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NO. 51401-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEANDRE BROWN,

Appellant.

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

Honorable Bernard Veljacic, Judge
Honorable Daniel Stahnke, Judge
Honorable Robert Lewis, Judge
Honorable Gregory Gonzalez, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error by allowing a juvenile probation officer, over Mr. Brown's objection, to identify Mr. Brown as the person depicted in still photos taken from the pharmacy's surveillance video.

2. Defense counsel's failure to direct the sentencing court to the youthful factors in Mr. Brown's transcribed statement to the police, admitted at the CrR 3.5 hearing, to justify an exceptional sentence downward denied Mr. Brown effective assistance of counsel.

3. The trial court erred in finding Mr. Brown used a motor vehicle in commission of the robbery and assaults in counts 1-5.

4. The parties erred in failing to enter written CrR 3.5 findings of fact and conclusions of law following a CrR 3.5 hearing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The court allowed a juvenile probation officer, over objection, to identify Mr. Brown as the person depicted in still photos taken from the pharmacy surveillance video. Where there was no showing that the probation officer was more likely to correctly identify Mr. Brown from the still photographs than the jury, did admission of the opinion testimony unfairly invade the province of the jury?

2. When sentencing a young offender, a judge should consider as mitigation: immaturity, impetuosity, and failure to appreciate risks and consequences; lessened blameworthiness and resulting diminishment in justification for retribution; and the increased possibility of rehabilitation. Did defense counsel's failure to direct the court's attention to mitigating youthfulness factors in Mr. Brown's transcribed statement to the police, admitted at the CrR 3.5 hearing, to justify a lower sentence constitute ineffective assistance of counsel?

3. Under RCW 46.20.285(4), a trial court may order an offender's driver's license revoked for one year if the court finds the offender "used" a motor vehicle in commission of a felony. The statute does not apply if the offender merely "used" the vehicle to transport from the scene of the crime. Here, Mr. Brown allegedly drove from, or was a passenger in, a car used to drive away after the robbery and assaults in the pharmacy. Did the trial court err in finding Mr. Brown "used" a motor vehicle in the commission of the robbery and assaults for purposes of RCW 46.20.285(4)?

4. To aid appellate review, CrR 3.5(c) requires entry of written findings of fact and conclusions of law following a 3.5 hearing. The trial court heard a CrR 3.5 hearing but no findings of fact and conclusions of law

have been entered. Must Mr. Brown's case be remanded to enter written CrR 3.5 findings of fact and conclusions of law?

C. STATEMENT OF THE CASE

Two men entered the Mill Plain Medical and Pharmacy during hours of business. RP2¹ 161; RP3 246. Both men had what appeared to be handguns. RP2 163, 194. Both men wore masks over their faces. RP3 272.

One man went to a back area and took the oxycodone from the pharmacy safe. RP2 181-83; RP3 343, 358. The other man held the employees and customers in check by displaying the handgun and making threatening statements. RP2 195, 210; RP3 239-41, 263, 278-79.

The two men left through the front door. RP3 281-82; RP4 436. A police officer sitting in traffic near the scene saw the two men go to a car parked nearby, get in, and leave the area. RP3 231, 290.

The pharmacy's surveillance system recorded the activities in the pharmacy. RP3 312. To identify the two men, police detectives made still photos from the surveillance tape. RP2 108. At times, the masks worn by the men slipped down to reveal parts of their faces. RP3 247, 268, 273.

¹ The number following the "RP" specifies the volume where the page number is located.

Similar pharmacy robberies in Portland lead the police to develop suspect information. RP4 456. Vancouver Police Detective Martin showed the stills from the pharmacy surveillance system photos to Portland Juvenile Probation Officer Harry Bradshaw. RP2 107. Bradshaw identified cousins Keith Woody and Keandre Brown as the two men in the pharmacy. RP1 107; RP4 452.

Police arrested Woody and Mr. Brown when they were discovered as passengers in a van stopped as part of an arrest warrant enforcement effort. RP4 368-70, 380. During the stop, Mr. Brown concealed a gun in the van seats. RP4 397-98. The police found the gun while serving a search warrant on the van.² RP4 402. Brown could not legally possess a gun because of a prior felony conviction. CP 4.

The state charged Mr. Brown with robbery and assault in the second degree and two counts of unlawful possession of a firearm. CP 1-3. The charges included firearm enhancements on the assault and the robbery and were charged to separately reflect the possession of a firearm by accomplice Woody and by Mr. Brown himself. CP 1-3.

