

NO. 45233-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

COLLEEN ANN MUIR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-00242-4

BRIEF OF RESPONDENT

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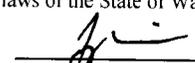
SERVICE	Lise Ellner Po Box 2711 Vashon, WA 98070-2711 Email: liseellnerlaw@comcast.net	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i> . I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 1, 2014, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether substantial evidence supports the trial courts' holding that the Defendant was not illegally seized and searched?
2. Whether the Defendant has been actually prejudiced by the trial court's failure to file written findings of fact and conclusions of law regarding the CrR 3.6 motion?
3. Whether remand to enter written findings and conclusions is the proper remedy?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Colleen Ann Muir was charged by information filed on March 8, 2013 in Kitsap County Superior Court with Possession of Methamphetamine with Intent to Manufacture or Deliver. CP 1. Muir filed a Motion to Suppress Evidence pursuant to CrR 3.6 on April 30, 2013. CP 8. The State filed responsive briefing on May 28, 2013. CP 22.

Kitsap County Superior Court Judge Steve Dixon heard testimony and oral arguments on Muir's motion on May 28, 2013. RP (5/28) 3. Judge Dixon ruled from the bench after the evidentiary hearing on May 28, 2013 and denied Muir's Motion to Suppress Evidence. RP (5/28) 55.

A bench trial based on Colleen Muir's Stipulation of Facts was

held before Kitsap Superior Court Judge Kevin Hull on August 5, 2013. CP 32. Judge Hull found Muir guilty of Possession of a Controlled Substance with Intent to Manufacture or Deliver. CP 38. Judge Hull sentenced Muir to fourteen months incarceration and other conditions, and stayed the sentence pending appeal. CP 42, 54.

B. FACTS

Bremerton Police Detective Aaron Elton testified during the evidentiary hearing that on February 7, 2013, he was on duty as a detective with Bremerton's Special Operations Group (SOG). RP (5/28) 6. He testified he has been an officer for approximately sixteen years and had been with SOG for eight and a half years. RP (5/28) 6. Detective Elton testified that on February 7, 2013, he saw James McIntyre at Harrison Hospital, in Bremerton, Washington. RP (5/28) 6-7. Detective Elton observed McIntyre drive off in a pickup truck with a female he later identified as the Defendant, Colleen Muir. RP (5/28) 7. Detective Elton was familiar with McIntyre as an individual who often has warrants and a suspended license, and who uses methamphetamine. RP (5/28) 7. Detective Elton requested patrol assistance to investigate McIntyre's current status. RP (5/28) 7.

Bremerton officers confirmed McIntyre's license was suspended and he had a warrant for his arrest. RP (5/28) 8. They located the truck

McIntyre was driving and watched him park in front of a mini-mart. RP (5/28) 8. Patrol officers pulled into the parking lot and waited until McIntyre and his female passenger went inside the store. RP (5/28) 8. None of the officers present engaged their lights or sirens or blocked the suspect's truck from leaving. RP (5/28) 8, 9. Bremerton Officer Nelson contacted McIntyre inside the store and placed him under arrest for the warrant and driving without a license. RP (5/28) 9. Officer Nelson searched McIntyre incident to his arrest and found syringes associated with intravenous drug use on his person. RP (5/28) 11. Colleen Muir was also in the store at the time McIntyre was arrested and remained there. RP (5/28) 10.

Detective Elton arrived shortly after and entered the store as McIntyre was being led outside. RP (5/28) 9. Detective Elton approached Muir, who he said was just standing there, purse in hand, not apparently shopping or doing anything. RP (5/28) 10, 20. Detective Elton asked for her name and she identified herself verbally as Colleen Muir. RP (5/28) 10. Detective Elton did not ask for or receive written identification. RP (5/28) 10. Elton testified he was not familiar with Muir before that day. RP (5/28) 10.

Muir and Detective Elton then walked outside together. RP (5/28) 10. Neither Detective Elton nor any other officer present told Muir to

come outside. RP (5/28) 11. Officers did not escort her outside or physically remove her from the store. RP (5/28) 11.

Shortly after exiting the store, Muir took a seat on the parking lot curb in front of the mini-mart. RP (5/28) 21. No officer asked her to sit down or remain on the scene. RP (5/28) 21, 11. Because McIntyre had needles associated with intravenous drug use on his person, and a known history of drug use, Detective Elton sought consent to search the truck and the backpack in the bed belonging to McIntyre. RP (5/28) 14, 23. He testified that he asked both Muir and McIntyre for consent because both of them were associated with the truck. RP (5/28) 24.

