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NO. 51668-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

E.E.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY, JUVENILE
DIVISION

The Honorable Andrew Toybee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting appellant's statements to law enforcement.

2. The trial court erred in failing to enter the written finding of fact and conclusion of law required by JuCR 7.11(d).

3. The trial court erred in failing to enter the written findings of fact and conclusion of law required by CrR 3.5(c).

Issues Pertaining to Assignments of Error

1. When a police officer questions a fourteen-year-old boy in his middle school principal's office where the principal told the boy to remain until the investigation was over, was this a custodial interrogation requiring Miranda¹ warnings?

2. When a juvenile adjudication is appealed, JuCR 7.11(d) requires the trial court to enter written findings of fact and conclusion of law setting forth the basis for its ruling. Because the adjudication here was appealed, did the trial court err by failing to file the required written findings and conclusions?

3. Following a hearing on the admissibility of a defendant's statements to law enforcement, CrR 3.5(c) requires the trial court to enter

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

written finding of fact and conclusions of law setting forth the basis for its ruling. Did the trial court here err by failing to file the required written findings and conclusions after it ruled appellant's statements to law enforcement were admissible?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Lewis County Prosecutor charged 14-year old appellant E.E. with felony harassment. CP 3-4. The prosecution alleged that on January 31, 2018, E.E. made a threat to "shoot up" the Napavine Middle School where he is a student. CP 2.

A combined² CrR 3.5, adjudication and disposition hearing was held March 13, 2018, before the Honorable Judge Andrew Toybee. RP³ 3-72. The court ruled E.E.'s statements to the arresting officer were admissible because they were not made while in custody. RP 57. The court also found E.E. guilty as charged. RP 57-59. The court imposed a standard disposition. CP 9-15. E.E. timely appeals. CP 18. To date, the

² At the beginning of the March 13th hearing the court and the parties agree to hold the CrR 3.5 hearing "contemporaneously with the trial [sic]." RP 4.

³ There is a single volume of verbatim report of proceedings for the dates of March 13 & 27, 2018, cited herein as "RP."

trial court has yet to enter the written findings of fact and conclusions of law required by both CrR 3.5(c)⁴ and JuCR 7.11(d).^{5 6}

2. Substantive Facts

At the combined CrR 3.5/adjudication hearing the court heard from four prosecution witnesses as follows:

***D.S.**, a classmate of E.E.'s who claimed he overheard E.E. make the alleged threat, RP 5-11;

***C.W.**, another classmate of E.E.'s who claimed he overheard E.E. make the alleged threat, RP 11-20;

⁴ 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 therefore."

⁵ JuCR 7.11(d) provides:

The court shall enter written finding and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

⁶ Undersigned counsel has alerted by e-mail both the trial prosecutor and E.E.'s trial counsel about the missing findings and conclusions. An e-mail was sent to defense counsel on July 5, 2018, which noted the missing JuCR 7.11(d) findings and conclusions. A second e-mail was sent to both the prosecutor and defense counsel on July 17, 2018, noting that written findings and conclusions were still missing under both CrR 3.5(c) and JuCr 7.11(d).

***Jason Prather**, the principal of Napavine Middle School, who summoned law enforcement after learning of E.E.'s alleged threat, RP 20-25, 39-46; and

***Napavine Police Chief Chris Salyers**, who responded to the reported threat, interviewed E.E. in Prather's office and then arrested him, RP 25-38.

According to 13-year old C.W., on January 31, 2018, he and E.E. were in their shared third period math class talking when the teacher told them to be quiet, after which C.W. claimed he overheard E.E. mutter to himself "[t]hat there was going to be a school shooting tomorrow." RP 12-14, 17. C.W. admitted E.E. made similar comments in the past that he did not take seriously, but he claimed E.E.'s remark on January 31st concerned him so he reported the comment to the math teacher. RP 16-18.

According to 14-year old D.S., he was in third period math class with E.E. and C.W. when he overheard E.E. say "[t]hat he was going to shoot the school." RP 6-8. D.S. admitted he did not take the statement seriously as E.E. had made similar comments in the past. RP 10. Despite not believing it was a "real threat," D.S. told law enforcement, Principal Prather and a friend about E.E.'s alleged comment. RP 9-11.

