

NO. 50005-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD E. HALEY,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

TABLE OF CONTENTS

Page

A. TABLE OF AUTHORITIES iii

B. ASSIGNMENT OF ERROR

 1. Assignment of Error 1

 2. Issue Pertaining to Assignment of Error 2

C. STATEMENT OF THE CASE

 1. Factual History 3

 2. Procedural History 5

D. ARGUMENT

I. THE TRIAL COURT’S FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 6.3 FOLLOWING A BENCH TRIAL REQUIRES REMAND TO THE TRIAL COURT FOR COMPLIANCE WITH THE RULE 14

II. THE TRIAL COURT ERRED WHEN IT ADMITTED STATEMENTS INTO EVIDENCE THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION WITHOUT PROOF THAT THE INTERROGATING OFFICER ADEQUATELY WARNED THE DEFENDANT OF HIS RIGHTS UNDER *MIRANDA v. ARIZONA* 15

III. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ACCEPTED A JURY WAIVER THAT THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER . 23

IV. THE TRIAL COURT VIOLATED RCW 9.94A.535 AND RCW 9.94A.589(1)(A) WHEN IT ORDERED THE SENTENCES IN THIS CASE TO RUN CONSECUTIVE TO THE SENTENCE IN CAUSE NO. 17-1-00010-3 17

E. CONCLUSION	31
F. APPENDIX	
1. Washington Constitution, Article 1, § 9	32
2. Washington Constitution, Article 1, § 21	32
3. United States Constitution, Fifth Amendment	32
4. United States Constitution, Sixth Amendment	32
5. CrR 3.5	33
6. CrR 6.1	34
7. RCW 9.94A.535 (introductory paragraphs only)	35
8. RCW 9.94A.589	35
G. AFFIRMATION OF SERVICE	38

TABLE OF AUTHORITIES

Page

Federal Cases

Blakely v. Washington,
542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) 25, 26

Cheff v. Schnackenberg,
384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966) 23

Duckworth v. Eagan,
492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989) 19

Edwards v. Arizona,
451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) 17

Michigan v. Mosley,
423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975) 18

Miranda v. Arizona,
384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) 16-20, 22, 31

United States v. Hernandez,
93 F.3d 1493 (10th Cir. 1996) 20

State Cases

Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982) 24

State v. Borboa, 124 Wn.App. 779, 102 P.3d 183 (2004) 25, 26

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 7, 16

State v. Bugai, 30 Wn.App. 156, 632 P.2d 917 (1981) 24

State v. Donahue, 76 Wn.App. 695, 887 P.2d 485 (1995) 24

<i>State v. Earls</i> , 116 Wn.2d 364, 805 P.2d 211 (1991)	16
<i>State v. Gimarelli</i> , 105 Wn.App. 370, 20 P.3d 430 (2001)	27
<i>State v. Grisby</i> , 97 Wn.2d 493, 647 P.2d 6 (1982)	18
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985)	22
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	14, 15
<i>State v. Holland</i> , 98 Wn.2d 507, 656 P.2d 1056 (1983)	17
<i>State v. Klimes</i> , 117 Wn.App. 758, 73 P.3d 416 (2003)	27
<i>State v. Rhoden</i> , 189 Wn.App. 193, 356 P.3d 242 (2015)	22
<i>State v. Richmond</i> , 65 Wn.App. 541, 828 P.2d 1180 (1992)	17
<i>State v. Vasquez</i> , 109 Wn.App. 310, 34 P.3d 1255 (2001)	24
<i>State v. Wheeler</i> , 108 Wn.2d 230, 737 P.2d 1005 (1987)	17
<i>State v. Wicke</i> , 91 Wn.2d 638, 591 P.2d 452 (1979)	24
<i>State v. Williams</i> , 23 Wn.App. 694, 598 P.2d 731 (1979)	24, 25

Constitutional Provisions

Washington Constitution, Article 1, § 9	15, 16
Washington Constitution, Article 1, § 21	23, 27
United States Constitution, Fifth Amendment	15
United States Constitution, Sixth Amendment	23

Statutes and Court Rules

CrR 3.5 18-20

CrR 6.1(d) 14, 15

RCW 9.94A.535 27, 28

RCW 9.94A.589 27, 29, 30

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's failure to enter findings of fact and conclusions of law under CrR 6.3 following a bench trial requires remand to the trial court for compliance with the rule.

2. The trial court erred under CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when it admitted statements into evidence the defendant made during custodial interrogation without proof that the interrogating officer adequately warned the defendant of his rights under *Miranda v. Arizona*.

3. The trial court violated the defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter.

4. The trial court violated RCW 9.94A.535 and RCW 9.94A.589(1)(a) when it ordered the sentences in this case to run consecutive to the sentence in cause no. 17-1-00010-3.