Woody made admissions when arrested. RP3 336.

²The possession is charged as count 6 in the amended information. CP 1-3.

Detectives interviewed Mr. Brown and recorded the interview. CrR 3.5 Supplemental Designation of Clerk's Papers, Exhibit 1. Prior to trial, the court heard a CrR 3.5 hearing. RP2 136-52. At the hearing, the court admitted a transcript of the interview. Exhibit 1. During the interview, Mr. Brown talks at length about himself and his life circumstances. Exhibit 1.

To date, the parties have not filed CrR 3.5 findings of fact and conclusion of law.

Prior to trial, Brown moved unsuccessfully to prevent Corrections Officer Bradshaw from identifying him in still photos made from the pharmacy surveillance system. RP2 97-127. Bradshaw identified Mr. Brown in the still photos while testifying before the jury. RP5 576-77.

The jury found Mr. Brown guilty as charged and found too that Mr. Brown and Woody both possessed firearms during the robbery and assaults. CP 5-22.

At sentencing, the state asked the court to dismiss without prejudice the firearm sentencing enhancements as they pertained to the possession of a firearm by accomplice Woody. RP6 680; CP 11, 14, 17, 20. See also Mr. Brown's Memorandum of Authorities at CP 23-28. The court granted the state's request. RP6 683-84; CP 32.

The court acknowledged Mr. Brown's youth, just 19 years old at the time of the offense and its awareness that youth can be considered a mitigating factor in imposing an exceptional sentence downward. RP6 679-682. The court, however, did not give full consideration to Mr. Brown's youth as a mitigating factor because defense counsel failed to provide the court with a copy of CrR 3.5 Exhibit 1 wherein Mr. Brown candidly talked about his life and his youthful existence. The information in Exhibit 1 is a marked contrast to the state's argument that Mr. Brown was not living a youthful lifestyle. RP6 679.

Mr. Brown did not wish to make a statement. RP6 682.

The court imposed a 360 month sentence. RP6 681-83; CP 33. In declining to impose any discretionary legal financial obligations, the court acknowledged Mr. Brown would be in prison for 30 years. RP6 683-84; CP 32.

On the judgment and sentence, the court checked the box that a motor vehicle was used in committing counts 1-5 – the robbery and assaults. CP 37.

Mr. Brown made a timely appeal of all portions of his judgment and sentence. CP 44-59.

D. ARGUMENT

Issue 1: The improper admission of opinion evidence identifying Mr. Brown in still photos taken from surveillance video invaded the province of the jury.

Prior to trial, Mr. Brown moved to exclude testimony from Harry Bradshaw, a Portland juvenile probation officer. RP2 99-135. The state sought to admit Bradshaw's opinion that Mr. Brown appeared in still photos taken from the pharmacy surveillance video. RP2 115-20. The court allowed Bradshaw's identification testimony over strenuous objection. RP2 122-27. The testimony invaded the province of the jury and was admitted in error.

Bradshaw planned to testify he knew of Mr. Brown as having been in the system over an approximate 10 year window. RP2 100-02. Bradshaw only had had about 10 interactions with Mr. Brown that varied in length from 2-3 minutes to 10 minutes. RP2 100-02. The interactions included face-to-face conversations. RP2 102.

Bradshaw's caseload involved mostly gang-involved youth so he looked closely at people. RP2 103. He had last seen Mr. Brown in early 2016. RP2 104. He was also familiar with Keith Woody as Woody had been on his caseload for 10 years starting around 2005. RP2 104. He was aware Woody and Mr. Brown were friends. RP2 105. He had seen social media

posts showing Woody and Mr. Brown. He had seen Mr. Brown in about 50 social media posts. RP2 106. He felt he could identify both Woody and Mr. Brown in still photos. RP2 105-06. He had met with Detective Neil Martin and recognized Mr. Brown in the surveillance video. RP2 107, 110.

Trial counsel argued that allowing the probation officer to give his opinion that the person in the surveillance still photos was Mr. Brown invaded the province of the jury. RP2 122-24. The jurors could compare the surveillance videos and still photos to Mr. Brown in court. RP2 122-25. Undoubtedly, Mr. Brown's appearance had changed quite a bit over the 10 years Bradshaw was familiar with Mr. Brown and he had no special insight or knowledge about Mr. Brown's appearance that would help the jury. RP2 122-25.

