hescoc, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 (“[T]he State’s obligation is similar under both CrR 3.5 and CrR 3.6). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id.

### 3. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Bryant to be "unable by reason of poverty to pay for any of the expense of appellate review" and entitled to appointment of appellate counsel at public expense. Supp. CP \_\_ (Sub. No. 96, Order Authorizing Appeal In Forma Pauperis, Appointment of Counsel and

Preparation of Record, filed April 13, 2015). If Bryant does not prevail on appeal, he asks that no costs of appeal be authorized under title 14 RAP. RCW 10.73.160(1) states the “court of appeals . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has ample discretion to deny the State’s request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a “case-by-case analysis” may courts “arrive at an LFO order appropriate to the individual defendant’s circumstances.” Id. Accordingly, Bryant’s ability to pay must be determined before discretionary costs are imposed. The trial court made no such finding. Instead, the trial court waived all non-mandatory fees, including court costs and fees for a court-appointed attorney. CP 390.

Without a basis to determine that Bryant has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

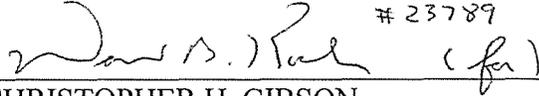
D. CONCLUSION

For the reasons stated, this Court should reverse Bryant's conviction and remand for a new, fair trial. This Court should also remand for entry of written findings of fact and conclusion of law as required by CrR 3.5.

DATED this 28<sup>th</sup> day of January, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

 # 23789 (for)

CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

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

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|---------------------|---|-------------------|
| STATE OF WASHINGTON | ) |                   |
|                     | ) |                   |
| Respondent,         | ) |                   |
|                     | ) |                   |
| v.                  | ) | COA NO. 73363-0-I |
|                     | ) |                   |
| OTIS BRYANT, JR.,   | ) |                   |
|                     | ) |                   |
| Appellant.          | ) |                   |

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF JANUARY, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] OTIS BRYANT  
DOC NO. 322938  
CLALLAM BAY CORRECTIONS CENTER  
1830 EAGLE CREST WAY  
CLALLAM BAY, WA 98326

**SIGNED** IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF JANUARY, 2016.

X *Patrick Mayovsky*