Issues Pertaining to Assignment of Error

1. Does a trial court's failure to enter findings of fact and conclusions of law under CrR 6.3 following a bench trial require remand to the trial court for compliance with the rule prior to the adjudication of the defendant's claims on appeal?

2. Does a trial court err under CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if it admits statements into evidence that a defendant made during custodial interrogation without proof that the interrogating officer adequately warned that defendant of his or her rights under *Miranda v. Arizona*?

3. Does a trial court violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it accepts a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter?

4. Under RCW 9.94A.589(1)(a) does a trial court err if it orders that two sentences imposed on the same day run consecutive with each other without declaring an exceptional sentence?

5. Under RCW 9.94A.535 does a trial court err if it orders a determinate sentence to run consecutive to an indeterminate sentence?

STATEMENT OF THE CASE

Factual History

In 2006 the defendant was a 37-year-old sex offender who lived in a camp trailer or a 5th Wheel on Marrow Stone Island in rural Jefferson County. RP 217-218¹; CP 1. His wife and two daughters lived in an adjacent trailer. RP 217-218; 353-357. One of his daughters was B.L.H., who was born in 1998. RP 293. In December of 2007, then Jefferson County Sheriff's Detective David Miller had B.L.H. brought into the sheriff's office so he could interview her about a claim that the defendant had sexual contact with her. RP 526-529. He videotaped that interview, which ran for about 35 minutes. RP 515. In that interview B.L.H. appeared at ease and denied that her father had ever touched her in any inappropriate manner. RP 535-569; 570-577; Exhibit No. 16. During this period of time the defendant's mother Betty Haley visited the defendant and his family while they lived on Marrow Stone Island. RP 497-498. According to Betty Haley, B.L.H. never appeared fearful of her father. *Id.*

¹The record on appeal includes four continuously numbered verbatim reports of the hearings held on 12/21/16, 1/10/17, 1/13/17, 1/20/17, 1/25/17, 1/27/17, the bench trial held on 1/30/17 and 1/31/17, and the sentencing hearing held on 3/3/17. There are referred to here as "RP [page #]." The record also includes a verbatim report of the trial court's rendition of its verdict on 2/3/17. It is referred to herein as "RP 2/3/17 [page #]."

The defendant was subsequently sentenced to prison on another matter and was housed at Coyote Ridge in Eastern Washington for a portion of his prison sentence. RP 498. According to the defendant's mother Betty Haley, over a three year period B.L.H. would routinely travel with her to visit the defendant while he was in prison. RP 498-501. During this period of time she also sent him cards and letters on a regular basis. RP 264-297. From Betty Haley's perception, B.L.H. never appeared fearful of the defendant and always appeared happy for the chance to visit him. RP 498-501.

Sometime during the first half of 2016, after the defendant got out of prison, B.L.H. alleged that between 2006 and 2010 the defendant had sexually abused her on a number of occasions, including forcing her to participate in vaginal intercourse, anal intercourse, and oral-genital contact. RP 220-236. She also claimed that on many occasions he would have sexual contact with her but not necessarily intercourse or oral-genital contact. *Id.*

After B.L.H.'s allegation came to light Jefferson County Detective Shane Stevenson began an investigation. RP 443-446. According to Detective Stevenson, on May 11, 2016, the defendant came to the sheriff's office as part of his sex offender registration requirement. RP 446. After the registration process was complete he took the defendant in for an

interview, read him his rights, and told him about B.L.H.'s allegations, including a claim that after one rape he took B.L.H. outside of their home and made her help him pick blackberries. RP 446-447. The defendant's immediate response was that he had "never picked blackberries with B.L.H. - never". 446-447. The defendant then said, "Well, actually I have. One time I have." RP 447. According to Detective Stevenson, at this point in the interview he confronted the defendant about being worried more about the blackberries than he was about the allegations of rape. *Id.* The defendant's response was "Well, there are no blackberries on the Marrow Stone property" but that actually "there were some down the hill." *Id.* The defendant then denied that he had any sexual contact with B.L.H.. RP 453. Following this interview Detective Stevenson placed the defendant under arrest. RP 451.

Procedural History

By information originally filed on May 12, 2016, and later amended three times, the Jefferson County Prosecutor charged the defendant Richard Everett Haley with three counts of first degree rape of a child, one count of first degree child molestation, two counts of first degree incest, and one count of second degree incest. CP, 1-4, 9-15, 16-24, 60-64. The last amended information claimed that the defendant committed all of

these offenses against his daughter B.L.H. between 2006 and 2010. CP 60-64.

Prior to trial in this case the defendant filed a jury waiver that stated as follows:

I understand that I have the right to trial by jury unless I waive my right to a jury trial. I hereby waive my jury trial right and request that my guilt or innocence be decided by a Judge.

CP 67.