Detective Elton first asked for Muir's permission to search the truck because it was registered to her boyfriend. RP (5/28) 12, 13. Muir told him to ask James McIntyre as he was the one driving. RP (5/28) 12. Elton obliged her and spoke to McIntyre, who replied that he could search the truck but it was up to Muir. RP (5/28) 13. He returned to the Defendant and informed her McIntyre had given his consent but that he stated it was up to her (Muir). RP (5/28) 13. Muir then gave her consent to search. RP (5/28) 13.

Detective Elton could see through the closed windows of the truck a number of items, including a purse, shoes, and a small safe, some of which likely belonged to a female. RP (5/28) 12. To prevent searching

items for which he had no authorization, Elton also asked McIntyre which items belonged to Muir. RP (5/28) 13. McIntyre stated he did not know. RP (5/28) 13. Elton testified that he attempted to ascertain which articles in the truck belonged to Muir and McIntyre because if he, “had a good idea an item belongs to somebody, then I need to deal with that through consent or through getting a search warrant, if I develop probable cause.” RP (5/28) 14. When asked by Detective Elton, Muir stated the only thing in the truck that belonged to her was the small, oblong safe. RP (5/28) 13.

The Defendant remained nearby while Elton and another officer searched. RP (5/28) 17. Detective Elton located within a purse, which Muir claimed was not hers, a pipe with residue he recognized as methamphetamine given his training. RP (5/28) 16. Detective Elton asked Muir about the safe in the truck and she told him she had purchased it earlier that day for \$20. RP (5/28) 14. When asked if he could look inside, Muir replied to the effect that he could, but she didn't know the combination. RP (5/28) 16. Elton estimated in his testimony that three elapsed from the time he contacted Muir in the store and when he asked her about the safe. RP (5/28) 26.

Detective Elton easily guessed the combination on his first attempt by moving the dial by one digit. RP (5/28) 16. He found inside the safe a dental case with 14 grams of a crystalline substance, a digital scale coated

with a similar residue, and a metal spoon. RP (5/28) 16, CP 19. The substance in the dental case later tested positive as methamphetamine. RP (5/28) 19.

Detective Elton informed the Defendant that he was arresting her for possession of methamphetamine. RP (5/28) 19. He read her her *Miranda* rights and she said she understood. RP (5/28) 19. The Defendant admitted that she had additional methamphetamine in her purse. RP (5/28) 19. Detective Elton testified she had her purse “right there with her”. RP (5/28) 39. Detective Elton asked permission to search her purse. RP (5/28) 39. The Defendant agreed and reached for it before Detective Elton stopped her for officer safety reasons. RP (5/28) 39. She then stated, “I was only going to get it for you.”

Elton testified that his main focus during the contact was on James McIntyre, given his arrest, his history, and his possession of syringes and a methamphetamine pipe. RP (5/28) 22-23. Detective Elton testified the tenor of the contact was cooperative and conversational. RP (5/28) 14-15. He stated the Defendant did not appear to be under the influence or impaired in any way. RP (5/28) 15.

Colleen Muir also testified during the 3.6 hearing. In contrast to Detective Elton’s testimony and report, Muir stated that she was trying to purchase drinks when Detective Elton came in and asked to speak to her

outside. RP (5/28) 30. She stated that Elton told her “he would like for me to come outside so he could talk to me” and did not ask her name until they were outside. RP (5/28) 30. Muir testified when she left the store, she placed her purse on the ground. RP (5/28) 31, 34. Detective Elton then said “Why don’t you have a seat,” which she did, thereby putting her purse beyond her reach. RP (5/28) 34.

The Defendant testified that she never provided her consent to search the truck. RP (5/28) 32. The Defendant testified that after both times she told Elton she would not consent, Detective Elton left and was out of her view for some time. RP (5/28) 33. As to the safe search, the Defendant testified she merely told him she did not know the combination without stating he could search. RP (5/28) 34. She stated Detective Elton asked her questions about buying and selling heroin. RP (5/28) 32. She testified that she did not feel free to leave. RP (5/28) 34. She also testified that she could have left the truck behind at the market. RP (5/28) 35.

