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MAY 21 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32955-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

DAVID HAMLICK,

Appellant.

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

The Honorable Brian Altman, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.5.	6
2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED UNDER CrR 6.1.	7
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Denison
78 Wn. App. 566, 897 P.2d 437
review denied, 128 Wn.2d 1006 (1995)..... 8

State v. Greco
57 Wn. App. 196, 787 P.2d 940
review denied, 114 Wn.2d 1027 (1990)..... 7

State v. Head
136 Wn.2d 619, 964 P.2d 1187 (1998)..... 6, 8

State v. Russell
68 Wn.2d 748, 415 P.2d 503 (1966)..... 7

State v. Smith
68 Wn. App. 201, 842 P.2d 494 (1992)..... 6

FEDERAL CASES

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

RULES, STATUTES AND OTHER AUTHORITIES

CrR 3.5..... 1, 6, 8

CrR 6.1..... 1, 7, 8

A. ASSIGNMENTS OF ERROR

1. The trial court erred under CrR 3.5 when it failed to enter written findings of fact and conclusions of law on the admissibility of appellant's statements to law enforcement officers.

2. The trial court erred under CrR 6.1 when it failed to enter written trial findings and conclusions of law.

Issues Pertaining to Assignments of Error

1. CrR 3.5(c) requires the trial court to enter written findings of fact and conclusions of law following an evidentiary hearing. Did the trial court err when it failed to do so?

2. When a case is tried to the court, CrR 6.1(d) requires the trial judge to enter written findings of fact and conclusions of law. Did the trial judge violate this rule in appellant's case?

B. STATEMENT OF THE CASE

The Klickitat County Prosecutor's Office charged David Hamllik with (count 1) Child Molestation in the Third Degree – Domestic Violence and (count 2) Incest in the Second Degree – Domestic Violence. CP 1-2. The alleged victim was Hamllik's son, D.W.H., Jr., who prefers to go by D.J. CP 2; 2RP¹ 4-5.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – 6/2, 7/7, 7/9, and 7/21/14; 2RP – 10/6, 10/7, and 11/3/14.

Prior to trial, the court conducted a CrR 3.5 hearing to determine the admissibility of Hamlik's statements to police. 1RP 3-4. At the hearing, Goldendale Police Officer Chris Wyzykowski testified that he and Lt. Reggie Bartkowski contacted Hamlik at his residence on April 2, 2013 to investigate an allegation of child molestation. 1RP 4-5. Hamlik agreed to go with the officers to the police station. 1RP 8. Once at the station, Lt. Bartkowski read Hamlik his Miranda² rights and Hamlik answered the officers' questions. 1RP 9-11, 13-15.

The parties disputed at which point Lt. Bartkowski read Hamlik his rights. According to defense counsel, it appeared from Officer Wyzykowski's report that there was significant conversation at the station before the warnings. 1RP 14. The prosecutor and Wyzykowski, however, indicated they had listened to the recording of the interview and warnings were given immediately after everyone present was identified for the record. 1RP 15-16. The court ruled all post-Miranda statements admissible. 1RP 15-17.

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

Hamllik waived his right to trial by jury and agreed the Honorable Brian Altman could decide his case. CP 14; 1RP 23-26.

The evidence at trial established that D.J. was 15 years old in March 2013. 2RP 40, 82. He suffers from several disabilities, including brain damage (from asphyxia at birth), ADHD, bipolar disorder, schizophrenia, and Tourette's syndrome. 2RP 41, 82. His parents separated 15 years ago. 2RP 42, 83. His mother has primary custody of D.J., and Hamllik had visitation privileges. 2RP 42-43. D.J. has no difficulty communicating with others, but his brain damage has left him unable to recognize the possible consequences of his actions beforehand. 2RP 41-42.

According to D.J., while staying at his father's home in mid-March 2013, he took a nap on the couch and awoke to find himself naked from the waist down and his father touching his penis.³ 2RP 85-88. Despite his protests, his father continued to touch him for the next 20 to 30 minutes and did not stop until someone knocked on the front door. 2RP 88. D.J. testified he did not want to see his father prosecuted, and denied that his mother was behind the

³ D.J. could not recall if he had been wearing jeans or went to sleep naked as he sometimes does. 2RP 14, 87. His father also was often naked at home because of his large size and certain medical issues. 2RP 14, 59, 103-106.

allegations. 2RP 90, 95. D.J. often would spend time watching court cases at the courthouse unrelated to his father's case. 2RP 91-94, 98. He found court in general to be "fun" and the courthouse "exciting." 2RP 97. And he testified he was not nervous on the stand.⁴ 2RP 100.

