

NO. 47683-5-II

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

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STATE OF WASHINGTON, Respondent

v.

RICHARD RAY KASS, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-00358-7

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BRIEF OF RESPONDENT

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## **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. The Trial Court Did Not Err in Giving a Jury Instruction on a Permissive Inference**
- II. The State Agrees and Concedes this Case Should be Remanded for Resentencing**
- III. The Trial Court's Failure to Enter Written Findings Pursuant to CrR 3.5(c) was Harmless**
- IV. The State Agrees this Court should Remand to Correct a Scrivener's Error in the Judgment and Sentence**

## **STATEMENT OF THE CASE**

Richard Kass (hereafter 'Kass') was charged by information with Residential Burglary. CP 1. The case proceeded to trial and a jury convicted Kass of Residential Burglary on May 27, 2015. CP 45. Prior to trial the court held a hearing pursuant to CrR 3.5. The State presented the testimony of Deputies Eric Swenson and Brice Smith. RP 152-66. Kass did not testify at the CrR 3.5 hearing and defense offered no other evidence. RP 166.

At the CrR 3.5 hearing the deputies testified that they went to Kass' residence as Kass had become a suspect in a burglary case they were investigating. RP 155. At the time, Kass was living in a fifth-wheel trailer on a property in Clark County. RP 156. Police knocked and yelled,

announcing themselves and “sheriff’s office,” at the trailer. RP 156. Kass came outside and he was placed under arrest. RP 156. At Kass’ request, he and the deputies moved behind another trailer on the property so they could be out of view of his family. RP 163. The deputies informed Kass of his rights pursuant to *Miranda* from one of the deputies’ department-issued card. RP 156, 163. The deputy told Kass:

You have the right to remain silent. Anything you say can be used against you in a court of law. You have the right at this time to talk with a lawyer and have him present with you while you’re being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before questioning, if you wish. You can decide at any time to exercise these rights, not answer any questions or make any statements.

RP 163. Kass said he understood those rights and agreed to speak with deputies. RP 164. Kass never indicated he wished to remain silent. RP 157. At no time during his subsequent conversation with the deputies did Kass ask for an attorney, and the deputies made no threats against Kass nor promises to him. RP 157-58. Kass then made statements regarding the burglary. RP 165.

The trial court ruled Kass’ statements to law enforcement were admissible at trial. RP 168. In its oral ruling, the court stated:

Okay. The facts appear to be uncontroverted in this case that law enforcement made contact with Mr. Kass on February 23<sup>rd</sup>, 2014, in his residence. He voluntarily exited

the residence. Law enforcement moved to a location outside of the line of sight of his family, at his request. *Miranda* rights were administered by Deputy Brice Smith per the department-issued card. Those appear to be the correct form. No promises or—or threats were made at any time, and he did agree to speak with law enforcement, so the Court is finding now that the statements are admissible.

RP 168. The trial court did not enter any written findings regarding the CrR 3.5 hearing.

At trial the evidence showed that victim, Douglas Knipe owned a residence located at 6800 NE 60<sup>th</sup> Street in Vancouver, Clark County, Washington. RP 208-09. There is a Safeway store directly behind the house, with a fence line in the parking lot that borders the property. RP 213. Mr. Knipe lived in the residence from 1988 until January 2014 when he moved out to begin remodeling the home. RP 20-10. Mr. Knipe moved into an apartment about half a mile away. RP 210. While living in the apartment, Mr. Knipe visited his house either every day or every other day to check on it. RP 211. Mr. Knipe kept almost all of his personal belongings in the house even though he was not living in it. RP 211-12.

On February 8, 2014 he arrived at the residence to see that someone had broken open the back garage door and ransacked the house; many items were missing. RP 212. Mr. Knipe boarded up the house as it was late in the evening and returned the next day. RP 212. He boarded up the door by nailing it shut with two-by-fours. RP 213. Mr. Knipe also