At the conclusion of the CrR 3.6 hearing, the trial court denied Muir’s motion to suppress. The court found that even if Detective Elton did ask her to have a seat outside in the way Muir described, this was an invitation not a directive or command. RP (5/28)53. The court found that though Detective Elton did ask for consent to search three times, he was

not “badgering” Muir. RP (5/28) 53. The court stated:

“He asked for consent the first time, and Ms. Muir said, ‘You’ll have to ask Mr. McIntyre, because it’s not my truck.’ So Officer Elton testified that he wants consent from everybody in that truck, which is, I think, a prudent thing to do. So he goes and asks Mr. McIntyre. Mr. McIntyre says yes. So he comes back and asks the second time, and she says yes. Importantly, when he went -- when Officer Elton asked -- after Officer Elton asked for consent from Ms. Muir the first time, he, according to Ms. Muir, left to go talk to Mr. McIntyre and was out of her view, during that period of time. Certainly, it’s not a true custodial interrogation or custodial matter when the officer walks off and he’s outside your view. I would think of no clearer invitation to walk off.” RP (5/28) 53-54.

The court also found Detective Elton’s testimony more credible regarding whether Muir in fact consented to his search of the safe. RP (5/28) 54. The trial court concluded; “I find by the greater weight of the evidence that Ms. Muir’s person was not illegally seized; and that her consent was not a product of illegal seizure, duress, or coercion; and that she did, in fact, consent to the search of the safe.” RP (5/28) 55.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING MUIR'S MOTION TO SUPPRESS BECAUSE MUIR WAS NOT ILLEGALLY DETAINED PRIOR TO HER ARREST AND HER CONSENT TO SEARCH WAS VOLUNTARILY GIVEN.

Muir argues that she was illegally seized because she was detained without reasonable suspicion and that her consent to search was involuntary because it was based on the prior illegal seizure. This claim is without merit because the trial court's factual findings were supported by substantial evidence and because the trial court did not err in reaching its legal conclusions because Ms. Muir was not seized prior to her formal arrest or prior to the time that she consented to the search of her lockbox.

1. Standard of Review

When reviewing the denial of a suppression motion, a reviewing court must first determine whether substantial evidence supports the findings of fact and then determine whether the findings support the conclusions of law. *State v. Bliss*, 153 Wn. App. 197, 203, 222 P.3d 107 (2009), *State v. Crane*, 105 Wn. App. 301, 305-06, 19 P.3d 100 (2001). Whether a seizure occurred is a mixed question of law and fact, and a reviewing court is to give the trial court's factual findings great deference

but ultimately must decide as a question of law whether those facts constitute a seizure and the review of this question is de novo. *Crane*, 105 Wn. App at 306, citing *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). Substantial evidence is evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *Crane*, 105 Wn. App at 306, citing *Hill*, 123 Wn.2d at 644.

It is the trial court's role to resolve issues of credibility, weigh evidence, and resolve differing accounts of the circumstances surrounding the encounter and the reviewing court gives great deference to these determinations. *Crane*, 105 Wn. App at 306, citing *State v. Barnes*, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999); *Russell v. Dep't of Human Rights*, 70 Wn. App. 408, 421, 854 P.2d 1087 (1993).

The Defendant in this case does not challenge any of the trial court's oral findings. To challenge a trial court's findings of fact, the defendant must cite to the specific record and assign error to the challenged finding. *State v. Slanaker*, 58 Wn. App. 161, 791 P.2d 575, *review denied*, 115 Wn.2d 1031 (1990). The record in this case contains the trial court's oral ruling and analysis, the briefing of the parties, and the testimonial evidence. Generally, remand is necessary to correct a lack of written findings and conclusions; however, there are some instances in which a review of the oral record, when it is sufficiently complete, is

allowed. See, e.g. *State v. Bynum*, 76 Wn. App. 262, 266, 884 P.2d 10 (1994), *State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992).

Washington appellate courts have often held that “although CrR 3.5 and 3.6 require entry of written findings and conclusions, failure to do so does not necessitate reversal where the court's comprehensive oral ruling is sufficient to allow appellate review.” *State v. Bynum*, 76 Wn. App. 262, 266, 884 P.2d 10 (1994), citing *State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992); *State v. Clark*, 46 Wn. App. 856, 859, 732 P.2d 1029, review denied, 108 Wash.2d 1014 (1987). The error is harmless if the court's oral findings “clearly and comprehensively” explained its’ ruling. *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998); *State v. Guevara*, 172 Wn. App. 184, 187-188, 288 P.3d 1167 (2012).

