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Court of Appeals
Division III
State of Washington
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No. 354938

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

EMANUEL LOPEZ CASILLAS,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

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I. STATEMENT OF THE CASE

On August 3, 2017 Emanuel Lopez Casillas was tried and found guilty of Fourth Degree Assault Domestic Violence in the Adams County Juvenile Court. A notice of appeal was served and filed on August 7, 2017 which was the date of sentencing.

Under JuCR 7.11(d) written findings of fact and conclusions of law were required to be presented to the court by the prosecuting attorney within 21 days after receiving the notice of appeal.¹ Under the rule, “[t]he 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 appeal worked its way through this Court of Appeals. Clerk’s Papers and transcripts of hearings were filed, and Appellant’s Opening Brief was filed on February 9, 2018. Accordingly, the State’s Brief of Respondent was due on April 10, 2018.

However, the State noted a presentment, and Findings of Fact and Conclusions of Law were entered in the superior court on March 12, 2018. Mr. Casillas’s counsel objected to the entry of the findings and conclusions, arguing that; while RAP 7.2 allows the trial court to enter findings and conclusions after the case has been appealed; RAP 7.2(j)

¹ By August 28, 2017.

states that the findings and conclusions shall be entered pursuant to Juvenile Court Rule JuCR 7.11, which requires the State to do this within the 21 day deadline. Therefore, the trial court lacked authority to enter findings and conclusions without leave of the court of appeals. Vol. 2 RP at 3-4.

Counsel also objected to the entry of any findings as to the trial court taking judicial notice of Mr. Casillas's physical superiority over the alleged victim in the case and other findings and conclusions that were not made at the conclusion of the trial on August 3, 2017.²

II. ARGUMENT

1. A juvenile court in a criminal case must enter written findings that address each element of the crime separately and indicate the factual basis for each.

“Without comprehensive, specific written findings, the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts.” *State v. Greco*, 57 Wash.App. 196, 204, 787 P.2d 940 (1990); *State v. Cannon*, 130 Wash.2d 313, 329, 922 P.2d 1293 (1996). The trial court's oral findings are not

² Page 1 through 7 of the Verbatim Transcript of Proceedings of the March 12, 2018 presentment were filed herein on March 23, 2018. This will be referred to as Vol. 2 RP.

binding and cannot replace written findings and conclusions. *State v. Head*, 136 Wash.2d 1619, 622, 964 P.2d 1187 (1998).

Remand is the typical remedy for a trial court's failure to enter written findings of Fact and Conclusions of Law. *Head*, 136 Wash.2d at 624-26. Reversal is appropriate where the individual can show actual prejudice resulting from the absence of findings and conclusions. *Id.* Prejudice is determined on a case by case basis. *State v. Cruz*, 88 Wash.App. 905, 909, 946 P.2d 1229 (Div. 3, 1997).

A defendant is prejudiced by a failure to enter written findings when the record is insufficient to permit appellate review. *Cruz*, 88 Wash.App. at 909; *State v. Smith*, 76 Wash.App 9, 16-17, 882 P.2d 190 (Div.1, 1991), rev. denied, 126 Wash.2d 1003 (1995); *State v. Smith*, 68 Wash.App. 201, 209-10, 842 P.2d 494 (1992).

Prejudice can also be inferred by late entered findings that have been "tailored" to meet the issues raised on appeal. *Head*, 136 Wash.2d at 625.

2. The issue of the Judge impermissibly taking judicial notice or testifying as to his personal knowledge was adequately preserved for review.

The State contends that the defense did not properly object to the Court's findings that the Respondent was "much physically superior" to

the victim based solely on the Court's observations of the 18 year old Respondent's physical size. Brief of Respondent at page 7. This is after the State quoted the record at RP 26 of the colloquy between Mr. Casillas's lawyer and the Court after the Court found Mr. Casillas guilty of simple assault domestic violence:

MR. SMITH: And your Honor, if I may. I know the court's rationale there was the size of my client. I don't know if the court's taking judicial notice of that because those facts were not in evidence.

THE COURT: The factfinder has the ability and may rely on the defendant's size, presence and demeanor, and I did that.

The lawyer's objection to the court taking judicial notice is clear and the objection was made as soon as the lawyer knew that the Court was determining ultimate facts concerning self defense without any evidentiary facts in the record to support the Court's conclusions.

3. The Findings of Fact and Conclusions of Law here are inadequate to permit appellate review.

JuCR 7.11(d) states:

(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.

“Ultimate facts,” for which findings are required under JuCR 7.11(d) are those which are necessary to determine issues in case, as distinguished from evidentiary facts supporting them. They are logical conclusions deduced from certain primary evidentiary facts, and final facts required to establish plaintiff's cause of action or defendant's defense. *State v. Roggenkamp*, 115 Wash.App. 927, 948-49, 64 P.3d 92 (Div. 1, 2003), affirmed 153 Wash.2d 614, 106 P.3d 196 (2005).