noticed some boards of his wood fence had been kicked in. RP 222. The following day, Mr. Knipe stopped at the Safeway store and upon leaving the store noticed a truck in the parking lot that was sitting on the fence line that borders his property. RP 213. The truck was idling, and a man was in the driver's seat. RP 213, 221. The weather was very bad this day, with snow and black ice. RP 213. Mr. Knipe took notice of the truck idling by the fence of his property as he left the store, but did not immediately see anything else unusual. RP 213. Mr. Knipe went to the house and as he approached the backyard he could see someone had broken the door open again, the same door he had nailed shut with two-by-fours the night before. RP 213. Mr. Knipe had a gun in his car, so he returned to his car and got his gun. RP 213. He then entered his house through the front door and started searching his house to see if anyone was in there. RP 213. Mr. Knipe encountered a man, smoking a cigarette, entering his house through the back sliding door and coming into the house and turning as to take a left, towards two large duffel bags that were later found in the living room. RP 214, 216, 284. Mr. Knipe found the intruder approximately three feet inside the sliding door. RP 217. The intruder did not say anything until Mr. Knipe pointed a gun at him, at which time he said something like "where is John?" RP 262.

Mr. Knipe was startled to find the intruder and pointed his gun at him. RP 215. Mr. Knipe then called 911 with his cell phone and explained to the dispatcher that he had a man at gunpoint inside his house. RP 216. Mr. Knipe provided the dispatcher with a description of the intruder, including what he looked like and what he was wearing. RP 216. Mr. Knipe approximated that he kept the intruder at gunpoint for fifteen minutes and was on the phone with 911 for five minutes. RP 216. While holding the intruder at gunpoint, the intruder made movements with his hands towards his pockets; this concerned Mr. Knipe because a gun had been stolen from the house. RP 218. At one point, while Mr. Knipe still had his gun pointed at the intruder, the intruder turned and ran out the back sliding door and through the backyard. RP 218. The intruder fell down and screamed, “don’t shoot me” and then got back up and continued. RP 218. Mr. Knipe noticed a second man standing at the fence line, a person he assumed was the man he had seen in the truck in the Safeway parking lot. RP 218. The second man started running as well and both got into the truck and took off. RP 219.

The truck the two men got into was the same truck Mr. Knipe had noticed in the Safeway parking lot at the fence line of his property. RP 219-20. The truck was unique; it was a white Ford with a flatbed (no sides) on the back end, dual tires with chains on the back. RP 223-24.

Both men were wearing “contractor-type” clothing. RP 221, 223. The intruder was wearing Carhartt type brown pants and a black jacket. RP 223.

Police arrived at Mr. Knipe’s residence after the two men left in the truck. RP 228. Mr. Knipe spoke to Deputy Eric Swenson and provided him with a description of the intruder and a description of the truck. RP 229.

Mr. Knipe identified the intruder as the defendant in court during his testimony. RP 228. Mr. Knipe did not know the defendant and never gave him permission nor invitation to enter his house. RP 240.

After police left, Mr. Knipe looked around his house and noticed two large duffel bags in the living room; these bags did not belong to him and were not there the night before. RP 234-35. The two duffel bags were full of Mr. Knipe’s household furnishings and personal belongings. RP 235, 279. Mr. Knipe did not notice these duffel bags until after police had left his house. RP 236.

Approximately a week after the incident, Mr. Knipe met with Deputy Swenson again at a Starbucks. RP 237. Deputy Swenson showed Mr. Knipe a photo of a truck that was identical to the one Mr. Knipe saw the intruder leave his house in. RP 237. Deputy Swenson also showed Mr. Knipe a photo of a man’s clothing, with the face of the man covered up.

RP 237. The clothing was identical to what Mr. Knipe saw the intruder wearing. RP 237.

Deputy Eric Swenson, a deputy sheriff with the Clark County Sheriff's Office, was assigned to dayshift patrol on February 8, 2014. RP 288-89. Deputy Swenson testified that on February 8, 2014 there was snow on the ground and it was cold outside. RP 289. Around 1pm he responded to an interrupted burglary at 6800 NE 60<sup>th</sup> Street in Clark County. RP 289. Deputy Swenson initially checked the area for the described truck, but could not locate it. RP 289. He then went to contact Mr. Knipe. RP 289. Mr. Knipe described the intruder to Deputy Swenson as "a male, thirty to forty, scruffy in appearance, with longer salt-and-pepper hair, glasses...." RP 292. He described the man as wearing Carhartt-type work clothes, a black jacket and brown pants. RP 293. Mr. Knipe told Deputy Swenson the truck involved was a "white dually flatbed pickup, a single-cab, late 1990s to early 2000s Ford with no front plate and tire chains on the rear wheels." RP 293.