In the instant case, Muir challenges only the trial court’s denial of her motion to suppress evidence, which she claimed was obtained via an unconstitutional search and seizure. Should this Court prefer to proceed based on the record as it currently exists, there is sufficient evidence to uphold the trial court’s denial of Muir’s motion to suppress.

2. *Muir was not detained when she voluntarily chose to remain on the scene and speak to law enforcement without being ordered to do so.*

“Not every encounter between an officer and an individual amounts to a seizure.” *State v. Aranguren*, 42 Wn. App. 452, 455, 711

P.2d 1096 (1985). A person is “seized” under the Fourth Amendment only if, “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), *quoted in Aranguren*, 42 Wn. App. at 455. Under Washington’s Constitution Article 1, Sec. 7, an officer seizes an individual when, considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave due to an officer's use of force or display of authority. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) citing *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). “Whether a reasonable person would believe he was detained depends on the particular, objective facts surrounding the encounter.” *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) citing *Mendenhall*, 446 U.S. at 554.

A police officer has not seized an individual merely by approaching him in a public place and asking him questions, as long as the individual need not answer and may simply walk away. *State v. Thomas*, 91 Wn. App. 195, 200, 955 P.2d 420, *review denied*, 136 Wn.2d 1030, 972 P.2d 467 (1998). Moreover, police questioning relating to one's identity, or a request for identification by the police, without more, is unlikely to result in a seizure. *Armenta*, 134 Wn.2d at 11.

The Appellant, in this case, was not seized until she was formally arrested after a search of the vehicle and the items she claimed ownership of revealed methamphetamine. In the present case, the trial court found that Detective Elton told Muir he wanted to talk to her outside, but did not order or physically guide Muir outside the store. RP (5/28) 52-53. The court found that, while Muir may have been invited to sit on the curb, she was not ordered to do so, and thus, was not seized. RP (5/28) 53. The court found only about ten or fifteen elapsed since Elton first contacted Muir in the store and when he arrested her after discovering her methamphetamine. RP (5/28) 53. The court also noted that Detective Elton was not asked about whether he had asked direct questions of Muir about the drug trade. RP (5/28) 53. The court found it likely that he did, but that “doesn't make the situation custodial.” RP (5/28) 53.

The court considered the differences between Muir and Elton's testimony regarding her consent to search the safe, and found the Detective's testimony more credible. RP (5/28) 54-55. The court found that Muir was left alone for some time and found that “it is not a true custodial interrogation or custodial matter when the officer walks off and is outside of your view.” RP (5/28) 54. The court also found noteworthy that Muir testified that she felt free to leave without the truck. RP (5/28) 55.

Substantial evidence supports the trial court's finding that she was not seized prior to being told she was under arrest. There was no show of force or intimidating police conduct. It is reasonable to infer that Muir wanted to stay on scene since her friend had just been arrested. A reasonable person would not feel they had been detained by law enforcement simply because officers speak to them and ask to search the truck being driven by an arrested person.

3. The separate, lawful actions of the police did not culminate in a progressive intrusion into Muir's privacy.

Muir's second argument primarily relies on Division II's holding in *State v. Soto-Garcia*, 68 Wn. App. 20, 841 P.2d 1271 (Div. 2, 1992) *abrogated on other grounds by State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996) and *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009). App.'s Br. at 6. Both cases focused on the concept of progressive intrusions into a person's freedom. This Court, however, recently distinguished *Soto-Garcia* and *Harrington* in *State v. Smith*, 154 Wn. App. 695, 222 P.3d 195 (Div. 2, 2010). The facts of this case more closely resemble *State v. Smith*.

Division II in *State v. Soto Garcia* found the defendant in that case was seized because there was a "progressive intrusion" into his privacy that constituted a seizure. *Soto-Garcia*, 68 Wn. App. at 25. In that case,

the court noted that there was a combination of a records check, an inquiry about illegal drug possession, and a request to search the person of the defendant, and that these facts were ultimately held to be a seizure considering the totality of the circumstances. *Soto-Garcia*, 68 Wn. App. 20.