The court then entered into a colloquy with the defendant about the waiver, telling him that he had the “right to a jury trial,” that it would be a “jury of 12” and that otherwise the case would be trial “to the judge alone.” RP 94-97. After the defendant indicated that he had not been threatened or forced to give up his right to jury trial the court accepted the waiver. RP 97. At no point during the colloquy did the court inform the defendant that although the United States Constitution does not require complete jury unanimity to find a defendant guilty, the Washington Constitution does have such a requirement. RP 92-99. Neither did the court tell the defendant that if the court accepted the waiver the court would actually then determine at trial whether or not the state had proven every element of the crimes charged, as opposed to finding his “guilt or innocence” as was stated in the written waiver. *Id.*

On the morning of trial in this case the trial court held a CrR 3.5 hearing to determine the admissibility of the statements the defendant made during custodial interrogation. CP 163-195. For the purposes of this hearing the state called one witness: Jefferson County Sheriff's Detective Shane Stevenson. RP 163-182. According to Detective Stevenson, on May 11, 2016, the defendant came into the Jefferson County Sheriff's office to register as a sex offender. Once the defendant was finished with that process, Detective Stevenson told him that he needed to talk to him about another matter. He then took the defendant into an interrogation room, closed the door and "read him his constitutional rights." Detective Stevenson's testimony on this latter issue was as follows:

I read him his constitutional rights. I asked him if he understood his rights and if he was willing to speak with me and he said that he did understand his rights and he was willing to speak with me.

RP 164.

Although Detective Stevenson did state on cross-examination that he "advised [the defendant] of his right to remain silent," at no point during his testimony during the CrR 3.5 hearing did Detective Stevenson claim that he told the defendant that he had the "absolute right to remain silent," that "anything that he said could be used against him," that he had "the right to have counsel present before and during questioning," or that "if he could

not afford an attorney, one will be appointed to him.” RP 163-182.

Following Detective Stevenson’s testimony, the parties presented their argument concerning the admissibility of the defendant’s statements. RP 183-190. During these arguments the state specifically conceded that Detective Stevenson’s questioning of the defendant constituted “custodial interrogation” although the prosecutor did claim that a number of the defendant’s statements were spontaneous and not in response to specific questions and were made after being properly advised of his *Miranda* rights. RP 186. The prosecutor stated the following on these issues:

And so my argument here is that, first of all, ***the defendant was in a custodial interrogation situation here. He wasn’t free to leave.*** But Detective Stevenson read him his *Miranda* rights. He asked Mr. Haley if he understood. Mr. Haley acknowledged that he did understand, and then Mr. Haley blurts out these various statements. Interrupts Detective Stevenson to make those statements. So the statements that he did make were simply not in response to custodial interrogation.

So the first point is that *Miranda* was properly read. He was advised of his rights. He understood them and he voluntarily spoke with full understanding of what his rights were and his right to remain silent. And second of all, these were simply not statements in response to any interrogation. They weren’t in response to any specific question.

RP 186-187.

The trial court appeared to reject the state’s claim that the defendant’s statements were spontaneous, although it accepted the state’s

argument that the officer had properly warned the defendant of his *Miranda* rights. RP 190-195. The court noted the following on these two issues:

The way I view this is, okay, the officer was – the officer was basically interviewing the defendant. The technique he used apparently was to go through and read from his report some of the allegations that BLH made concerning the alleged sexual abuse. And to confront defendant with that and get some type of a response. It sounds like it was cast not explicitly in terms of a question such as, you know, did you do blah, blah, blah, blah, blah, blah. But rather it was – but – but still, the context to me, it seems like in effect it was – in effect he was soliciting a response from Mr. Haley.

The officer then read the defendant his *Miranda* constitutional rights. The defendant acknowledged that he understood those rights. The officer asked if he would be willing to talk to him and the defendant said yes, he would be willing to talk to him.

RP 190-191, 193.

Although the trial court ruled that the defendant's statements were admissible, as far as appellate counsel can tell, the court has not entered any findings of fact and conclusions of law from the CrR 3.5 hearing. CP 1-255.

Following the CrR 3.5 hearing in this case the court began the trial and the state called three witnesses: B.L.H, Dana Richardson (B.L.H.'s mother), and Detective Shane Stevenson. RP 209, 350, 430. The defense

then called Betty Haley, the defendant's mother, and David Miller, the former Jefferson County Sheriff's Deputy who had recorded his interview with B.L.H. in 2007 regarding allegations that the defendant had sexually assaulted B.L.H.. RP 496, 526. These witnesses testified to the facts set out in the preceding factual history. See Factual History, *supra*. The parties then presented closing arguments after which the court took the case under advisement. RP 679-621.