The court ruled the probation officer's opinion identifying Mr. Brown from the still photos would be admitted, based on his few observations of Brown over the years. RP2 126-27, 130. The court found that his opinion would be useful to the jury and was therefore admissible under ER 701. RP2 126-27, 134. The court did agree to exclude any reference to Bradshaw as a probation officer to avoid further prejudice. RP2 131.

A trial court's ruling admitting evidence is reviewed for abuse of discretion. *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.*

Under ER 701, a lay witness may testify to an opinion if it is rationally based on the witness's perception and helpful to a clear understanding of the fact in issue. *George*, 150 Wn. App. at 117. Opinion testimony identifying persons in a surveillance photograph runs the "risk of invading the province of the jury and unfairly prejudicing [the defendant]." *George*, 150 Wn. App. at 118 (*quoting U.S. v. La Pierre*, 998 F.2d 1460, 1465 (9th Cir.1993)). Such testimony is admissible only where there is "some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." *George*, 150 Wn. App. at 118 (*quoting State v. Hardy*, 76 Wn. App. 188, 190-91, 884 P.2d 8 (1994)). Opinion testimony may be appropriate if the witness has had sufficient contacts with the person or if the person's appearance has changed significantly since the photograph was taken. *See La Pierre*, 998 F.2d at 1465.

In *George*, armed robbers entered a motel lobby and stole cash and a television set, and the defendants were arrested after exiting a van seen

leaving the area. A poor quality surveillance video recorded the robbery. The video and several stills were shown to the jury. In addition, a police officer was permitted to identify two of the people in the video as the defendants by their build, how they moved, what they were wearing, and his impressions from talking to them later. *George*, 150 Wn. App. at 115-16.

The defendants objected to the officer's identification, and the Court of Appeals held that the trial court abused its discretion in allowing it. *George*, 150 Wn. App. at 118-19. The officer had observed one defendant as he exited the van and ran away and again at the hospital that evening. He observed the other defendant as he exited the van and was handcuffed and while he was at the police station in an interview room. These observations fell short of the extensive contacts needed to support a finding that the officer knew enough about the defendants to opine that they were the robbers in the video. *Id.* at 119.

In this case, as in *George*, the trial court abused its discretion in admitting lay opinion regarding the identity of the person in surveillance photographs. Over defense objection, Bradshaw was permitted to give his opinion that the person depicted in the surveillance still photos was Mr. Brown. Bradshaw's encounters with Mr. Brown - brief contacts over the

years - were no more extensive than the ones found insufficient in *George* given their infrequency and brief window for observation. Bradshaw was no more likely to correctly identify Mr. Brown from the photos than the jury. *See Hardy*, 76 Wn. App. at 181 (officer who had known defendant for several years was in better position to identify him in grainy videotape than jury).

Bradshaw's opinion testimony was an impermissible invasion of the province of the jury. *See State v. Jamison*, 93 Wn.2d 794, 799, 613 P.2d 776 (1980) (close familiarity of lay witnesses with defendant insufficient to permit them to identify defendant in surveillance photo, where jury was able to compare defendant's appearance with photos to make the critical determination).

There is no reason to believe Bradshaw could offer the jury any assistance in determining whether the photographs depicted Mr. Brown. Instead, the opinion served merely to unfairly bolster the state's case by invading the province of the jury. The trial court erred in failing to exclude Bradshaw's testimony.

Issue 2: Defense counsel failed to provide Mr. Brown effective counsel at sentencing by failing to refer the trial court to the youthful sentencing mitigating factors in Exhibit 1, the transcript of Brown's police interview, admitted at the CrR 3.5 hearing.

Defense counsel's failure to direct the court to youthful mitigating sentencing factors in Mr. Brown's transcribed interview with police detectives denied Brown effective assistance of counsel at sentencing. The court acknowledged Mr. Brown's youth as a potential mitigating factor but was not made expressly aware by defense counsel of the breadth of that factor's application to Mr. Brown's situation. See Exhibit 1; RP6 682-83. Defense counsel failed in the obligation to provide effective assistance by failing to provide the transcript to the court. Mr. Brown is entitled to a resentencing hearing.