In *Soto-Garcia*, Kelso Police Officer Kevin Tate performed a social contact with Marcelo Soto-Garcia as the latter walked out of an alley. *Id.* at 22. Tate stopped his patrol car and Soto-Garcia approached Tate on his own accord. *Id.* Tate asked Soto-Garcia where he was coming from and where he was going. *Id.* Tate asked for Soto-Garcia's name, Soto-Garcia produced identification and Tate ran identification and warrant checks in Soto-Garcia's presence. *Id.* When the checks came back clean, Tate asked if Soto-Garcia had any cocaine on his person, which Soto-Garcia denied. *Id.* Tate then asked if he could search Soto-Garcia, who replied, ““Sure, go ahead.”” *Id.* Tate reached into Soto-Garcia's shirt pocket and discovered cocaine. *Id.* The court found the consent was tainted by the illegal seizure:

“Soto-Garcia was stopped at night in the city of Kelso at a time when there was no reason to suspect that he was engaged in criminal activity. After he was confronted by the police officer he was immediately searched without having been afforded the benefit of Miranda warnings or advice that he could withhold his consent to being

searched.” *Id.* at 29.

Muir also cites *State v. Harrington*, which held law enforcement’s actions, though individually justifiable, when considered as a whole elevated the contact to a seizure. *State v. Harrington*, 167Wn.2d 656, 222 P.3d 92 (2009). The defendant in that case was contacted on the street by an officer and spoke consensually about his whereabouts that night. *Harrington*, 167 Wn.2d at 660-61. A few minutes into the contact a second officer arrived on the scene and stood a few feet away as though to provide backup. *Id.* at 660. The first officer ordered the defendant to remove his hands from his pockets. *Id.* The Court found that the officer’s order was an effort to control the defendant’s actions. *Id.* at 667. The Court held the second officer’s sudden appearance and the first officer’s order to remove his hands intruded progressively beyond the realm of a purely social encounter such that by the time the officer asked to frisk the defendant it was clear he was not in fact free to say no and walk away. *Id.* at 669. The Court stated that a request to frisk is “inconsistent with a social encounter.” *Id.*

In contrast, Division II in *State v. Smith*, considered the progressive intrusion analysis used in *Soto-Garcia* and found that case distinguishable. *Smith*, 154 Wn. App. 695. In *Smith*, several armed officers arrested a third party while he was inside his motel room with two

other companions. *Id.* at 698. Officers asked the other two men to step outside while the room was searched. *Id.* One man decided to remain in the room, but the other man, the defendant, stepped outside. *Id.* Outside, an officer whose gun was visible stood by and another officer stood approximately six feet away with an AR-15 rifle slung over his back. *Id.* at 700. A detective asked the defendant his name and for a piece of identification. *Id.* at 698. The defendant handed the detective a check cashing card, but the detective was not satisfied and asked him for another piece of identification. *Id.* The defendant opened his wallet and the detective asked if he could search the wallet. *Id.* In response, the defendant handed his wallet over to the detective. *Id.* The Court held the encounter between the defendant and the detective was a social contact that did not escalate into a seizure. *Id.*

The appellant in that case, Kevin Smith, argued he was seized when he was asked to leave the room, but the court found this was merely a request, not a command. *Id.* at 699, citing *State v. O'Neill*, 148 Wn.2d 564, 62 P.2d 489 (2003). The appellant also argued he was seized when the officer began questioning him in front of several officers bearing weapons; however, the court found that the “threatening presence of several officers” and the “display of a weapon by an officer” may convert a contact to a seizure, but held the circumstances were not threatening

simply because several officers were armed. *Id.* at 700, citing *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998). The appellant in *Smith* went on to argue he was seized when the officer retained his identification card. The court noted, however, that the officer remained within a few feet of the defendant and never removed the card from his presence. *Id.*

Finally, Smith argued, as Muir does in the instant case, that all the actions combined created an atmosphere of coercion similar to that in *Soto-Garcia* and *Harrington*. *Id.* The court disagreed and noted that there was no direct questioning about whether the appellant possessed drugs, there was no request to search the appellant's person, and there were no attempts to control the appellant's actions. *Id.* at 702. The court stated:

“Detective May did not question Smith about illegal activity, attempt to control his actions, or request to frisk him. The detective simply asked for identification, and then asked to look through Smith's wallet, which Smith was holding open at the time.” *Id.*

Like in *Smith*, Detective Elton did not attempt to control Muir's actions, he did not ask her if she possessed drugs, and he did not ask to search her person. Detective Elton's initial investigation was clearly focused on the arrestee, James McIntyre. McIntyre gave permission to search the truck and Detective Elton appropriately asked first which items in the truck belonged to Muir so as not to overstep the scope of his

authority to search.