A little over a week after the trial the court called the case to render its verdict. RP 2/3/17 1-27. The court then found the defendant guilty on the three counts of first degree rape of a child, guilty on three counts of first degree incest, and not guilty on the remaining counts. RP 2/3/17 23-25. During a discussion of the evidence prior to rendering its verdicts, the court stated the following concerning Detective Stevenson's interrogation of the defendant:

He received the forensic interview and looked at it and then he investigated the case and interviewed a number of people. He interviewed the defendant at the jail. The jail – he had come to the office to register as an SO, and after that process was completed the officer told him he needed to talk to him about another matter. Shut the door for privacy. Read the defendant his Miranda Rights. Explained in detail the allegations of at least one of the alleged rapes.

And during the course of describing that in detail, which included reciting that it was alleged by the victim that the defendant

had anally raped her and that afterwards the victim had laid in a fetal position on the bed, and so forth.

And as they went – as the officer went through and described that, the defendant interrupted the officer and contested him about picking the blackberries and said, “We didn’t pick blackberries.” Or, “I’ve never picked blackberries with the – BLH.” But then he moments later corrected himself and says, “Oh yes, I guess I did one time.” And the officer explained how odd that was in the context of the conversation and what the officer had just relayed to him.

And at one point the defendant also interrupted and said, “There were no blackberries on the property.” And then moments later then acknowledged, “Oh yeah, I guess there are some down below the hill.” And the officer found that response to be very odd.

And he – and indicated that defendant at the time did not seem to express any concern for the victim, and also indicated as to why somebody might be saying this about him.

That there might be child custody issues with connection with a divorce. Even though the children were – one was over 18 and the other one was going to be turning 18 that year.

He did an investigation and verified that the family did live on Marrowstone Island during the time period that was described. He also investigated and found that blackberries were on the property and that they would have been growing during the time that school was in session, which is the time when BLH described that these incidents – or at least one, occurred.

At some point during the interview and the discussion, the defendant – the officer described, and he said the defendant eventually denied the allegations in connection with BLH. And their conversation, he said, was not confrontational or argumentative.

He described the defendant’s response regarding the berries, that it was really weird. It was as if the defendant was trying to grasp for some item of truth. And it was some time before he

actually contested the allegations themselves.

Based on his training, the defendant's response was completely unusual. It was an important piece, but not a decision maker for the officer in connection with how he proceeded with the investigation. He didn't believe the defendant was being truthful at the time, and ultimately he ended up arresting the defendant for Rape of a Child 1st Degree.

RP 18-20.

On March 3, 2017, this case came on for sentencing with the court calculating the defendant's offender score at 9+ points. CP 195-209. The standard range on each of the first three offenses was life in prison with a minimum mandatory time of from 240 to 318 months before the defendant could first be considered for release by the Indeterminate Sentencing Review Board. CP 198. The standard range on each of the remaining three offenses was from 77 to 102 months. *Id.* During that same hearing the court also imposed sentence on a second degree incest conviction in cause number 17-1-00010-3 to which the defendant pled guilty. CP 240-254. The range on that offense was 60 months. CP 243. After argument from the parties the court imposed sentences of life in prison with a minimum mandatory time of 318 months on each of the first three counts, along with sentences of 102 months concurrent on each of the remaining three counts. CP 224. The court then imposed 60 months on the second degree incest

charge from cause number 17-1-00010-3 and ordered that it run consecutive to the sentences in this case. CP 224. The court's only comment on its decision to run the sentences from the two cause numbers consecutively was as follows:

Okay. And the one change that I'm going to order is, is that the 60 months is going to be consecutive to the 318. Regardless of what statute I consider, being familiar with the case and everything set forth in the PSI, and even if I ignore the RCW that was cited by Mr. Isett, in my opinion, 318 months followed by 60 months for a total of 378 months is totally appropriate for the sentence here, given all of the factors, for example, that have been cited by Mr. Charlton, and all of the factors cited by Mr. Isett in the PSI, plus my own familiarity with these two cases. So – so the 60 months, like I say will be consecutive to – consecutive to the 318.

RP 643-644.

The court did not declare an exceptional sentence outside the standard sentence and did not set out its reasons for running the sentences consecutively in written findings of fact and conclusions of law. CP 1-354; RP 607-650. Following imposition of sentence the defendant filed timely notice of appeal. CP 219-234.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 6.3 FOLLOWING A BENCH TRIAL REQUIRES REMAND TO THE TRIAL COURT FOR COMPLIANCE WITH THE RULE.

Under CrR 6.1(d) the trial court following a bench trial must prepare findings of fact and conclusions of law. This rule states:

(d) Trial Without Jury. In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

CrR 6.1(d).