"[T]he right to counsel is constitutionally guaranteed at all critical stages of a criminal proceeding, including sentencing." *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). The state and federal constitutions guarantee criminal defendants effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d

460, 471, 901 P.2d 286 (1995); U.S. Const. amend. 6;³ Wash. Const. art I, § 22.⁴

Ineffective assistance of counsel occurs when “counsel’s representation fell below an objective standard of reasonableness,” and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012) (quoting *Strickland*, 466 U.S. at 688).

Counsel’s failure to apprise the trial court of important legal considerations, such as its discretion to impose a sentence below the standard range, may constitute ineffective assistance of counsel. *See State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002) (finding ineffective assistance of counsel for failing to ask for exceptional sentence downward based on multiple offense policy); *see also State v. Saunders*, 120 Wn. App.

3 The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defense.

4 Article I, section 22 provides, in pertinent part: In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.

800, 824-25, 86 P.3d 232 (2004) (ineffective assistance of counsel for failing to ask court to treat offenses as same criminal conduct).

“A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has discretion to exercise.” *McGill*, 112 Wn. App. at 102.

An attorney’s representation is unreasonable and deficient when it falls below prevailing professional norms. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)). Professional norms include offering sentencing advocacy. The American Bar Association’s standards direct counsel to either file a presentence report or “submit to the court and the prosecutor all favorable information relevant to sentencing.” *Criminal Justice Standards, Defense Function, Standard 4–8.1, Sentencing*, American Bar Association (3d ed.1993). The National Legal Aid and Defender Association (NLADA) standards for attorney performance state that defense counsel at sentencing “should be prepared” to “advocate fully for the requested sentence and to protect the client’s

interest.” NLADA Performance Guidelines for Criminal Defense Representation, 8.7 (1985).⁵

There are fundamental differences between youths and mature adults. *State v. O'Dell*, 183 Wn.2d 680, 692, 358 P.3d 359 (2015). These differences impact the areas of risk and consequence assessment, impulse control, tendency towards antisocial behaviors, and susceptibility to peer pressure. *Id.* Until full neurological maturity, young people have less ability to control their emotions, clearly identify consequences, and make reasoned decisions than they will in the late twenties and beyond. *Id.*

Mr. Brown's attorney did not mention recent case law on youthfulness as a mitigating sentence factor to the court. RP6 681-82. See *Miller v. Alabama*, 567 U.S. 460, 472, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *Graham v. Florida*, 560 U.S. 48, 71, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 571, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). Where this factor is present and a sentencing court fails to meaningfully consider youthfulness, the court abuses its discretion. *O'Dell*, 183 Wn. 2d at 696.

⁵ Available at:
http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#ei

Defense counsel failed to provide the court with the mitigating information in Mr. Brown's transcribed statement admitted as a CrR 3.5 hearing Exhibit 1. RP 100. He did not ask the Court to consider a sentence less than the standard range based on the attributes of youth bolster by the available information in the transcript. The transcript contained information about Mr. Brown's home, life, education, and other individual circumstances. Exhibit 1 at 4-8. Mr. Brown spent a significant portion of his youth in an Oregon juvenile detention facility. He went to high school at the facility. He was supposed to attend Lane Community College in Eugene, Oregon, on release but failed in that effort. His failure deprived him of the opportunity to later attend the University of Oregon and play basketball. Exhibit 1 at 4-8. He had limited work experience. He learned landscaping skills while growing up in juvenile detention. Exhibit 1 at 6. He held a job briefly with Frito Lay in the Portland area. Exhibit 1 at 14. He had no home. Instead, he relied on the goodwill of girlfriends to provide him a place to stay. Exhibit 1 at 2-3. His father is a gang member. Exhibit 1 at 7. He committed the offenses with Keith Woody, his "big cousin." Exhibit 1 at 32; RP6 452. The record suggests the youthful Mr. Brown never received quality parental guidance. Exhibit 1. Much of his family lived in California while he lived from place to place in Portland, Oregon. Exhibit 1 at 11.

Defense counsel's performance was not only deficient, but prejudicial. The court acknowledged realized youth. RP6 682-83. This showed the judge would have considered mitigating information and case law regarding the diminished culpability of youth if presented. RP6 682-83.