The trial court's Findings of Fact and Conclusions of Law are found at CP 69 -70. Of relevance here are the following:

FINDINGS OF FACT

...

9. The Court observed the now 18 year old Respondent's physical size.
...
11. After observing the Respondent and the victim's relative sizes, the Court finds the Respondent to be much physically superior to the victim.
...

CONCLUSIONS OF LAW

...

1. The Court, as factfinder, assesses the credibility of the witnesses.
2. The Court, as factfinder, has the ability and may rely on the Respondent's size and demeanor.

3. The Court finds that, although the defense offered some less than credible evidence of self-defense, the claim of self-defense was disproven beyond a reasonable doubt in the State's case in chief due to the excessive amount of force used.

These findings and conclusions are inadequate because they are not grounded in evidence that supports each element of simple assault, domestic violence, or the absence of self-defense.

4. A trial court cannot take judicial notice of a disputed fact nor can a judge use his personal beliefs or personal experiences as a substitute for evidence at trial.

ER 201 permits a court to take judicial notice of "adjudicative facts ... not subject to reasonable dispute" in the sense that they are either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." And a judge's own knowledge should not be confused with judicial notice." A trial judge is prohibited from relying on his personal experience to support the taking of judicial notice." *In re Estate of Hayes*, 185 Wash.App. 567, 597-98, 342 P.3d 1161 (Div. 3, 2015) (cites omitted).

ER 605 similarly prohibits a judge from inserting his or her own personal experience into the decision-making process. *Hayes*, 185

Wash.App. at 599. And, under this rule, no objection is required to preserve the issue on appeal.

5. Mr. Casillas is prejudiced by the of findings of fact and conclusions of law that were entered on March 13, 2018.

Judge Schultheis correctly noted that “the practice of allowing findings to be entered after remand, after the appellant has framed the issues in his or her brief, is inherently prejudicial.” *State v. Naranjo*, 833 Wash.App. 300, 921 P.2d 588 (Div. 3, 1996).³

Here the State has plainly “tailored” the findings and conclusions to address the issues raised in Appellants Opening Brief, which the court in *Head* stated was grounds for reversal. 136 Wash.2d at 625. They have conflated the findings of fact around Mr. Casillas’s supposed “physical superiority” over the victim, only through the evidence of the victim’s height and weight. They also attempt to use this information and the court’s impermissible judicial notice as justification for the court to ignore each of the objective and subjective elements of assault, including the absence of self- defense.

Finally, Mr. Casillas is prejudiced by being convicted on a record that is incapable of review. Mr. Casillas cited *State v. Payne*, 45

³ The court of appeals in *Naranjo* found that the complete lack of findings precludes review and warrants dismissal outright. This part of the decision was abrogated

Wash.App. 528, 726 P.2d 997 (1986) in Appellant’s Opening Brief. The trial court imposed an exceptional sentence for deliberate cruelty, based in part on the judge’s courtroom observations that the victim was a small and slight woman, and therefore “particularly vulnerable.” *Id.* The court rejected this argument, concluding that to assume facts that are not documented in the record would require impermissible speculation as to the basis for the trial court's reasoning:

A reviewing court may uphold the sentencing judge's reasons for an exceptional sentence only if those reasons are supported by the record. **Here there is no evidence in the record as to any aspect of the victim's size or appearance.** The first mention of size appeared in the court's findings. Although the court may judicially notice physical attributes and characteristics pursuant to ER 201(b), such notice must be of facts not subject to reasonable dispute. 5 K. Tegland, Wash. Prac. 44 (2d ed. 1982). The finding regarding the victim's physical attributes was challenged by defense counsel below. **This court has no means for evaluating or reviewing the sentencing court's finding. Absent any record, we are required to conclude that it was error to find the victim particularly vulnerable because of her size.** As this finding is not supportable, we need not discuss whether the victim's size is a proper aggravating factor.

Payne, 45 Wash.App. at 531-32. (Emphasis added).

The only thing we know from the record about Mr. Casillas’s physical attributes is that he is male and that he was 17 years old at the time of the incident charged. There is nothing whatsoever in the record

by the supreme court in *State v. Head*, 136 Wash.2d at 624-26, with the finding that cases

that would enable this appellate court to verify he was “very much physically superior to the victim,” or to evaluate whether the trial correctly rejected his claim of self-defense.

CONCLUSION

For the reasons stated, this Court should reverse Emanuel Casillas’s conviction and dismiss the Information.

DATED this 19th day of April, 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert M. Seines", written over a horizontal line.

Robert M. Seines, WSBA 16046
Attorney for Emanuel Lopez Casillas

should be remanded for entry of findings and conclusions.

CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on April 19, 2018 I provided e-mail service, by prior agreement, a true and correct copy of the annexed Appellant's Opening Brief to:

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