The appropriate remedy upon the court's failure to enter these required findings is remand of the case with an order to enter findings in compliance with the rule. *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998). For example, in *State v. Head, supra*, the court found the defendant guilty of eight counts of first degree theft following a trial to the bench. The defendant thereafter appealed. In spite of the appeal, the trial court never did enter written findings of fact as required under CrR 6.1(d). The defendant argued on appeal that the trial court's failure to comply with CrR 6.1(d) required vacation of the convictions and dismissal. The state argued that the error was harmless under the facts of the case. However, the

Washington Supreme Court determined that the appropriate remedy was to vacate the conviction and remand for entry of the findings. The court stated:

CrR 6.1(d) requires entry of written findings of fact and conclusions of law at the conclusion of a bench trial. The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal.

Remand for entry of written findings and conclusions is the proper course. A trial court's oral opinion and memorandum opinion are no more than oral expressions of the court's informal opinion at the time rendered. An oral opinion "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment."

State v. Head, 136 Wn.2d at 621-22 (footnote and citations omitted).

As these cases indicate, the absence of findings in the case at bar precludes appellate review. As a result, this court should remand this case for entry of findings as required under CrR 6.1(d).

II. THE TRIAL COURT ERRED WHEN IT ADMITTED STATEMENTS INTO EVIDENCE THE DEFENDANT MADE DURING CUSTODIAL INTERROGATION WITHOUT PROOF THAT THE INTERROGATING OFFICER ADEQUATELY WARNED THE DEFENDANT OF HIS RIGHTS UNDER *MIRANDA V. ARIZONA*.

The United States Constitution, Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." Similarly, Washington Constitution, Article 1, § 9 states that "[n]o

person shall be compelled in any criminal case to give evidence against himself.” The protection of Washington Constitution, Article 1, § 9 is coextensive with the protection of the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). In addition, under United States Constitution, Sixth Amendment, a defendant has the right to consult an attorney prior to answering any questions during custodial interrogation. This protection is also guaranteed under Washington Constitution, Article 1, § 22.

In order to effectuate these rights, the United States Supreme Court held in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), that before a defendant’s “custodial statements” may be admitted as substantive evidence, the state bears the burden of proving that prior to questions the police informed the defendant that: “ (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him.” *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997) (quoting *Miranda*, 384 U.S. 436, 86 S.Ct. 1602). The state bears the burden of proving not only that the police properly inform the defendant of these rights, but that the defendant’s waiver of these rights was knowing and voluntary. *State v.*

Earls, supra. If the police fail to properly inform a defendant of these four rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

The "triggering factor" requiring the police to inform a defendant of his or her rights under *Miranda* is "custodial interrogations." Just what the words "custodial" and "interrogation" mean has been the subject of significant litigation. *State v. Richmond*, 65 Wn.App. 541, 544, 828 P.2d 1180 (1992). Generally speaking, an interrogation is "any words or actions on the part of the police ... that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Richmond*, 65 Wn.App. at 544 (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)).

Once an accused asserts his or her right to remain silent and right to counsel, all interrogation must cease until an attorney is present "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 485, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981); *State v. Wheeler*, 108 Wn.2d 230, 737 P.2d 1005 (1987). At this point, the right to silence and counsel must be

“scrupulously honored.” *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313, (1975); *State v. Grisby*, 97 Wn.2d 493, 504, 647 P.2d 6 (1982).

In order to implement the requirements the Supreme Court created in *Miranda*, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of a defendant’s post-arrest statements given in response to police interrogation. This procedure is found in CrR 3.5, which states in part:

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court to Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(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 therefor.

CrR 3.5.

In the case at bar the only evidence presented at the CrR 3.5 hearing concerning any advise of rights was Detective Stevenson's claim that he read the defendant "his constitutional rights." On cross-examination Detective Stevenson did testify that at one point he "advised [the defendant] of his right to remain silent." RP 170. However, at no point did Detective Stevenson claim that he told the defendant that he had the "absolute right" to remain silent, that anything he said could be used against him, that he had the right to have counsel present before and during questioning, and that if he could not afford counsel, one would be appointed to him. RP 163-182.

While there is no requirement under *Miranda* that an arresting officer use any specific language when informing a defendant of his or her rights prior to custodial interrogation, to be adequate, whatever language is used must convey that (1) a defendant need not speak to the police, (2) that any statement made may be used against the defendant, (3) that a defendant has the right to an attorney, and (4) that an attorney will be appointed if the defendant cannot afford one. *See Duckworth v. Eagan*, 492

U.S. 195, 210–15, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989); *see also United States v. Hernandez*, 93 F.3d 1493, 1502 (10th Cir. 1996). Since there is no evidence in the record at the CrR 3.5 hearing in this case that the defendant was warned of three of his *Miranda* rights the trial court erred when it admitted the defendant's statements into evidence over the defendant's objection.