"Where the appellate court 'cannot say that the sentencing court would have imposed the same sentence had it known an exceptional sentence was an option,' remand is proper." *In re Mulholland*, 161 Wn.2d 322, 334, 166 P.3d 677 (2007) (quoting *McGill*, 112 Wn. App. at 100-01). The court could not make an informed decision without knowing the parameters of its decision-making authority and having the information supporting the mitigating factors. *McGill*, 112 Wn. App. at 102. Mr. Brown's attorney unreasonably failed to inform the court of its constitutional obligation to take Mr. Brown's youth and personal circumstances into account before imposing a sentence that, based on the firearm enhancements alone, would keep him in custody until he was well into his 50s. A new sentencing hearing is required.

Issue 3: Mr. Brown used no motor vehicle in the commission of the robbery or the second degree assaults thus the trial court erred in suspending Brown's driver's license as it related to those charges.

The trial court erred in suspending Mr. Brown's driver's license for counts 1-5 because a motor vehicle was not used in the commission of

those offenses. Mr. Brown's judgment and sentence should be remanded for correction.

In Washington, a court may instruct the Department of Licensing to revoke an offender's driver's license for one year upon a conviction of various crimes, including "[a]ny felony in the commission of which a motor vehicle is used." RCW 46.20.285(4). Here, the court found Mr. Brown "used" a motor vehicle in committing the crimes of robbery and second degree assault and therefore ordered the Department of Licensing to revoke his driver's license for one year under the statute.⁶ CP 29, 37. In doing so, the court erred because any vehicle Mr. Brown used in getting to or leaving from the pharmacy was merely incidental to the robbery and assaults.

This issue involves the application of the statute to a specific set of facts and review is *de novo*. *State v. Hearn*, 131 Wn. App. 601, 609, 128 P.3d 139 (2006).

RCW 46.20.285(4) does not define "use." The courts have clarified that "used" in the statute means "employed in accomplishing something." *Hearn*, 131 Wn. App. at 609-10. The vehicle must

⁶ At sentencing, there was no mention of the license suspension. RP6 667-687. The suspension is noted on the judgment and sentence. CP 37.

contribute to the accomplishment of the crime. *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 227-28, 340 P.3d 859 (2014). There must be a significant relationship between the vehicle and the commission or accomplishment of the crime. *Id.* The statute does not apply if the vehicle was merely incidental to the commission of the crime. *Id.*

For instance, in *State v. Dupuis*, 168 Wn. App. 672, 278 P.3d 683 (2012), the Court held the defendant “used” a car while committing the offense of second degree taking or riding in a motor vehicle without the owner’s permission. Likewise, the Court found a sufficient connection between the car and the crime when the defendant was given cocaine in exchange for a ride in his car. *State v. Griffin*, 126 Wn. App. 700, 708, 109 P.3d 870 (2005). The Court also found the use of a vehicle was supported in *State v. Dykstra*, 127 Wn. App. 1, 12, 110 P.3d 758 (2005), where the defendant and his accomplices to an auto theft ring drove around looking for cars to steal, drove stolen cars, posted someone in a lookout car during a theft, and drove away unwanted engine parts after disassembly.

If the defendant merely used a vehicle to transport himself to the scene of the crime, he did not “use” the vehicle to commit the crime for purposes of the statute. *Alcantar-Maldonado*, 184 Wn. App. at 228-30.

In *Alcantar-Maldonado*, the defendant drove to his estranged wife's house, where he assaulted her boyfriend. *Id.* at 219-21. Afterward, he left in his car. *Id.* The Court acknowledged that the car facilitated the assault to some degree because it transported the defendant to the scene. *Id.* at 228-29. But this was not sufficient to trigger the statute because the defendant did not use the car to assault the boyfriend. *Id.* at 230. "The commission of the felony did not entail operation of a motor vehicle." *Id.* at 229.

Here, as in *Alcantar-Maldonado*, Mr. Brown "used" a car to leave the vicinity of the pharmacy after committing the robbery and second degree assaults in the pharmacy. RP3 290-98. But this cannot trigger the statute because he did not "use" the car to commit the robbery or the assaults. "The commission of the [burglary] did not entail operation of a motor vehicle." *Alcantar-Maldonado*, 184 Wn. App. at 228-30. The car he left in after leaving the pharmacy was merely incidental to the crimes and thus the statute did not apply. *Id.* at 228-30.

Because Mr. Brown did not "use" the car to accomplish a robbery or a second degree assault, the court's finding to the contrary, and its order directing the Department of Licensing to revoke Mr. Brown's

driver's license, must be vacated. *Alcantar-Maldonado*, 184 Wn. App. at 230.