Deputy Swenson observed Mr. Knipe's house and the backyard, looking for evidence related to this incident. RP 296. Deputy Swenson saw multiple sets of foot tracks on a path between the back sliding door and the hole in the fence, as if someone went back and forth several times. RP 297. Deputy Swenson observed the house as "cluttered, messy," and

“ransacked.” RP 317. He agreed that it appeared likely that transients had been staying at the house. RP 317. Deputy Swenson did not notice any duffel bags in Mr. Knipe’s living room; Deputy Swenson told Mr. Knipe to “figure out what’s missing and let me know.” RP 318.

On February 9, 2014, another Clark County Sheriff’s Deputy, Deputy Skordahl executed a traffic stop of a vehicle that matched the description Mr. Knipe gave of the truck involved. RP 335-36. The driver of the vehicle was identified as Kass. RP 335, 341. Deputy Skordahl and another deputy took photos of Kass and the vehicle. RP 342. He sent those photos to Deputy Swenson and Deputy Swenson contacted Mr. Knipe to arrange a time to meet with him to show him the photos and a prepared photo laydown. RP 298-99. On February 15, 2014 Deputy Swenson met Mr. Knipe and showed him photographs of the suspect vehicle; Mr. Knipe indicated he was certain the truck in the photo was the same one that he had seen the intruder run to. RP 301. Deputy Swenson showed Mr. Knipe a photo of Kass with his face covered and Mr. Knipe indicated the clothing the person in the photo was wearing was exactly the same as that worn by the intruder except that the jacket had been zipped up at the time of the incident. RP 303-04. Deputy Swenson also showed Mr. Knipe a photo laydown with six photographs of different persons who were similar to Mr. Knipe’s description of the intruder. RP 304-05. Mr. Knipe indicated

the persons in positions three and five looked similar to the intruder. RP 305-06. Mr. Knipe then thought about it for a few minutes and indicated he thought the intruder was the person in position three, but that he was not sure. RP 306. The person in position three was not Kass. RP 323. Kass' photo was located in position five. RP 323.

On February 23, 2014 Deputy Swenson went to Kass' residence to contact and interview him. RP 307-08. Kass was located in a fifth-wheel on the property; Kass came out of the fifth-wheel after police knocked at the door. RP 308. Kass was handcuffed, advised of the *Miranda* warnings and interviewed. RP 308-09. Kass asked the deputies "if this was about the motorcycle that he had gone to look at." RP 310. Deputy Swenson testified that his conversation with Kass included Kass saying

"he had heard about a motorcycle that was at a house in—the house, in the backyard, and that he was looking for one for his girlfriend, Barbara. He said that Barbara went with him to the house and that they knocked on the backdoor. He said he followed a clear and worn trail into the backyard of the house, and he said that he saw a no 'no trespassing' signs and the hole was already in the fence. And continuing our conversation, Mr. Kass told me there was no response when he knocked on the back slider door. He said that he had been there previously and also tried knocking on the back slider door with no response. Told me that he was looking around by the motorcycle when a guy came out the backdoor at him with a gun. He said the guy told him, 'get on the ground,' followed by, 'show me your hands' with the gun pointed at him. He said that he ran back to the truck as soon as he got a chance, where he found Barbara standing by the truck, waiting for him. He said that he told

her to get in the truck and they left. He said that he didn't take anything from the residence, either on this trip or during prior trips to the house. And he told me that he never went inside the house.

RP 310-11. Kass told police that his girlfriend, Barbara, was with him that day, and that she went into the Safeway store while Kass went to knock on Mr. Knipe's door. RP 311. Mr. Knipe had a 1972 750 Kawasaki motorcycle that he kept in the backyard of his house. RP 241. He was contemplating selling it, but had not posted it for sale in any way. RP 241. Kass did not present any witnesses or other evidence at trial. RP 347-96.

The trial court gave the following instruction to the jury over Kass' objection:

A person who enters or remains unlawfully in a building may be inferred to have acted with the intent to commit a crime against a person or property therein. There inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.

RP 359; CP 34.