Muir does not claim he asked her if she possessed drugs. She stated that he asked, if she was going to buy drugs where she would go. RP (5/28) 32. Detective Elton did not offer testimony on this subject and the court found he probably did ask questions about the “drug trade,” but that such questions did not render the contact custodial. RP (5/28) 53. Detective Elton had information at this point that McIntyre had syringes on his person, a methamphetamine pipe in his bag, and there was an additional methamphetamine pipe found in an unidentified female’s bag in the truck. RP (5/28) 16. Under Washington law, an officer encountering a suspicious person (whom the officer has no other basis to seize) sometimes has “the limited right and the duty to approach and inquire about what appeared to be suspicious circumstances.” *State v. Belanger*, 36 Wn. App. 818, 821, 677 P.2d 781 (1984). Though he may have asked Muir about buying and selling heroin, such questioning was reasonable in light of McIntyre’s arrest, and the presence of drugs in the truck. Detective Elton also found Muir’s story about purchasing the safe that morning from a woman without knowing the contents or the combination to be suspicious. CP 19. Questions about the drug trade would not lead a reasonable person to believe she was not free to leave and the trial court did not err in finding the questioning was not custodial.

The only question not related to the investigation of McIntyre was Detective Elton's questions about the safe. That is not enough for a reasonable person to believe she was not free to leave and had in fact been seized by law enforcement.

Muir's case more closely resembles the facts of *State v. Smith*, and, as in that case, the trial court had a lawful basis to conclude she was not seized and her consent was not rendered involuntary. The trial court's decision was well within the trial court's discretion given the record before it and should not be overturned.

4. Muir consented to a search of her safe when she told law enforcement they could open it and her consent was voluntary.

For a valid consensual search, the trial court must find the consent was voluntary, the person granting consent had authority to consent, and the search did not exceed the scope of the consent. *State v. Johnson*, 75 Wn. App. 692, 706, 879 P.2d 984 (1994). Appellate courts give great deference to the trial court having been in the best position to evaluate the witnesses' demeanor. While appellate review of "the trial court's inferences and conclusions is appropriate, review of its findings as to credibility or the weight to be given evidence is not." *State v. Swan*, 114 Wn.2d 613, 637, 790 P.2d 610 (1990), quoting *In re Pers. Restraint of*

Bugai, 35 Wn. App. 761, 765, 669 P.2d 903 (1983). A detective's sworn testimony under oath is sufficient evidence to support the finding Muir in fact gave consent because it is enough to persuade a fair-minded rational person of the truth of the finding. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002), *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Muir argues, not that she did not consent, but that her consent was invalid because it arose from the unlawful intrusion into her rights. App.'s Br. at 13. Her argument fails because she was not seized until law enforcement formally placed her under arrest following discovery of a substantial amount of methamphetamine in her safe.

In the present case, based on the totality of the circumstances, the trial court did not err in declining to find that Muir was seized. Substantial evidence supports the trial court's finding that, "her consent was not a product of illegal seizure, duress, or coercion; and that she did, in fact, consent to the search of the safe". RP (5/28) 55. Detective Elton testified that he asked Muir if he could open the safe, and that she said she did not know the combination, but if he could open it, he could. RP (5/28) 16. Muir later testified only that she told Detective Elton that she did not have the combination to the safe. RP (5/28) 34. The court found that "Officer Elton's version of the conversation rings more true". RP (5/28) 54. The court stated, "[t]he greater weight of the evidence is that Officer Elton

received a response of, ‘Yes, but I don’t have combination to it.’” RP (5/28) 55.

The trial court found she was not ordered to exit the store or sit on the ground, and, in her appeal, Muir does not dispute those findings. Muir also argues that Elton’s attempt to control her actions when he told her not to touch her purse after she gave her consent to search it is a factor in the progressive intrusion. App. Br. 12. Muir’s argument must fail on this point because prior to Elton’s controlling her actions in this way, she had been arrested and read her *Miranda* rights. RP (5/28) 19. The search of her purse falls outside any progressive intrusion analysis since at that point she had in fact been seized based on probable cause.