Officer Wyzykowski^{After} testified that, after receiving a report of suspected molestation from D.J.'s mother, he spoke to her and spoke to D.J., who alleged the touching had occurred about two weeks before. 2RP 7-9. The following morning, Officer Wyzykowski and Lt. Bartkowski contacted Hamlik at his home. 2RP 10-11, 52-53. Both officers were familiar with Hamlik based on helpful information he had provided the department in the past. 2RP 11-12, 51-52. After taking him to the station and advising him of his rights, the officers informed Hamlik of D.J.'s allegation. 2RP 12-13, 53-55.

Hamlik steadfastly and repeatedly denied any improper touching for the first 36 minutes of the interrogation.⁵ 2RP 13-14, 24-27, 30-33, 58-59; exhibit 3, at 3-26. The officers did not

⁴ Judge Altman would later describe D.J. as "kind of a courthouse gadfly" who appeared to enjoy being at the courthouse. 2RP 125.

⁵ A transcript of the April 2, 2013 interrogation was admitted at trial as

believe him. 2RP 59-60. He eventually stopped denying the allegations and indicated he was open to getting help. 2RP 14, 64-66. He then confessed to molesting D.J. 2RP 16.

Initially, Hamlik told the officers the molestation happened much as D.J. had described, although it lasted only five minutes and not the lengthy period D.J. claimed. 2RP 16-17, 66-71; exhibit 3, at 27-28. Later, however, he told the officers that D.J. had an erection, had been bugging and hounding him to touch him, and that he just finally gave in and stroked D.J.'s penis one time. 2RP 16-17, 71-74; exhibit 3, at 36-40. Hamlik told the officers he was the kind of person that, if you hounded him long enough, he would give in. 2RP 17, 33, 37-38, 77-78. Both officers testified that Hamlik seemed relieved and more relaxed after confessing. 2RP 36, 74-75.

Hamlik testified in his own defense and swore he did not molest his son. 2RP 103, 114. He maintained that he had been telling officers the truth when he repeatedly denied touching D.J. and explained that he eventually changed his story, and told officers what they wanted to hear, because it was obvious they did not believe him. 2RP 111-113. As he had mentioned during the

exhibit 3. 2RP 24, 55-56.

interrogation, if someone hounds him long enough, he will finally give in. 2RP 113.

Judge Altman found the circumstances “well within the bounds of a professional interrogation,” that Hamllik had confessed, and that his testimony on the stand was not credible. 2RP 124-125. He concluded Hamllik was guilty as charged on both counts and imposed standard range concurrent 20-month sentences. 2RP 125, 134; CP 24-25. Hamllik timely filed his Notice of Appeal. CP 35-48.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY CrR 3.5.

CrR 3.5(c) states that “[a]fter [a CrR 3.5] 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.”

These findings and conclusions are mandatory and the failure to enter them is error. State v. Smith, 68 Wn. App. 201, 205-206, 211, 842 P.2d 494 (1992). When the court has failed to enter required findings, the proper remedy is remand. State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). Once the necessary

findings and conclusions have been entered, either party may then appeal. Head, 136 Wn.2d at 626.

2. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED UNDER CrR 6.1.

At Hamlik's trial, the court was the trier of fact. A trial court sitting as trier of fact must enter written findings of fact and conclusions of law. CrR 6.1(d) provides:

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.

"Findings of fact are required in judge-tried cases in order to support a conviction, and should separately state the factual basis for the legal conclusions as to each element of the crime." State v. Greco, 57 Wn. App. 196, 204, 787 P.2d 940 (citing State v. Russell, 68 Wn.2d 748, 415 P.2d 503 (1966)), review denied, 114 Wn.2d 1027, 793 P.2d 974 (1990). Without comprehensive and specific findings, it is impossible to review the trial court's application of the law to the facts. Id.

Where there is a complete failure to comply with CrR 6.1(d), the proper remedy is to vacate the judgment and sentence and

remand to the trial court for entry of the required findings and conclusions. Head, 136 Wn.2d at 624-26; State v. Denison, 78 Wn. App. 566, 572, 897 P.2d 437, review denied, 128 Wn.2d 1006, 907 P.2d 297 (1995).

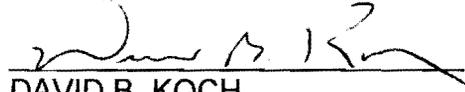
D. CONCLUSION

Hamlik's case should be remanded for noncompliance with CrR 3.5(c) and CrR 6.1(d).

DATED this 18th day of May 2015.

Respectfully submitted,

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