The jury returned a verdict of guilty on the Residential Burglary charge on May 27, 2015. RP 471; CP 45. The court then sentenced Kass on June 3, 2015. CP 57-65. At the sentencing hearing, the State informed the court that Kass' offender score was an 11, and presented a written "declaration of criminal history" outlining Kass' prior convictions. RP

481; CP 67-69. The State presented no evidence regarding Kass' prior convictions. RP 481. In response, Kass' attorney stated,

Well, that—that's based on the State's calculation of the offender score. Now, I've learned, I think, through experience not to stipulate to priors. I will acknowledge that I've gone through the package of priors they have sent me, and we have no opposition evidence to it, and that throughout some of these convictions that Mr. Kass has pled guilty to and signed, declarations of—signed on the judgment and sentences there's been, allegedly, his signature line agreeing to some of these priors. But we'll agree as a – well, that's –that's my point. I have no contra evidence to that. His offender score is at least nine or more, according to the State's calculation.

RP 481-82. Kass signed the declaration of criminal history the State presented, but wrote “service accepted only” above his signature. CP 69. The trial court sentenced Kass to a standard range sentence based on an offender score of 11. CP 59. This appeal follows. CP 55.

## ARGUMENT

### **I. The Trial Court Did Not Err in Giving a Jury Instruction on a Permissive Inference**

Kass argues that the jury instruction the trial court gave on a permissive inference violated his right to due process. Kass contends the instruction was improper because, he argues, there was insufficient evidence to support the giving of such an instruction. Kass' right to due

process of law was not violated by the giving of this instruction. Kass' claim fails.

On appeal, the Court reviews due process challenges to jury instructions *de novo*. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Due process requires that the State prove every element of a crime beyond a reasonable doubt. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). The State may use presumptions and inferences to meet its burden of proof. *Id.* A permissive inference, in which the jury is permitted, but not required, to find a presumed fact from a proven fact, does not relieve the State of its burden of proof. *Id.* With a permissive inference, the State is still required to persuade the jury that the proposed inference follows from the proven facts. *Id.*

A person is guilty of Residential Burglary if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025. The intent required for burglary is the intent to commit a crime against a person or property inside the burglarized premises. *State v. Bergeron*, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985). The intent to commit a crime may be inferred when a person enters or remains unlawfully in a premises. RCW 9A.52.040. Washington Pattern Jury Instruction (WPIC) 60.05 provides that "a person who enters or remains unlawfully in a building may be

inferred to have acted with intent to commit a crime against a person or property therein. This inference is not binding upon you and it is for you to determine what weight, if any, such inference is to be given.” WPIC 60.05. This exact instruction was given to the jury in Kass’ case. CP 34.

This Court considers the propriety of a permissive inference instruction on a case-by-case basis, considering the evidence presented in the State’s case. *Hanna*, 123 Wn.2d at 712. A permissive inference is part of the State’s case and therefore only the State’s evidence need support the giving of a permissive inference instruction; if the defendant’s version of facts do not support the inference, the jury is capable and free to reject the inference. *Id.* at 712-13. The standard of proof for permissive inferences is “more likely than not.” *Ulster County Court v. Allen*, 442 U.S. 140, 167, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). “When an inference is only part of the prosecution’s proof supporting an element of the crime, due process requires the presumed fact to flow ‘more likely than not’ from proof of the basic fact.” *Hanna*, 123 Wn.2d at 710. This permissive inference is acceptable whenever “the evidence shows a person enters or remains unlawfully in a building.” *State v. Cantu*, 156 Wn.2d 819, 826, 132 P.3d 725 (2006) (quoting *State v. Grimes*, 92 Wn.App. 973, 980 n. 2, 966 P.2d 394 (1998)). Furthermore, only “slight corroborative evidence” is necessary to establish a person’s guilty knowledge. *State v. Womble*, 93

Wn.App. 599, 604, 969 P.2d 1097, *rev. denied*, 138 Wn.2d 1009 (1999).

Therefore, the permissive inference instruction given to Kass' jury was appropriate as the State's proof showed that Kass' intent to commit a crime against persons or property within the residence 'more likely than not' flowed from his unlawful entry into the residence.

