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Division III
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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 OPENING BRIEF

ROBERT M. SEINES
Attorney at Law
P.O. Box 313
Liberty Lake, WA 99019
509-844-3723
fax 509-255-6003
rseines@msn.com
Attorney for Defendant/Appellant

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR 1

1. The trial court failed to enter written findings of fact and conclusions of law as is mandated by JuCR 7.11(d) 1

2. The trial court disregarded substantial credible evidence that raised the issue of self-defense and then failed to conduct the required mixed subjective and objective analysis regarding the Respondent’s mental state or require the State to disprove self-defense. 1

3. The trial court erred by allowing the prosecuting attorney to tell the court what the witness wrote in a sworn statement and the statement was not presented or admitted into evidence. 1

4. The trial court erred by taking judicial notice that that the respondent is “very much physically superior” to the alleged assault victim. 1

Issues Pertaining to Assignments of Error

1. Should this case be remanded to the trial court for entry of written findings and conclusions stating the ultimate facts and evidence as to each element of fourth degree assault; and the ultimate facts and evidence that negated respondent’s claim of self-defense. Or, should this appellate court vacate respondent’s conviction and dismiss because Respondent will be prejudiced by such remand? 1

2. Should the prosecutor’s statements to the trial court about what the alleged assault victim wrote, or failed to write in her statement to arresting officers, be stricken because the statement was not presented or admitted into evidence? 2

3.	Did the trial court commit reversible error by finding that the Respondent was “very much physically superior” to the alleged assault victim, in the absence of any evidence as to the Respondent’s physical attributes?	2
II.	STATEMENT OF THE CASE	2
III.	SUMMARY OF ARGUMENT	9
IV.	ARGUMENT	10
1.	The trial court erred by failing to enter written findings of fact and conclusions of law as is mandated by JuCR 7.11(d).	10
2.	The trial court disregarded substantial credible evidence that raised the issue of self-defense and then failed to conduct the required mixed subjective and objective analysis regarding the Defendant’s mental state, or put the State to the task of disproving self-defense beyond a reasonable doubt.	12
a.	Standard of Review.	12
b.	Analysis.	14
3.	The trial court erred by allowing the prosecuting attorney to tell the court what the witness wrote in a sworn statement and the statement was not presented or admitted as an exhibit.	18
4.	The trial court erred by taking judicial notice that “the respondent is very much physically superior” to the alleged assault victim.	20
V.	CONCLUSION	23

TABLE OF AUTHORITIES

Table of Cases:

United States Supreme Court

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068 (1970)	12
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781 (1979)	13
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745 (1986)	14
<i>Thompson v. Louisville</i> , 362 U.S.199, 80 S.Ct. 624 (1960)	13

Washington State Cases

<i>In re A.V.D.</i> , 62 Wash.App. 562, 815 P.2d 277 (1991)	14
<i>Clark v. Baines</i> , 150 Wash.2d 905, 84 P.3d 245 (2004)	15
<i>Rogers Potato v. Countrywide Potato</i> , 152 Wash.2d 387, 97 P.3d 745 (2004)	14
<i>State v. Alvarez</i> , 128 Wash.2d 1, 902 P.2d 754 (1995)	11
<i>State v. Avila</i> , 102 Wash.App. 882, 10 P.3d 486 (2000)	11
<i>State v. Baker</i> , 136 Wash.App. 878, 151 P.3d 237 (2007)	15
<i>State v. Carlson</i> , 130 Wash. App. 589, 123 P.3d 891 (2005)	14