Principal Prather explained that on January 31, 2018, a teacher reported some students overheard E.E. threaten to "shoot up the school

and to do harm in general.” RP 22-23. Prather said he took the threat seriously, and noted E.E. had past behavioral issues, including assaulting other students, disrespecting staff and once bringing a knife to school. RP 23-24.

Prather called E.E. into his office and confronted him about the alleged statement, which E.E. denied making. After interviewing C.W. and D.S., Prather contacted law enforcement. RP 24.

Napavine Police Chief Chris Salyer responded to Prather’s request for law enforcement assistance. RP 26-27. Salyers first spoke with Prather and interviewed both C.W. and D.S., who reiterated their claims. RP 26-28. Salyers then spoke to E.E. in Prather’s office, where he claims E.E. “confirmed the statements that were made and basically said that he didn’t take them seriously and he was just kind of joking.” RP 28, 30. Salyers also recalled discussing whether E.E. had access to guns at home, which E.E. admitted he did. RP 37. After concluding the interview Salyers took E.E. to juvenile detention where he was “held on the harassment charges [sic].” RP 29.

When questioned about the specifics of his interview of E.E. in Prather’s office, Salyers claimed E.E. was not under arrest and was free to leave. RP 30-31. Salyers agreed he never gave E.E. an advisement of his Miranda rights prior to his interrogation of the boy. RP 31, 36.

On cross examination Salyers recalled that Prather brought E.E. into his office for Salyers to interview, and that the office door was closed during the interview. RP 32-33. Prather sat behind his desk and E.E. sat in a chair in front of the desk. RP 33-35. Salyers remained standing, as he was too large to fit in the seats in Prather's office. RP 35.

Salyers could not recall if Prather directed E.E. to sit. RP 35. Salyers admitted he never told E.E. he was free to leave. RP 36. But Salyers offered that he did nothing to prevent E.E. from leaving. RP 38.

When Prather's was examined about the circumstances of Salyers interview of E.E., he recalled that after learning of the alleged threat, he ordered E.E. to go sit in his office. RP 40. After they spoke, during which E.E. denied making the threat, Prather ordered E.E. to go wait near the attendance secretary's office until law enforcement arrived. RP 40-41. Once Chief Salyers arrived, Prather brought E.E. back into his office, directed him to sit and shut the office door. RP 41. Prather agreed E.E. was not free to return to class or otherwise roam the campus, and instead he was expected to remain in Prather's office. RP 43. Prather agreed he would not have let E.E. leave, asserting that "[h]e was going to stay in the office until I finished the investigation." RP 44.

The only defense witness was E.E.'s stepmother. She explained E.E. lives with her on a farm where he often uses a knife to do chores. RP

49. She recalled that the time E.E. brought a knife to school was after he did chores, and when he got to school he realized he had a knife, so he immediately went to Prather's office and turned it in. RP 50. She also denied E.E. had access to guns at their home. RP 50.

Regarding the admissibility of E.E.'s statements to Chief Salyers in the principal's office, E.E.'s counsel argued they should be excluded because E.E. was in custody when they were made. RP 55-56. In response, the prosecutor noted that it was Prather, not Salyers, that directed E.E. into his office, and therefore to the extent E.E. was not free to leave, it had nothing to do with law enforcement and therefore no rights were violated despite the lack of Miranda warnings. RP 56.

The trial court agreed with the prosecution, ruling:

All right. This is an interesting situation, but it's not completely unique. There are other, I guess, similar situations in case law. But I'm finding that the respondent was not in custody, he was not under arrest, and he was not in a – nothing that the officer did elevated his level of, I don't want to use the term "detention" in a legal sense, but the fact that he may have been under direction of the principal, nothing that the officer did escalated that or elevated that to the point where he was in custody.

So I'm finding that he was not in custody for purposes of Miranda and that although it probably would have been very prudent, it was not necessary for the officer to place him under Miranda.

I don't believe there are any uncontested facts, so I'm not making findings as to what is or -- I don't think I have to make a finding on what is or isn't contested. I think

the facts of this situation, at least for purposes of the admissibility of the statement, are all uncontested.

But I don't find that he was in police custody where Miranda was necessary, and I do find that he was not advised of his Miranda warnings.

RP 57.