In this case the error in admitting the defendant's statements into evidence was far from harmless. In fact, as the trial court explained when it rendered its verdict, the defendant's statements during his interrogation, particularly his failure to adequately address the claims of rape while concentrating on the issue of the existence of blackberry bushes at a particular residence, constituted evidence of guilt in the court's eyes. The court's comments on this evidence was as follows:

He received the forensic interview and looked at it and then he investigated the case and interviewed a number of people. He interviewed the defendant at the jail. The jail – he had come to the office to register as an SO, and after that process was completed the officer told him he needed to talk to him about another matter. Shut the door for privacy. Read the defendant his *Miranda* Rights. Explained in detail the allegations of at least one of the alleged rapes.

And during the course of describing that in detail, which included reciting that it was alleged by the victim that the defendant had anally raped her and that afterwards the victim had laid in a fetal position on the bed, and so forth.

And as they went – as the officer went through and described that, the defendant interrupted the officer and contested him about picking the blackberries and said, “We didn’t pick blackberries.” Or, “I’ve never picked blackberries with the – BLH.” But then he moments later corrected himself and says, “Oh yes, I guess I did one time.” And the officer explained how odd that was in the context of the conversation and what the officer had just relayed to him.

And at one point the defendant also interrupted and said, “There were no blackberries on the property.” And then moments later then acknowledged, “Oh yeah, I guess there are some down below the hill.” And the officer found that response to be very odd.

And he – and indicated that defendant at the time did not seem to express any concern for the victim, and also indicated as to why somebody might be saying this about him.

That there might be child custody issues with connection with a divorce. Even though the children were – one was over 18 and the other one was going to be turning 18 that year.

He did an investigation and verified that the family did live on Marrowstone Island during the time period that was described. He also investigated and found that blackberries were on the property and that they would have been growing during the time that school was in session, which is the time when BLH described that these incidents – or at least one, occurred.

At some point during the interview and the discussion, the defendant – the officer described, and he said the defendant eventually denied the allegations in connection with BLH. And their conversation, he said, was not confrontational or argumentative.

He described the defendant’s response regarding the berries, that it was really weird. It was as if the defendant was trying to grasp for some item of truth. And it was some time before he actually contested the allegations themselves.

Based on his training, the defendant’s response was completely

unusual. It was an important piece, but not a decision maker for the officer in connection with how he proceeded with the investigation. He didn't believe the defendant was being truthful at the time, and ultimately he ended up arresting the defendant for Rape of a Child 1st Degree.

RP 18-20.

A trial court's admission of a defendant's statement obtained in violation of *Miranda* is an error of constitutional magnitude and requires reversal unless the reviewing court finds it harmless beyond a reasonable doubt. *State v. Rhoden*, 189 Wn.App. 193, 202, 356 P.3d 242 (2015). To find a *Miranda* violation harmless beyond a reasonable doubt, the courts look only at the untainted evidence to determine if that untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Under this standard, the state has the burden of demonstrating that the admission of the statement did not contribute to the final conviction. *Id.* Thus, the court will reverse if there is any reasonable chance that the use of the inadmissible evidence was necessary to reach the guilty verdict. *Id.*

In the case at bar the untainted evidence of guilt presented in this case was far from "so overwhelming that it necessarily leads to a finding of guilt." Rather, the only evidence of guilt came from the testimony of B.L.H. and that testimony was itself compromised by B.L.M.'s prior, 35 minute

interview during which she denied the existence of any crime². While her testimony meets the substantial evidence rule, it was unsupported by any other evidence. Thus, in this case, the trial court's error in admitting and relying upon the defendant's statements to Detective Stevenson requires reversal and a remand for a new trial.

III. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ACCEPTED A JURY WAIVER THAT THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER.

Under the United States Constitution, Sixth Amendment every person charged with an offense that could result in over six months imprisonment is entitled to a trial by jury. *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). By contrast, Washington Constitution, Article 1, § 21, affords the citizens of this state the right to trial by jury for any offense that is defined as a "crime," conviction of which

²It is true that B.L.M.'s mother claimed that the defendant had confessed to the crimes during a telephone call with her from custody at Coyote Ridge. However, the state failed to produce a recording of this call and the evidence presented at trial indicated that the defendant was not at Coyote Ridge when B.L.M.'s mother claimed they had the telephone conversation. In rendering its verdict the trial court specifically discounted this evidence and did not find it credible. ("I'm not putting – I'm not making my decision based on that at all. Her testimony that there was "a confession of some kind" is too vague. I don't find it to be reliable. And so as far as the confession goes I'm not basing my decision on that." RP 2/1/17 16).

could result in any imprisonment. *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may only be sustained if “knowingly, intelligently and voluntarily made.” *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981).

The waiver of the right to jury trial must either be made in writing or made orally on the record. *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). If the defendant challenges the validity of the jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. *State v. Donahue*, 76 Wn.App. 695, 697, 887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews the waiver de novo. *State v. Vasquez*, 109 Wn.App. 310, 34 P.3d 1255 (2001). Finally, in examining an oral waiver of the right to jury made in violation of the requirement under CrR 6.1, “every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary.” *State v. Wicke, supra*.