<i>State v. Colquitt</i> , 133 Wash. App. 789, 137 P.3d 892 (2006)	13,14
<i>State v. DeVries</i> , 149 Wash.2d 842, 72 P.3d 748 (2003)	14
<i>State v. Graves</i> , 97 Wash.App. 55, 982 P.2d 627 (1999)	15,16
<i>State v. Head</i> , 136 Wash.2d 619, 694 P.2d 1187 (1998)	11,12, 17
<i>State v. Kinard</i> , 109 Wash.App. 428, 36 P.3d 57 (2001)	19
<i>State v McCollum</i> , 98 Wash.2d, 656 P.2d 1064 (1983)	15,16
<i>State v. Payne</i> , 45 Wash.App. 528, 726 P.2d 997 (1986)	21
<i>State v. Read</i> , 147 Wash.2d 238, 55 P.3d 26 (2002)	17
<i>State v. Summers</i> , 120 Wash.2d 801, 846 P.2d 490 (1983)	16
<i>State v. Walden</i> , 131 Wash. 2d 469, 932 P.2d 1237 (1997)	16
Constitutional Provisions:	
U.S. Const. Amend. XIV.....	12
Statutes	
RCW 9A.16.020(3)	15
Court Rules	
JuCR 7.11(d)	1,10,11

ER 106	19
ER 605	22
ER 1002	19
ER 1004	19

Secondary Sources

BLACK'S LAW DICTIONARY 1522 (6th ed. 1990)	11
5 Wash. Prac., Evidence Law and Practice § 201.3 (2017)	21
13B Wash.Prac., Criminal Law §3304 (2017)	15

I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court failed to enter written findings of fact and conclusions of law as is mandated by JuCR 7.11(d).
2. The trial court disregarded substantial credible evidence that raised the issue of self-defense and then failed to conduct the required mixed subjective and objective analysis regarding the Defendant's mental state.
3. The trial court erred by allowing the prosecuting attorney to tell the court what the witness wrote in a sworn statement and the statement was not presented or admitted into evidence.
4. The trial court erred by taking judicial notice that the Respondent is "very much physically superior" to the alleged assault victim.

Issues Pertaining to Assignments of Error

1. Should this case be remanded to the trial court for entry of written findings and conclusions stating the ultimate facts and evidence as to each element of fourth degree assault; and the ultimate facts and evidence that negated Respondent's claim of self-defense? Or, should this

appellate court vacate Respondent's conviction and dismiss because Respondent will be prejudiced by such remand?

2. Should the prosecutor's statements to the trial court about what the alleged assault victim wrote, or failed to write in her statement to arresting officers, be stricken because the statement was not presented or admitted into evidence?

3. Did the trial court commit reversible error by finding that the Respondent was "very much physically superior" to the alleged assault victim, in the absence of any evidence as to the Respondent's physical attributes?

II. STATEMENT OF THE CASE

Emanuel Lopez Casillas was charged in the Adams County Superior Court, Juvenile Division with one count of Fourth Degree Assault DV. CP 12-13. The charge was from an incident that occurred on June 2, 2017 and involved Veronica Herrera, with whom Mr. Casillas had been in an intimate relationship and they have a daughter who was born in April, 2017. RP 14.

Emanuel Casillas was seventeen years old at the time of the offense. (RP 17). Veronica Herrera was twenty-nine years old. (RP 13). He was booked into Martin Hall and on June 4, 2017 the juvenile court

determined there was probable cause for the charge, set his initial appearance for the next day, and set bail at \$500. CP 4-5. Mr. Casillas was arraigned on June 5, 2017 and was released, subject to conditions including a no-contact order prohibiting contact with Veronica Herrera. CP 6-9.

On July 13, 2017 the State filed a motion to extend Juvenile Court jurisdiction beyond Defendant's eighteenth birthday, which was July 18, 2017. CP 18-22. An agreed order extending juvenile jurisdiction was entered on July 14, 2017. CP 24-25. RP 5.

A fact-finding hearing was held on August 3, 2017. The State called Veronica Herrera who testified that Emanuel Casillas was at her home in Othello on June 2, 2017. An argument started around 6:00 pm when Ms. Herrera pushed the door open and confronted him in the shower to ask him, why he was on his phone in the shower. RP 9. She testified she was very angry and upset at what she had seen on his phone. RP 10.

On cross exam she elaborated that she had seen that Mr. Casillas had been messaging someone and she wanted to see if he was messaging this person while he was in the shower. RP13. Although they were not in an exclusive relationship, she was angry because he might be talking to other females, which she confirmed when she saw his phone. RP 13-14.