C. ARGUMENTS

1. THE COURT ERRED IN ADMITTING E.E.'s STATEMENTS MADE WITHOUT BENEFIT OF MIRANDA WARNINGS.

Juveniles have a right to be warned that statements made under police interrogation may be used against them in court. In re Gault, 387 U.S. 1, 18 L.Ed. 2d 527, 87 S. Ct. 1428 (1967) (“Neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law.”) (citing Haley v. Ohio, 332 U.S. 596, 601 (1948); In re Forest, 76 Wn.2d 84, 86-87, 455 P.2d 368 (1969); see also RCW 13.40.140(8) (“A juvenile shall be accorded the same privilege against self-incrimination as an adult.”). “Miranda warnings are designed to protect a defendant’s right not to make incriminating statements while in the potentially coercive environment of custodial police interrogation.” State v. D.R., 84 Wn. App. 832, 835, 930 P.2d 350 (1997) (citing State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986). Pre-Miranda statements made during custodial interrogation are presumed involuntary and inadmissible. Miranda 384 U.S. 436. The juvenile court expressly

found Chief Salyers did not advise E.E. of his Miranda rights before questioning him. RP 57. However, the court also concluded E.E. was not in custody at the time. Id. This conclusion is untenable.

Whether there has been a custodial interrogation is a mixed question of law and fact this Court reviews de novo. State v. Lorenz, 152 Wash. 2d 22, 36, 93 P.3d 133 (2004). Substantial evidence must support the factual findings and the findings must support the legal conclusions. State v. Broadaway, 133 Wn.2d 118, 130, 942 P.2d 363 (1997).

Custodial interrogation is not limited to any specific location and occurs whenever a person is “taken into custody or otherwise deprived of his freedom of action in any significant way.” Miranda, 384 U.S. at 444. The test is whether, looking at the totality of the circumstances, a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest. Lorenz, 152 Wn.2d at 36-37 (citing Berkemer v. McCarty, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984)). The interrogation is custodial if the defendant reasonably believed he was not free to leave or his movement during questioning was restricted. Lorenz, 152 Wn.2d at 36; State v. Sargent, 111 Wn.2d 641, 649-50, 762 P.2d 1127 (1988). Here, the facts do not support the court's conclusion that E.E. was not in custody when interrogated by Chief Salyers.

Although not entirely clear from the trial court's oral ruling, it appears the court reasoned E.E. was not in custody while in Principal Prather's office because it was Prather, not Salyers, who directed E.E. into the office for the interview. RP 57.

The court's analysis fails to take into consideration the reality of the circumstances. Once Prather learned of 14-year old E.E.'s alleged school-shooting comment, he took control of E.E. movements by first directing him to sit in the principal's office, where he then confronted him about the allegation, which E.E. denied. RP 40. Prather then ordered E.E. to wait in the secretary's office until Chief Salyers arrive. RP 40. Once Chief Salyers arrived, Prather brought E.E. back into his office, told him to sit in a chair and shut the door. RP 32-33, 41. Prather agreed E.E. would not be allowed to leave until he "finished the investigation." RP 43-44.

Once E.E. was in the principal's office with Prather and Salyers, he was never advised of his Miranda rights. RP 31, 36. Salyers remained standing during the interrogation of E.E., which led to E.E.'s confession that he made the comment and that he had access to guns at home. RP 28, 35, 37. Neither Prather or Salyers ever told E.E. he was free to leave. RP 35-36.

The circumstances here are analogous to those in State v. D.R.. In D.R., the court held a 14-year-old boy was in custody because a 14-year-old in his position would have “reasonably supposed his freedom of action was curtailed.” 84 Wn. App. at 836 (quoting State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989)). The court held the child was in custody for purposes of Miranda based on the child's age, the “naturally coercive” nature of the principal's office where the interview occurred, and the obviously accusatory nature of the interrogation. 84 Wn. App. at 838. The detective had shown D.R. his badge and had told him he did not have to answer his questions. Id. at 834. In distinguishing a similar Oregon case, the court stated, “The most significant difference is that D.R. was not told he was free to leave.” Id. at 838.