For example, in *State v. Williams*, 23 Wn.App. 694, 598 P.2d 731 (1979) the defendant’s were convicted in a superior court bench trial de novo of illegally taking shellfish. The record contained no written waiver of

jury trial and no colloquy between the defendant and the court. The defendants thereafter appealed, arguing that the state had failed to meet its burden of showing that they had knowingly, intelligently, and voluntarily waived their rights to a jury trial. The Court of Appeals agreed, holding as follows:

State v. Jones, 17 Wn.App. 261, 562 P.2d 283 (1977), held that a criminal defendant's right to trial by jury is not waived unless a written waiver is filed by defendant himself. *In re Reese*, 20 Wn.App. 441, 580 P.2d 272 (1978), softened the rule in holding that an express and open waiver of jury trial in open court and appearing in the record constitutes substantial compliance with CrR 6.1(a). This interpretation was upheld by our Supreme Court following a consolidated appeal in *State v. Wicke, supra*. Under the present state of the law, where there is no written waiver of a jury trial, substantial compliance with CrR 6.1(a) requires some colloquy between the court and the defendant personally. The absence of such a colloquy in the record of the present case dictates reversal of the convictions.

State v. Williams, 23 Wn.App. at 697-698.

In a 2004 case, *State v. Borboa*, 124 Wn.App. 779, 102 P.3d 183 (2004), the defendant appealed his exceptional sentence, arguing that under the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court had denied him his right to jury trial when it imposed a sentence in excess of the standard range based upon judicially determined aggravating facts. In this case, a jury convicted the defendant of first degree kidnaping, second degree assault of a child, and

first degree rape of a child. The jury had also returned a special finding that the defendant had committed the kidnaping with sexual motivation. Under RCW 9.94A.712, the court imposed sentences of life in prison, and then declared a minimum mandatory term in excess of the applicable range based upon deliberate cruelty and particular vulnerability because of age.

While the defendant's case was on appeal, the Supreme Court issued the decision in *Blakely* and the defendant then argued that the minimum mandatory sentence in excess of the applicable range violated his right to jury trial. The state responded by arguing that even if *Blakely* applied, the defendant had waived his right to a jury determination on the aggravating factors when he admitted one of the factors in his initial brief. However, the Court of Appeals rejected this argument, holding as follows:

Although a defendant can waive his Sixth Amendment right to jury trial, he or she must do so knowingly, voluntarily, and intelligently. *Borboa* was tried by a jury and sentenced before *Blakely* was decided. He did not know of or agree to forgo his right to have a jury find the facts needed to support a sentence above the standard range. Thus, he did not knowingly, voluntarily, or intelligently waive his Sixth Amendment right to have a jury find such facts.

State v. Borboa, 124 Wn.App. at 792 (footnotes omitted).

In the case at bar, the defendant was at least aware that he had the right to trial by jury, since the written waiver so states. However, the

inadequacy of the written waiver and the inadequacy of the colloquy between the court and the defendant on what the right to a jury trial entails shows that the waiver in this case was no more effective than the waiver in *Borboa*. The hearing on the jury waiver in this case does not reveal whether or not the defendant understood that under the Washington constitution, there had to be complete jury unanimity in order to enter a guilty verdict. This state constitutional right varies significantly from the United States Constitution and many other state constitutions, which do not require complete jury unanimity in order to sustain a guilty verdict. See *State v. Gimarelli*, 105 Wn.App. 370, 20 P.3d 430 (2001); *State v. Klimes*, 117 Wn.App. 758, 73 P.3d 416 (2003). Absent advice on this important component of the right to jury trial under Washington Constitution, Article 1, § 21, the state in this case cannot meet its burden of proving that the jury waiver was knowingly, intelligently, and voluntarily made. As a result, this court should reverse the conviction and remand for a new trial before a jury.

IV. THE TRIAL COURT VIOLATED RCW 9.94A.535 AND RCW 9.94A.589(1)(A) WHEN IT ORDERED THE SENTENCES IN THIS CASE TO RUN CONSECUTIVE TO THE SENTENCE IN CAUSE NO. 17-1-00010-3.

Under RCW 9.94A.535, a trial court may not impose a sentence outside the standard range without first finding substantial and compelling

reasons justifying an exceptional sentence and without then entering written findings and conclusions in support of that exceptional sentence.

The introductory section of this statute states:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

RCW 9.94A.535 (introductory paragraphs only).