The State presented more than sufficient evidence to uphold the giving of the permissive inference jury instruction. The instruction was not the sole evidence that Kass' entry into the home was with the intent to commit a crime against property within the residence. Significant other evidence supported the inference that Kass had a criminal intent in entering Mr. Knipe's residence: the door was broken in; the footprints in the snow suggested someone or multiple persons had taken more than one trip from the truck to the house; two duffel bags were packed full of Mr. Knipe's personal belongings, bags which had not been there when Mr. Knipe was at the residence the day before; Kass started turning left, towards where the duffel bags were when he entered the residence; Kass immediately came in through the back door and did not knock, hesitate, or call out for someone's name as someone who was simply looking for someone as Kass claimed would have.

In *State v. Sandoval*, 123 Wn.App. 1, 94 P.3d 323 (2004), Division Three of this Court held the facts of the case did not permit giving the

permissive inference instruction because there were no facts from which entering with the intent to commit a crime more likely than not could flow. *Sandoval*, 123 Wn.App. at 5. In that case, the defendant kicked open the door at the victim's residence and entered; he shoved the victim only after he was confronted. The defendant and the victim did not know each other and the defendant was surprised to see the victim there. The defendant did not carry any burglary tools, and was not wearing any burglary-like apparel, and did not try to flee. *Id.* at 5-6. The breaking and entering therefore did not give rise to an inference of intent to commit a crime. *Id.* at 6.

However, the facts of Kass' case differ significantly from those in *Sandoval*, *supra*. Kass was not alone and had a get-away truck idling, at the ready, approximately 20 feet from the house; the house had been ransacked and two duffel bags full of the victim's belongings were packed and ready to go by the back door; another door had been broken in; multiple foot tracks in the fresh snow made the fact of multiple trips to and from the truck more likely; Kass came right in through the door and made to turn towards the direction of the duffel bags, and only indicated he was looking for someone after he was confronted by the victim. These facts show much more than the jury had in *Sandoval*, *supra*. Here, the court was presented with more than sufficient additional facts which tended to show

Kass' criminal intent in entering the house. The jury instruction, telling the jury it may, but did not have to, accept an inference of criminal intent from the entry, was acceptable and appropriate in the facts of this case. The trial court properly instructed the jury. Kass' right to due process was not violated; Kass' claim fails.

## **II. The State Agrees and Concedes this Case Should be Remanded for Resentencing**

Kass argues his case should be remanded for a new sentencing hearing because the state failed to present sufficient evidence to support its proffered criminal history. The State agrees and concedes under the facts particular to Kass' sentencing hearing that insufficient evidence of his prior convictions was presented to the trial court. Kass' case should be remanded for resentencing.

At sentencing, Kass and his attorney did not expressly object to the State's calculation of his offender score, and indicated they had no evidence to contradict the calculation; however, Kass also did not expressly agree to the calculation of his offender score or the existence of his prior convictions. RP 481. The State bears the burden of proving a defendant's prior convictions by a preponderance of the evidence. *State v. Cabrera*, 73 Wn.App. 165, 168, 868 P.2d 179 (1994). In *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999), our Supreme Court held that the

State must introduce evidence of some kind to support its allegations regarding a defendant's criminal history. *Ford*, 137 Wn.2d at 479-80. Despite the Legislature's attempt to allow the State to present prima facie evidence of a defendant's criminal history through a declaration, our Supreme Court has continued to reject the notion that a summary, not expressly objected to by the defendant, can constitute prima facie evidence to satisfy the State's burden. *State v. Hunley*, 175 Wn.2d 901, 912, 287 P.3d 584 (2012). Even when a defendant fails to object to or contradict the state's pronouncement of his or her criminal history, the State must present evidence of his or her criminal history absent an agreement. *Id.*

Though it appears from the record that the State presented Kass and his attorney with certified copies of documents related to Kass' prior convictions, and that Kass previously agreed to his criminal history in other cases, there is no evidence in the record to suggest the trial court considered the certified documents related to these prior convictions or Kass' prior admissions to his history. RP 481-86. Under the controlling case law discussed above, this was insufficient to prove Kass' criminal convictions and therefore it was error for the trial court to sentence Kass under an offender score it did.