She testified that the argument turned physical back in her living

room:

I was upset. Then from there it just -- the arguing just kept going and going, and I went out to the living room and I sat down, tried to cool down myself, and that's when he came over and sat next to me and all just -- try to calm me down, and it just -- I just couldn't calm down and I just -- I was just so mad.

So when I got up and I -- I -- I got up and he got up and -- I pushed him. It was just -- a lot of arguing back and forth.

That's when I -- like I -- pushed him pretty hard and that's when he like -- tried to stop me and -- like, smacked me on my face. I -- don't remember (inaudible), I guess, really -- I don't know. I was just so angry. I just don't know.

RP 9 -10.

The State took issue with Ms. Herrera's testimony that she initiated the physical confrontation and that Mr. Casillas was defending himself after she, "pushed him pretty hard" RP 10. The State attempted to impeach her using a sworn written statement Ms. Herrera had made at the request of the arresting officers. However, the statement was never made an exhibit and the trial court was informed about what Ms. Herrera wrote, only through the court's questions to the prosecuting attorney:

Q: Do you recall what you told the police --

MR. SMITH: Objection. Hearsay.

THE COURT: Sustained. Are you offering this to impeach?

MS. FLICKNER: Yes, your Honor.

THE COURT: I'm sorry. Overruled.

...

THE COURT: She's already -- What are you going -- What portion of her testimony are you attempting to impeach?

MS. FLICKNER: That she pushed him --.

THE COURT: Oh. In her statement she says she doesn't push him?

MS. FLICKNER: She doesn't mention anything about pushing.

THE COURT: She doesn't mention it.

MS. FLICKNER: No.

THE COURT: Sustained.

RP 12-13.

Mr. Casillas's attorney had filed a Notice of Intent to Rely on Self-Defense at trial. CP 33. On cross, he asked Ms. Herrera about her height and weight. She answered that she was 5'7" and weighed 250 pounds. RP 15-16. She was also asked if she thought that Mr. Casillas was trying to defend himself and stop her from assaulting him:

Q And you indicated that at some point you were slapped in the face? Is that right?

A Yeah.

Q What -- Could you describe how that happened?

A As I pushed him I -- I guess he wanted to defend himself (inaudible) smacked me on the face.

Q Okay. So you -- you think he was just trying to -- to get you off of him?

A Yeah. I -- I think so.

Q Was it with an open hand?

A Yeah.

Q Looking back at this, you think he was acting in self-defense?

A I --

THE COURT: Counsel, are you going to object to that legal conclusion?

MS. FLICKNER: Yes, your Honor.

THE COURT: Sustained.

Q And, he wasn't the primary aggressor, right? It was you?

MS. FLICKNER: Objection. Legal conclusion.

THE COURT: No. Overruled.

Q Is that right?

A Yes.

RP 16-17

The State then called Officer Steven Perez who testified that he was one of the officers that were called to Ms. Herrera's residence on June

2, 2017. In his brief testimony, Officer Perez stated that Ms. Herrera was visually upset, her face was red, and it appeared she had been crying. He was asked if Ms. Herrera had any marks or injuries. Then, over objection, he was permitted to testify she had red marks on her face that appeared to have been caused by fingers. RP 21.

After the State rested, Mr. Casillas's attorney moved to dismiss on the grounds that, based on Ms. Herrera's testimony, there was insufficient evidence to support a finding, beyond a reasonable doubt, that Mr. Casillas did not act in self-defense. The trial court's ruling was terse; "I disagree. Motion denied." RP 22.

The court began its oral ruling with his observations regarding the physical attributes of Ms. Herrera and Mr. Casillas:

THE COURT: I'm looking -- Ms. Herrera may in fact be a woman of more than average size. I do not find her obese in any -- at all. But it is plain to the court that the respondent is very much physically superior to her.

She pushed him. That might have been an assault. But he slapped her hard enough to cause welts on her face. And that is abominable. To slap a person -- who is physically inferior to you hard enough in the face to cause welts is very clearly a response that is not reasonable and appropriate to the circumstances.

I find respondent guilty of simple assault domestic violence.

RP 25-26.

The defense requested clarification whether the court was taking judicial notice that Mr. Casillas was physically superior to Ms. Herrera because there was no evidence in the record regarding his physical abilities. The court answered:

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

RP 26.

