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Division II  
State of Washington  
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NO. 50005-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

RICHARD E. HALEY,

Appellant.

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REPLY BRIEF OF APPELLANT

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### **ADDITIONAL STATEMENT OF THE CASE**

Counsel filed the opening brief of appellant on August 24, 2017. *See* Opening Brief of Appellant. The first argument in that brief is that this court should remand this case back to the trial court for entry of findings as required CrR 6.3 following a bench trial. *Id.* On August 16, 2017, without notice of appellate counsel, the Jefferson County Prosecutor prepared 12 pages of findings as were required under CrR 6.3. *See* Supplemental Clerk's Papers. The trial court signed and filed these findings on October 6, 2017. *Id.* The first time counsel for appellant became aware of this document was on November 30, 2017, when the state filed its Brief of Respondent along with a Supplemental Designation of Clerk's Papers designating the findings the trial court entered on October 6<sup>th</sup>.

As the following sets, Appellant objects to a certain portion of these findings as (1) unsupported by substantial evidence, and (2) tailored specifically to respond to the arguments previously filed in the opening brief of appellant.

## ARGUMENT

### I. A PORTION OF THE FINDINGS OF FACT THE STATE PREPARED AND THE COURT ENTERED AFTER APPELLANT FILED HIS OPENING BRIEF ARE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings "if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

In the case at bar, appellant assigns error to the highlighted portion of the third full paragraph of page 9 of the trial court's findings concerning the testimony of Detective Shane Stevenson:

He interviewed the defendant at the Jefferson County Jail, when the defendant came to the Sheriff's office to register as a sex offender. Detective Stevenson indicated he wanted to speak with

the defendant about another matter and shut the door for privacy. ***Detective read the defendant his Miranda rights*** and explained in detail one of the rape allegations.

Supplemental Clerk's Papers, page 9 (emphasis added).

In fact, a careful review of Detective Stevenson's testimony at the CrR 3.5 hearing held on the first day of trial reveals that he claimed he informed the defendant of his "constitutional rights," not his "*Miranda*"

This testimony went 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.

Thus, the trial court's claim that the officer read the defendant his "Miranda" rights as required under the decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is unsupported by substantial evidence. Substantial evidence does support the conclusion that the officer read the defendant his "constitutional" rights, although just what those rights were are impossible to ascertain because the state did not elicit this information from the officer.

**II. THIS COURT SHOULD REFUSE TO CONSIDER THE WRITTEN FINDINGS OF FACT THE STATE TAILORED TO SPECIFICALLY REBUT APPELLANT'S SECOND ARGUMENT THAT THE TRIAL COURT ERRED WHEN IT ADMITTED THE DEFENDANT'S CUSTODIAL STATEMENTS AND THAT THIS ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.**

This court will not reverse a conviction for the late entry of findings unless the defendant can show prejudice resulting from the delay or that the findings were tailored to address the issues raised on appeal. *State v. Cannon*, 130 Wn.2d 313, 329–30, 922 P.2d 1293 (1996). As the following sets out, the state specifically tailored a certain portion of the trial court's findings in this case to rebut issues appellant raised in his opening brief. In addition, as will also be pointed out, the state also tailored the findings so as to undermine the importance of certain oral findings the trial court made when it rendered its verdict and upon which appellant relied in his opening brief.

In the case at bar the defendant's second and third arguments were as follows:

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.

As was set out in the previous argument, at no point during the CrR 3.5 hearing did the interrogating officer claim that he read the defendant his “*Miranda*” rights. These rights are: “(1) that the defendant has the absolute right to remain silent, (2) that anything the defendant says can be used against him, (3) that the defendant has the right to have counsel present before and during questioning, and (4) that if the defendant 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).

As was also set out in the opening brief of appellant, the state bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant’s waiver of these rights was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991). 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).

In this case the officer merely stated that he read the defendant his “constitutional” rights. The officer did not elaborate on what those “constitutional” rights were, he certainly did not claim that he informed the defendant of his “*Miranda*” rights, and did not claim that he informed the defendant of the four critical elements of a proper “*Miranda*” warning. Thus, the state’s inclusion of a finding that the officer informed the defendant of his “*Miranda*” rights was a specific attempt to tailor that finding to rebut the defendant’s second argument in the opening brief of appellant. This court should not consider this finding both because it is not supported by substantial evidence and because the state tailored it after the fact to rebut the second argument from Appellant’s opening brief.