The same result is required here. E.E. was fourteen years old and never told he was free to leave. RP 35. To the contrary, Prather said he would not have let E.E. leave until he had finished his investigation and noted E.E. would have faced consequences had he tried to leave. RP 41, 44. As in D.R., the questioning was accusatory in the sense that Chief Salyers had been dispatched on suspicion a student was threatening to commit a school shooting. RP 26-27. And although the record fails to establish whether Chief Salyers was armed and in uniform when he interrogated E.E., it does reveal he is large man by the fact that he

considered the chairs in Prather's office too small to accommodate him. RP 35. As such, Salyers large size likely had the predictable effect of intimidating E.E., much like the display of the officer's badge in D.R., and even more so if Salyers was armed and in uniform. RP 35; 84 Wn. App. at 834. The posture of the scene with E.E. seated in a chair as directed by Principal Prather and the large Chief Salyers standing over him as he interrogated him about the alleged comments was "naturally coercive." RP 35, 41; D.R., 84 Wn. App. at 838. A finding of custodial interrogation is even more justified here because, unlike the detective in D.R., the record fails to show Chief Salyers ever told E.E. he did not have to answer any questions. 84 Wn. App. at 834.

A reasonable person in E.E.'s position would not have felt free to leave and his freedom of movement was restricted. That is the very definition of "custodial" and Miranda warnings were required. See, e.g., Sargent, 111 Wn.2d at 649-50; D.R., 84 Wn. App. at 838. For purposes of Miranda, E.E. was in custody and the court erred in concluding otherwise.

The court's error in admitting E.E.'s statement in violation of Miranda cannot be harmless because the untainted evidence alone does not lead to a finding of guilt. See, D.R., 84 Wn. App. at 838 (quoting State v. Ng., 110 Wn.2d 32, 38, 750 P.2d 632 (1988)). If E.E.'s statements to Chief Salyers are not admissible, the only other substantive evidence of a crime

is the testimony of 14-year old D.S. and 13-year old C.W. D.S. admitted he did not take E.E.'s alleged comments as a "real threat" because E.E. "says stuff like that all the time." RP 10. C.W., who revealed he did not like E.E. to begin with (see RP 14-15, C.W. states he does not think E.E. is a good person), claimed the comment made him concerned, but also admitted E.E. had made similar remarks in the past that he had not taken seriously. RP 18. The adjudication of guilt should be reversed, because the testimony of D.S. and C.W., does not constitute overwhelming evidence of guilt once E.E.'s admission to Chief Salyers is excised from consideration.

2. THE TRIAL COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

JuCR 7.11 provides in relevant part:

(d) **Written Findings and Conclusions on Appeal.** The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

Written findings of fact and conclusions of law are necessary because the trial court's oral statements are merely an informal opinion

which is "necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned." **Error! Bookmark not defined.**State v. Dailey, 93 Wn.2d 454, 458, 610 P.2d 357 (1980) (citation omitted); see also State v. Smith, 68 Wn. App. 201, 206, 842 P.2d 494 (1992) ("a trial court is always entitled to change views expressed in an oral opinion upon presentation of findings of fact"). Moreover, this 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 challenge the sufficiency of the evidence on appeal. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Accordingly, "[a]n oral opinion 'has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment.'" Head, 136 Wn.2d at 622 (citations omitted).

The purpose of requiring written findings and conclusions is to aid the appellate court on review. Head**Error! Bookmark not defined.**, 136 Wn.2d at 622; State v. Naranjo, 83 Wn. App. 300, 303, 921 P.2d 588 (1996); State v. McCrorey, 70 Wn. App. 103, 115, 851 P.2d 1234 (1993). Timely filing of findings and conclusions also preserves the appellant's right to an appeal without unnecessary delay under Const. art. 1, § 10.⁷

⁷ See State v. Smith, 68 Wn. App. at 208-09 (because over a year had passed since Smith's conviction without findings and conclusions being entered

When the court fails to enter written findings, there is a strong presumption on appeal that dismissal is the appropriate remedy. State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997). This presumption is overcome only when the court's oral opinion is clear and comprehensive enough to preclude doubt as to the basis for its decision. State v. Cruz, 88 Wn. App. at 909; accord, State v. Smith, 68 Wn. App. at 211. Generally, however, dismissal is the remedy when the trial court fails to comply with JuCR 7.11 (d) and a juvenile appellant is challenging the sufficiency of the evidence. Naranjo, 83 Wn. App. at 303; McCrorey, 70 Wn. App. at 115-16. As explained by this Court in McCrorey**Error! Bookmark not defined.**