In this case at bar the trial court did not declare an exceptional sentence, it did not find any substantial and compelling reasons for exceeding the standard range, and it did not enter written findings in support of an exceptional sentence. However, as the last paragraph to the

introductory section of RCW 9.94A.535 indicates, any departure from the standards for imposing concurrent and consecutive sentences under RCW 9.94A.589(1) and (2) constitutes an exceptional sentence. A review of this latter statute in the context of this case indicates that this is precisely what the court did in this case. Section (1)(a) of RCW 9.94A.589 states:

(1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. ***Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.*** "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a) (emphasis added).

In the case at bar the court sentenced the defendant in two concurrent cases on the same day without declaring an exceptional sentence under RCW 9.94A.535. Thus, the trial court erred when it failed to order that those sentences run concurrently.

In addition, in this case the trial court also committed another error.

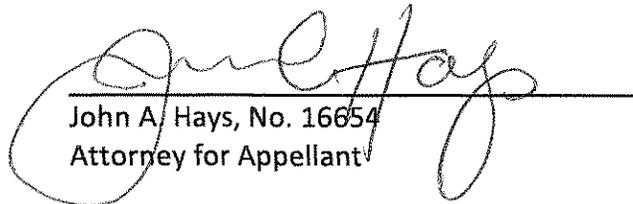
As was set out in the introductory sentence to RCW 9.94A.535, a sentence “outside the standard sentence range shall be a determinate sentence.” The trial court violated this provision when it ordered that the defendant’s 60 months determinate sentence from cause number 17-1-00010-3 to run consecutively to the first three sentences in the case at bar because the court imposed indeterminate sentences in those first three convictions. By doing so the court created an exceptional sentence “outside the standard sentence range” that was indeterminate, which the introductory section to RCW 9.94A.535 prohibits. Thus, in this case, the trial court should remand this case back to the trial court with instructions to run the sentences in this case concurrent with the sentence in 17-1-00010-3.

CONCLUSION

The trial court's admission of the defendant's statements following the CrR 3.5 hearing was error and requires remand for a new trial because the interrogating officer did not inform the defendant of his *Miranda* rights and the error was not harmless. In addition, this court should vacate the defendant's convictions and remand for a new trial because the trial court acceptance of an inadequate and uninformed jury waiver denied the defendant his right to a jury trial. In addition, the trial court's failure to enter findings and conclusions after a bench trial requires remand for entry of those findings and conclusions. Finally, the trial court erred when it imposed consecutive sentences in this case. As a result and in the alternative, this court should remand this case to the trial court with instructions to impose concurrent sentences.

DATED this 24th day of August, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

RULE 3.5
CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court To Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(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 therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

CrR 6.1
TRIAL BY JURY OR BY THE COURT

(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.

(b) Number of Jurors. Unless otherwise provided by these rules, the number of persons serving on a jury shall be 12, not including alternates. If prior to trial on a noncapital case all defendants so elect, the case shall be tried by a jury of not less than six, or by the court.

(c) Juror Unable to Continue. If a case has not yet been submitted to the jury and a juror is unable to continue and no alternate jurors were selected or none are available, or if a case has been submitted to the jury and a juror is unable to continue, all defendants may elect to continue with the remaining jurors. The court shall declare a mistrial for any defendant who does not elect to continue with the remaining jurors. If some, but not all, defendants elect to continue with the trial, the court shall proceed with the trial for those defendants unless the court determines manifest necessity requires a mistrial.

(d) Trial Without Jury. In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

RCW 9.94A.535

Departures from the Guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

RCW 9.94A.589

Consecutive or Concurrent Sentences

(1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional

sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(d) All sentences imposed under RCW 46.61.502(6), 46.61.504(6), or 46.61.5055(4) shall be served consecutively to any sentences imposed under RCW 46.20.740 and 46.20.750.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in

community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

RICHARD E. HALEY,
Appellant.

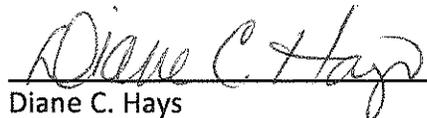
NO. 50005-1-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Michael Haas
Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368
mhaas@co.jefferson.wa.us
2. Richard E. Haley, No. 962742
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

Dated this 24th August, 2017, at Longview, WA.


Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

August 24, 2017 - 2:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50005-1
Appellate Court Case Title: State of Washington, Respondent v. Richard Haley, Appellant
Superior Court Case Number: 16-1-00063-6

The following documents have been uploaded:

- 3-500051_Briefs_20170824143255D2420481_4909.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Haley Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- mhaas@co.jefferson.wa.us

Comments:

Sender Name: Diane Hays - Email: jahayslaw@comcast.net

Filing on Behalf of: John A. Hays - Email: jahayslaw@comcast.net (Alternate Email: jahayslaw@comcast.net)

Address:
1402 Broadway
Longview, WA, 98632
Phone: (360) 423-3084

Note: The Filing Id is 20170824143255D2420481