In this case the state also tailored the findings of fact it prepared in an attempt to cut off the argument that the trial court’s error in admitting the defendant’s custodial statements caused prejudice. The state did this by omitting any mention of the following comments during which the trial court outlined the importance and significance of the defendant’s custodial statements:

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 1<sup>st</sup> Degree.

RP 18-20.

As these 10 paragraphs over 3 pages of transcripts reveal, the trial court assigned great weight to the defendant's custodial statements when it found him guilty of the majority of the charged counts. In spite of this fact, the findings the state prepared for the court to sign over eight months after the trial do not even mention the defendant's custodial statements or their importance. Based upon this absence in the written findings the state argued as follows in the Brief of Respondent:

Additionally, in its Findings of Fact and Conclusions of Law (FOFCOL), the Court made a brief reference to the blackberry bushes in its "Testimony Presented at Trial." FOFCOL, pp. 9-10. However, the Court completely omits any mention of Defendant's statements to Det. Stevenson in the actual "Findings of Fact" section of that document. FOFCOL, pp. 10-11.

Brief of Respondent, pages 16-17.

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There should be little wonder that the findings of fact the state prepared and had the court sign over eight months after the trial do not mention the three pages and 10 paragraphs of comments the trial court reviewed concerning the defendant's custodial statements when rendering its verdict. The state's omission of these facts from the findings was a specific effort to undercut the argument from the Brief of Appellant that the erroneous omission of the defendant's custodial statements denied the defendant a fair trial.

**III. THE FAILURE TO PROPERLY INFORM A DEFENDANT OF HIS MIRANDA RIGHTS, WITHOUT EXCEPTION, REQUIRES SUPPRESSION OF THOSE STATEMENTS IN A CASE IN WHICH THE DEFENDANT DOES NOT TESTIFY.**

In the Brief of Respondent the state argues that the trial court's admission of the defendant's custodial statements was not error even though the state did not bear its burden of proving that the interrogating officer properly informed the defendant of his four separate *Miranda* rights. Specifically, the state argued as follows:

Finally, substantial experience with the criminal justice system will support the conclusion that the Defendant appreciates the gravity of *Miranda* warnings. *See, e.g., State v. Hutchinson*, 85 Wn.App. 726, 938 P.2d 336 (1997).

Brief of Respondent, page 17.

The *Hutchinson* case upon which the state relies does not involve

the state's failure to prove that the defendant was properly given the four warnings required under *Miranda* prior to the admission of a defendant's custodial statements at trial. Rather, in *Hutchinson*, the court was addressing the defendant's claim that intoxication and low intelligence prevented him from waiving those rights after an officer properly gave them to him. The court noted as follows in that case:

Hutchinson argues that inebriation, sleep deprivation, and low intelligence quotient precluded him from knowingly and intelligently waiving his rights. Before addressing these specific impairments, however, we emphasize that in the twelve years preceding the murders, Hutchinson had been "Mirandized" on at least five separate occasions. On each occasion he acknowledged understanding those rights, he waived them, and he answered questions. This substantial experience strongly supports the conclusion that Hutchinson appreciated the warning's gravity and a waiver's concomitant peril.

*State v. Hutchinson*, 85 Wn.App. at 739.

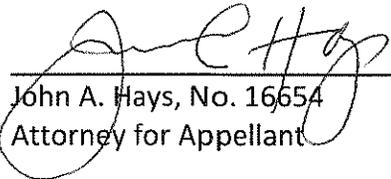
Thus, the decision in *Hutchinson* does not support the state's implicit argument that once a defendant has been "Mirandized" during a sufficient number of prior arrests the defendant's current custodial statements may be admitted without proof of current *Miranda* warnings. The law does not support this proposition.

**CONCLUSION**

The trial court erred when it admitted the defendant's statements made during custodial statements. Since the state has failed to prove the error harmless beyond a reasonable doubt, this court should reverse the defendant's convictions and remand for a new trial.

DATED this 5<sup>th</sup> day of December, 2017.

Respectfully submitted,



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COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,  
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RICHARD E. HALEY,  
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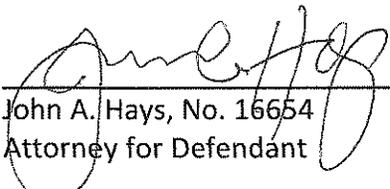
NO. 50005-1-II

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:

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Dated this 5<sup>th</sup> day of December, 2017, at Longview, WA.

  
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**December 05, 2017 - 12:04 PM**

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