. . . Although failure to strictly comply with JuCR 7.11(d) does not lead to automatic reversal, see State v. Cowgill, 67 Wn. App. 239, 834 P.2d 677 (1992), the total noncompliance in this case [where McCrorey is raising a challenge to the sufficiency of the evidence] precludes review. In general, dismissal is not appropriate absent a showing of prejudice. State v. Charlie, 62 Wn. App. 729, 733, 815 P.2d 819 (1991); State v. Witherspoon, 60 Wn. App. [596, 572, 805 P.2d 248 (1991)]. The total disregard for procedure in this case creates an appearance of unfairness that compels dismissal. See State v. Charlie, 62 Wn. App. at 733; State v. Witherspoon, 60 Wn. App. at 572.

pursuant to CrR 3.6, this Court held that Smith's appeal had been unnecessarily delayed in violation of Const. art. 1, § 10; accordingly, this Court reversed Smith's conviction and dismissed the charge against him).

McCrorey, 70 Wn. App. at 115-16; accord, Naranjo, 83 Wn. App. at 303 (the trial court failed to file findings as required by JuCR 7.11 (d); this Court stated that the total absence of findings prevented review of Naranjo's insufficiency of the evidence challenge; accordingly, this Court reversed and dismissed Naranjo's adjudication of guilt); cf. Head, 136 Wn.2d at 624 (the trial court's failure to enter findings and conclusions under CrR 6.1(d) required remand for entry of written findings and conclusions).

Under JuCR 7.11(d), the State had to submit findings of fact and conclusions of law to the juvenile within 21 days after E.E. filed his notice of appeal. E.E.'s notice of appeal was filed and served on the prosecutor on March 30, 2018. CP 18. To date, almost four months later, no findings of fact and conclusions of law have been filed. Although remand is the typical remedy, the Head court recognized the possibility that reversal may be appropriate when the individual can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. Head, 136 Wn.2d at 624-25. E.E. requests this Court remand for entry of written findings of fact and conclusions of law and reserves the right to offer further argument

depending on the content of any written findings and conclusions. Id. at 625-26.

3. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 3.5

In conjunction with the adjudication, the trial court held a hearing under CrR 3.5 to determine admissibility of E.E.'s statements to law enforcement. RP 30-44, 55-57. The court, however, failed to enter written findings or conclusions as required by CrR 3.5. That court rule provides in part:

(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 therefore.

Under the plain language of CrR 3.5, written findings of fact and conclusions of law are required. Here, the court followed CrR 3.5's mandate to hold a hearing on the admissibility of the statements and rendered an oral decision but failed to enter the required written findings and conclusions.

The oral decision is "no more than a verbal expression of [the court's] 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, 567, 383 P.2d 900 (1963). Consequently, the court's decision is not binding "unless it is formally incorporated into findings of fact, conclusions of law, and judgment." State

v. Hescocock, 98 Wn. App. 600, 606, 989 P.2d 1251 (1999) (quoting State v. Dailey, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)).

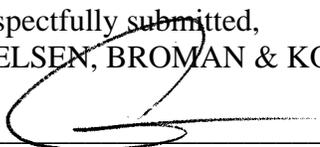
“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.” State v. Smith, 68 Wn. App. 201, 211, 842 P. 2d 494 (1992). Although Smith involved a CrR 3.6 hearing, its reasoning applies equally to CrR 3.5 hearings. See Smith, 68 Wn. App. at 205 (“[T]he State’s obligation is similar under both CrR 3.5 and CrR 3.6). But where no actual prejudice would arise from the failure of the court to file written findings and conclusions, the remedy is remand for entry of the written order. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Here, no findings of fact and conclusions of law were filed after the CrR 3.5 hearing, and remand for entry of the findings and conclusions is appropriate. Id. As with the missing JuCR 7.11(d) findings and conclusions, E.E. request that this Court allow him the right to offer further argument depending on the content of any written findings and conclusions. Head, 136 Wn.2d at 625-26.

D. CONCLUSION

This Court should reverse and remand for a new adjudication hearing because the trial court erred in admitting his statements to Chief Salyers. Remand is also necessary for entry of the required written finding and conclusions required by both CrR 3.5(c) and JuCr 7.11(d).

DATED this 24th day of July 2018.

Respectfully submitted,
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