The appropriate remedy for this error is to remand to the trial court for re-sentencing, requiring the State to prove Kass' prior convictions

unless affirmatively acknowledged. *See Hunley*, 175 Wn.2d at 915-16. The facts the Supreme Court considered in *Hunley* are directly on point with those before this Court now. In *Hunley*, the State presented a declaration summarizing the defendant's prior convictions; the defendant did not affirmatively acknowledge this declaration as correct and the trial court did not consider any other evidence to establish the defendant's criminal history. *Id.* at 915. The Supreme Court found this to be error and remanded for resentencing, giving the State an opportunity to prove the defendant's prior criminal convictions. *Id.* at 916.

As Kass requests, and the law supports, this case should be remanded for resentencing for the trial court to consider the State's evidence establishing Kass' prior criminal convictions to be used in calculating his offender score.

### **III. The Trial Court's Failure to Enter Written Findings Pursuant to CrR 3.5(c) was Harmless**

Kass argues the trial court erred in failing to enter written findings pursuant to CrR 3.5 after it held a hearing on the admissibility of Kass' statements to police. Kass further argues this Court should remand the matter to the trial court for entry of findings and conclusions pursuant to CrR 3.5. Although the trial court did err in failing to enter written findings and conclusions pursuant to CrR 3.5, its oral findings and conclusions are

clear enough to allow review and thus Kass has not been prejudiced.

Remand is not required to correct this issue.

CrR 3.5 is the procedure by which a trial court determines whether statements of a defendant, offered by the State at trial, are admissible into evidence. CrR 3.5(a). This rule requires that the trial court, “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 therefor.” CrR 3.5(c). The trial court did hold a hearing pursuant to CrR 3.5 prior to Kass’ trial, however the trial court did not enter any written findings pursuant to CrR 3.5(c). The trial court instead, gave an oral ruling finding the statements Kass made to law enforcement officers admissible. RP 168.

The trial court made the following findings and conclusions, orally, regarding the CrR 3.5 hearing:

Okay. The facts appear to be uncontroverted in this case that law enforcement made contact with Mr. Kass on February 23<sup>rd</sup>, 2014, in his residence. He voluntarily exited the residence. Law enforcement moved to a location outside of the line of sight of his family, at his request. *Miranda* rights were administered by Deputy Brice Smith per the department-issued card. Those appear to be in the correct form. No promises or—or threats were made at any time, and he did agree to speak with law enforcement, so the Court is finding now that the statements are admissible.

RP 168.

Although a trial court's failure to enter written findings and conclusions pursuant to CrR 3.5(c) is error, it is harmless error as long as the oral findings are sufficient to allow appellate review. *State v. Thompson*, 73 Wn.App. 122, 130, 867 P.2d 691 (1994) (citing to *State v. Riley*, 69 Wn.App. 349, 352-53, 848 P.2d 1288 (1993) and *State v. Clark*, 46 Wn.App. 856, 859, 732 P.2d 1029, *rev. denied*, 108 Wn.2d 1014 (1987)). In *State v. Haynes*, 16 Wn.App. 778, 559 P.2d 583, *rev. denied*, 88 Wn.2d 1017 (1977) this Court found that the trial court's failure to enter written findings and conclusions on the CrR 3.5 hearing was not reversible absent prejudice to the defendant. *Haynes*, 16 Wn.App. at 788. This Court reasoned that the trial court gave "adequate oral reasoning in ruling that the statements, if indeed made, were voluntary" and the absence of written findings "did not hinder [its] review...." *Id.* Many courts have since upheld this reasoning. *See e.g. State v. Grogan*, 147 Wn.App. 511, 195 P.3d 1017, *rev. granted, cause remanded*, 168 Wn.2d 1039, 234 P.3d 169, *on remand*, 158 Wn.App. 272, 246 P.3d 196 (2008) (holding a trial court's failure to enter findings required is harmless error if the court's oral findings are sufficient to permit appellate review); *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998) (holding a trial court's failure to comply with CrR 3.5(c) is harmless error if the court's oral findings are sufficient to allow appellate review); *State v. Phillip*

*Arthur Smith*, 67 Wn.App. 81, 834 P.2d 26, reviewed and affirmed on other grounds, 123 Wn.2d 51, 864 P.2d 1371, (1992) (holding a trial court's failure to enter written findings following the denial of a motion to suppress was harmless error where the court's oral findings were sufficient to permit appellate review).