That leaves, therefor, only Muir’s argument that being asked for consent three times escalated the tenor of the contact and rendered her consent involuntary. The very definition of escalation makes it clear that it does not occur on the first or second request to search. The two requests to search the truck can hardly be characterized as separate requests as the second time Detective Elton merely reported back to Muir McIntyre’s response as she had demanded. The request to search her safe is a separate request; however, that one question is not enough for a reasonable person to believe she was not free to leave and had in fact been seized by law enforcement.

The record was sufficient to support the finding that officers did not use force or display authority sufficient to make a reasonable person believe that he or she could not leave. Because Muir was not unlawfully seized, her claim that her consent to the search of her lockbox was somehow invalidated by an unlawful seizure must fail. The trial court, therefore, did not err in failing to grant Muir's motion to suppress.

B. REMAND IS THE PROPER REMEDY TO ADDRESS THE LACK OF WRITTEN FINDINGS AND CONCLUSIONS IN THE APPELLATE RECORD.

Muir argues that pursuant to the Court of Appeals decisions in *State v. Cruz* and *State v. Smith*, the failure to file written findings of fact and conclusions of law requires reversal. This argument is without merit because these cases have been overruled on this point by the Supreme Court in *State v. Head*, which held remand is the proper remedy. *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187, 1190 (1998).

1. Standard of Review

Following a ruling on suppression hearing, CrR 3.6 requires written findings of fact:

[U]pon a motion to suppress physical, oral or identification evidence, the trial court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) the court's findings as

to the disputed facts; and (4) the court's reason for the admissibility or inadmissibility of the evidence sought to be suppressed. CrR 3.6.

The purpose of filing written findings of fact and conclusions of law is to facilitate appellate review such that there is “no doubt as to the trial court's findings and the basis for its decision.” *State v. Cruz*, 88 Wn. App. 905, 908, 946 P.2d 1229, 1230 (Div. 3, 1997). The remedy for a trial court's failure to issue findings of fact and conclusions of law is remand for entry of the findings and conclusions. *In re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). There is no fixed time limit for the entry of findings and conclusions. *State v. Nelson*, 74 Wn. App. 380, 393, 874 P.2d 170, 314 *review denied*, 125 Wn.2d 1002 (1994) citing *State v. Smith*, 68 Wn. App. 201, 204–05, 842 P.2d 494 (1992), *State v. Brown*, 68 Wn. App. 480, 485–86, 843 P.2d 1098 (1993) (finding no prejudice even though findings and conclusions were prepared 6 months after notice of appeal).

The Supreme Court, consistent with CrR 3.6, has ruled that a lack of written findings requires remand unless the defendant proves actual prejudice. *Head*, 136 Wn.2d at 624. Division Two has adopted the holding in *State v. Head*, and ordered remand for entry of written findings following imposition of an exceptional sentence. *State v. Hyder*, 159 Wn.

App. 234, 257, 244 P.3d 454, 466 (Div. 2, 2011), *see also State v. McCarty*, 152 Wn. App. 351, 215 P.3d 1036 (Div. 2, 2009). The burden of showing actual prejudice is upon the appellant. *Head*, 136 Wn.2d at 625.

2. The Appellant has not proven that she has suffered actual prejudice by the lack of written findings.

Muir argues she is prejudiced because the record is insufficient to allow for appellate review without written findings. App.'s Br. at 16. That argument fails because a lack of written findings alone is insufficient to infer prejudice. *Head*, 136 Wn.2d at 625.

The trial court in *State v. Head*, following a bench trial, entered a judgment and sentence convicting the defendant of eight out of nine charged counts of theft but did not enter findings of fact and conclusions of law supporting the convictions. *Id.* at 621. Though the hearing at issue in *Head* was a bench trial not a CrR 3.6 hearing, the rules in both circumstances require written findings and in both the trial judge is the sole decision-maker. CrR 3.6; CrR 6.1 (d). At the Court of Appeals, the appellant in *Head* argued for reversal because there was insufficient evidence to support his conviction and no written findings were filed. *Id.* at 622. The Supreme Court took review following the affirmation of the trial court's ruling, at which time the appellant argued for reversal or, in

the alternative, remand. *Id.* at 622. The State argued in that case that the oral record was sufficient to permit review and any error in not entering written findings was harmless so the conviction should be upheld. *Id.* at 622. The Supreme Court disagreed with the State, explaining the trial court's oral opinion is simply an expression of its' informal opinion at the time rendered and has no formal or binding effect. *Id.* at 622, citing *State v. Mallory*, 69 Wn.2d 532, 419 P.2d 324 (1966).