Issue 4: The trial court's failure to follow CrR 3.5(c) warrants remand for entry of written findings of fact and conclusions of law.

The trial court's failure to enter mandatory CrR 3.5 findings of fact and conclusions of law requires remand and their entry.

After a hearing to determine the admissibility of a defendant's statements, the trial court must enter written findings of fact and conclusions of law. CrR 3.5(c). CrR 3.5(c) provides, "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) conclusions as to whether the statement is admissible and the reasons therefor."

Written findings of facts and conclusions are mandatory. *State v. Cunningham*, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The trial court and the prevailing party share the responsibility to see the appropriate findings and conclusions are entered. *State v. Vailencourt*, 81 Wn. App. 373, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1(d), which requires entry of written finding of fact and conclusion of law after bench trial).

Here the trial court held a hearing to determine whether to admit Mr. Brown's statements to Vancouver Police Detective Tom Topaum and Portland Police Detective Brett Hawkinson. RP2 136, 139. The interview was audio recorded and later transcribed. RP2 138; CrR 3.5 Exhibit 1. Mr. Brown did not testify at the hearing. The court concluded some of Mr. Brown's statements were admissible, RP2 152-54, but failed to enter mandatory written finds of fact and conclusions of law.

The purpose of written findings of fact and conclusions is to promote efficient and precise appellate review. *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); *see State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (written findings necessary to simplify and expedite appellate review). The absence of written findings and conclusions prohibits effective appellate review.

Although the trial court entered oral findings, such findings are not a suitable substitute. A court's oral opinion is not a finding of fact. *State v. Hescok*, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a court's oral opinion is merely an expression of the court's informal opinion when rendered. *Head*, 136 Wn.2d at 622. An oral opinion is not binding unless formally incorporated in the written findings, conclusions,

and judgment. *Id.*, (citing *State v. Mallory*, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)).

A trial court's failure to enter written findings and conclusions requires remand for entry of the written findings. *Head*, 136 Wn.2d at 624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

"It must be remembered that a trial judge's oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." *Ferree v. Doric Co.*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963). An oral ruling "has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment." *Id.* at 567 (emphasis added). "[A]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." *Head*, 136 Wn.2d at 624.⁷

⁷But see *State v. Yallup*, __ Wn. App. __, 416 P.3d 1250, 1255 (2018). While the initial burden of entering findings was on the court and the prevailing party, appellate counsel should have attempted to resolve this discrepancy either informally with the trial prosecutor or through a

Where a defendant cannot show actual prejudice from the absence of written findings and conclusions, the remedy is remand for entry of written findings of fact and conclusions of law. *Id.* The trial court's failure to make written findings is not cured by the provision of an oral ruling on the record. Until a written order is entered, the court's rulings are not considered final. *State v. Collins*, 112 Wn.2d 303, 308, 771 P.2d 350 (1989).

Here, the court did not enter written findings or conclusions following either the CrR 3.5 hearing and provided only an oral ruling. RP2 152-54. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

E. CONCLUSION

Probation Officer's Bradshaw's identification of Mr. Brown in still photos invaded the province of the jury, was admitted in error, and requires remand for reversal of all charges but count 7, the October 2016 unlawful possession of a firearm.

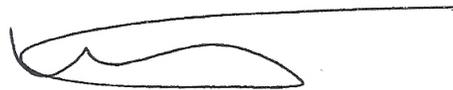
Alternatively, because the court failed to consider the information as to Mr. Brown's youth available in Exhibit 1 from the CrR 3.5 hearing, Mr.

motion to compel in the trial court before resorting to the appellate briefing process.

Brown's case should be remanded for resentencing with consideration given to youth as a mitigating factor.

Also, remand is necessary to strike the inapplicable license suspension on counts 1-5 and to enter written CrR 3.5 findings and conclusions.

Respectfully submitted August 17, 2018.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

LISA E. TABBUT/WSBA 21344
Attorney for Keandre Brown

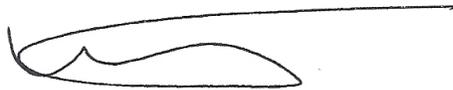
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Clark County Prosecutor's Office, at cntypa.generaldelivery@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Keandre Brown/DOC#402919, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 17, 2018, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Keandre Brown, Appellant

LAW OFFICE OF LISA E TABBUT

August 17, 2018 - 4:42 PM

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