Kass cites to *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998) to support his argument. In *Head*, the Court did not address the trial court's failure to enter written findings after a CrR 3.5 hearing, but rather addressed the failure of the trial court to enter written findings after a bench trial pursuant to CrR 6.1(d). *Head*, 136 Wn.2d at 621. This case is not instructive on the issue of whether a trial court's failure to enter written findings after a CrR 3.5 hearing requires reversal or remand. Kass also cites to *State v. Kevin C. Smith*, 68 Wn.App. 201, 842 P.2d 494 (1992) to support his contention that any failure to enter findings after a CrR 3.5 hearing requires automatic remand. However, the *Kevin C. Smith* case discussed the entry of findings after a CrR 3.6 motion to suppress evidence hearing, not a CrR 3.5 hearing. *Kevin C. Smith*, 68 Wn.App. at 205. Even though this case discusses a different type of hearing, it affirms the precedent that written findings may not be necessary if the court's oral findings allow for appellate review. The Court in *Kevin C. Smith*, found the trial court's oral ruling on the CrR 3.6 hearing was not "clear and

comprehensive...so that the appellate court [was] left with no doubt as to the court's findings," and later referred to the trial court's "lack of clarity" in its ruling. *Id.* at 206-07. The Court there found review of the trial court's CrR 3.6 findings to be impossible because it was unable to determine what the trial court's theory was or even what facts the trial court deemed to be established by the testimony. *Id.* at 207. The Court concluded that a lack of written findings is not harmless "unless the oral opinion is so clear and comprehensive that written findings would be a mere formality." *Id.* at 208. This case is distinguishable from the situation below, and does not advance Kass' argument. The CrR 3.5 hearing below was short, offered no disputed testimony, and no legal argument from defense. The trial court's findings were "clear and comprehensive," outlined the facts the trial court found to be established, that *Miranda* was properly given, and that Kass chose to speak with police. RP 168. The findings clearly allow for appellate review, and Kass does not suggest otherwise.

Kass cites to no case that supports his contention that the failure of a trial court to enter written findings after a CrR 3.5 hearing requires automatic remand for entry of written findings. In fact, the case law in existence on this subject clearly holds that such error is harmless if the trial court's oral findings are sufficient to allow appellate review. Kass

never suggests the trial court's findings are insufficient or unclear. A simple reading of the transcript shows the trial court properly established the facts it found proven, the applicable legal standard and its conclusion as to the admissibility of the statements Kass made. RP 168. If Kass wanted appellate review of the admissibility of his statements to police, the record is sufficiently clear to allow such review. The trial court's erroneous failure to enter written findings is harmless; Kass has not been prejudiced. This Court should deny Kass' claim that remand is necessary.

**IV. The State Agrees this Court should Remand to Correct a Scrivener's Error in the Judgment and Sentence**

Kass requests this Court remand his matter to correct a scrivener's error on the judgment and sentence. The State agrees there appears to be a scrivener's error on the judgment and sentence that should be corrected on remand.

The jury returned a guilty verdict, finding Kass guilty of Residential Burglary, on May 27, 2015. CP 45. Kass was sentenced on June 3, 2015. CP 57-65. The judgment and sentence indicates that Kass is guilty of the current offense based upon a jury verdict that occurred on June 3, 2015. CP 57. This is clearly erroneous as the jury verdict was returned on May 27, 2015. This error should be corrected to reflect the

correct verdict date. *See State v. Naillieux*, 158 Wn.App. 630, 646-47, 241 P.3d 1280 (2010) (remanding to correct a scrivener's error).

### CONCLUSION

For the reasons discussed above, this Court should deny Kass's claims regarding the permissive inference jury instruction and the CrR 3.5 findings. The jury instruction was properly given and well-supported by the facts presented in the State's evidence at trial, and there was no prejudice to the trial court's failure to enter written CrR 3.5 findings as the oral findings are sufficient to allow for any potential review of the issues. This case should, however, be remanded for resentencing to allow the State to present evidence of Kass' prior criminal convictions and to correct a scrivener's error.

DATED this 25<sup>th</sup> day of March, 2016.

Respectfully submitted:

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# CLARK COUNTY PROSECUTOR

**March 25, 2016 - 3:33 PM**

## Transmittal Letter

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Case Name: State v. Richard Kass

Court of Appeals Case Number: 47683-5

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