Prior to the Supreme Court's ruling in *State v. Head*, there were significant contradictions in the way Washington appellate courts approached missing or incomplete written findings. The Supreme Court, thus, underwent an analysis of the existing case law before issuing its' holding. *Head*, at 624. The Court considered cases that held a lack of written findings required automatic reversal, *State v. Naranjo*, 83 Wn. App. 300, 921 P.2d 588 (Div. III, 1996), others that "expressly rejected" reversal, *State v. Jones*, 34 Wn. App. 848, 664 P.2d 12 (Div. I, 1983), cases that found a "strong presumption" for reversal, *e.g. State v. Cruz*, 88 Wn. App. 905, 946 P.2d 1229 (Div. I, 1997), and other cases that automatically remanded, *e.g. City of Bremerton v. Fisk*, 4 Wn. App. 961, 486 P.2d 294 (Div. II, 1971). *Head*, 136 Wn.2d at 624.

The Court also noted that the practice of requiring written findings has long established precedent under the Washington Supreme Court. *Id.*,

citing *State v. Wilks*, 70 Wn.2d 626, 424 P.2d 663; *State v. Wood*, 68 Wn.2d 303, 412 P.2d 779 (1966); *State v. Russell*, 68 Wn.2d 748, 415 P.2d 503 (1966); *State v. Marchand*, 62 Wn.2d 767, 384 P.2d 865 (1963); *State v. Helsel*, 61 Wn.2d 81, 377 P.2d 408 (1962); *City of Seattle v. Silverman*, 35 Wn.2d 574, 214 P.2d 180 (1950). The Court recognized the importance of having written findings; explaining, “[a]n appellate court should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Id.* at 624.

Unlike *State v. Naranjo*, the Supreme Court declined to infer prejudice simply by the failure to file written findings. *Id.* at 624. The Court also considered one Division II case, *State v. Witherspoon*, 60 Wn. App. 560, 805 P.2d 248 (1991), which reversed a juvenile court conviction where the written findings were filed after the appeal brief. *Id.* The Court in that case found prejudice in the appearance of unfairness created by noncompliance with the juvenile court rule requiring filing within 21 days of the notice of appeal. *Witherspoon*, 60 Wn. App. at 572. The Court in *Head* declined to follow *Witherspoon* and noted that the court in that case found most important the fact that the appellant was in custody, since a remand and a new appeal would take more time, and nullify full relief should the issues be decided in the appellant’s favor. *Id.* at 624. Such

potential prejudice is not at issue in the instant case, as Muir's sentence was stayed pending appeal. CP 54.

The Defendant also argues that on remand the State would be in a position to "tailor" its proposed written findings to address issues raised in her appeal. Her argument must fail because that issue is not yet ripe. The current record neither addresses why written findings were not entered, nor can we guess what the written findings the trial court will enter in order to question the possibility of "tailoring". The Court in *Head* noted that such a prejudice claim can arise only after written findings have been entered following remand. *Head*, 136 Wn.2d at 625. The Court stated; "[t]his kind of prejudice could be shown only, of course, after remand and the entry of findings." *Id.* at FN3. The burden of proving such prejudice is on the defendant. *Id.* at 625.

The only grounds for showing actual prejudice the Defendant offers in this case is her statement that the record is insufficient currently to allow for appellate review. However, in accord with *Head*, Muir has not met her burden of showing actual prejudice. Furthermore, her statement that she could be prejudiced by "tailored" findings cannot be considered at this time. Should the case be remanded, and written findings entered by the trial court, then issues surrounding why findings were not entered, whether by prosecutorial or clerical oversight, and whether there

are in fact any grounds to believe those findings are tailored can be considered.

Therefore, because Muir has not shown any grounds for actual prejudice and given the practice preferred by our Supreme Court, the State requests Muir's motion to reverse and dismiss be denied and her alternative motion for remand for entry of written findings be granted only if this court finds the present record to be insufficient to permit review.

IV. CONCLUSION

For the foregoing reasons, Muir's conviction and sentence should be affirmed as the trial correctly found the search and seizure proper. Alternatively, should this Court find the oral record insufficient to permit review, Muir's case should be remanded for entry of written findings of fact and conclusions of law.

DATED April 1, 2014.

Respectfully submitted,
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