The court then signed an Order on Adjudication finding Mr. Casillas guilty of assault and continued sentencing to August 7, 2017. CP 37-46.

At sentencing Ms. Herrera spoke, asking the judge to not send Mr. Casillas to jail. RP 29. Mr. Casillas also asked the court for leniency. RP 32-33. The court responded:

DEFENDANT: So I was just wondering if you could please give me a chance.

THE COURT: Is that all? Mr. Casillas, it is pathetic--

DEFENDANT: Yes.

THE COURT: --and reprehensible that you would hit a woman smaller and weaker than you just because she pushed you. That is, as I say, pathetic. Weak-minded, and disgusting. And I'm not too pleased with the victim taking up the time of the police and the court only to change her mind about your culpability.

-- the other hand, you're only barely eighteen. I'm going to give you one day of jail and I want you to spend your time thinking about what a puny, disgusting thing it is to hit somebody smaller and weaker than you.

That will be the order of the court.

RP 33.

An Order on Disposition was entered, sentencing Mr. Casillas to 4 days in jail with credit for time served of 3 days. CP 49-57.

The notice of appeal was filed the same day as the sentencing hearing. The trial court record does not contain any written findings of fact or conclusions of law filed thereafter.

III. SUMMARY OF ARGUMENT

The juvenile court has not entered the required written findings of fact and conclusions of law that are required to be presented to the court by the prosecutor within 21 days after receiving the notice of appeal. The prosecutor received the notice of appeal on the date of sentencing, August 7, 2017.

The Respondent made a claim of self-defense and there was substantial evidence offered at trial supporting self-defense. However, the court failed to conduct the required subjective or objective tests regarding the Respondent's actions and failed to require the State to disprove self-defense.

Instead, the juvenile court concluded that the self-defense claim failed because the Respondent's "physical superiority" over the alleged victim. However, the trial record is totally silent as to the seventeen-year-old Respondent's physical characteristics, and the court's finding is based solely on judicial notice.

The juvenile court made another critical evidentiary error by having the prosecutor recount a portion of what the alleged victim wrote in the written statement she made for the arresting officers. This statement was never made an exhibit and admitted into evidence.

The issue is whether this case should be remanded to the juvenile court to enter the required findings and conclusions, or if this appellate court should reverse the conviction and dismiss the Information based on the actual prejudice to Respondent from the errors committed by the juvenile court.

IV. ARGUMENT

1. The trial court failed to enter written findings of fact and conclusions of law as is mandated by JuCR 7.11(d).

Following a juvenile adjudication hearing, "the [juvenile] court is required to state its findings of fact, including the evidence relied upon, in reaching its decision, JuCR 7.11(c). And then, if the case is appealed, the court is required to enter written findings and conclusions. The

prosecuting attorney must submit the proposed findings and conclusions within 21 days after receiving the notice of appeal. JuCR 7.11(d). The written findings are mandatory. *State v. Avila*, 102 Wash.App. 882, 10 P.3d 486 (Div. 3, 2000).

The juvenile court's written findings of fact and conclusions of law must state with specificity the ultimate facts necessary to support a conviction. *State v. Alvarez*, 128 Wash.2d 1, 17, 902 P.2d 754 (1995). "Ultimate facts" are facts "which are necessary to determine issues in the case, as distinguished from evidentiary facts supporting them. The logical conclusions deduced from certain primary evidentiary facts. Final facts required to establish plaintiff's cause of action or defendant's defense." *Id* at 15 n.15 (quoting BLACK'S LAW DICTIONARY 1522 (6th ed. 1990)).

A juvenile court's failure to enter written findings of fact and conclusions of law as required by JuCR 7.11(d) requires, at a minimum, a remand for entry of written findings and conclusions. *State v. Head*, 136 Wash.2d 619, 624-25, 694 P.2d 1187, 1190 (1998) ("An 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.")

No additional evidence will be taken on remand and the findings and conclusions must be based on the evidence already taken. However,

the trial court is not bound by its oral decision and it is free to reverse the conviction after addressing each of the elements of the crime charged.

Head, 136 Wash.2d at 625.

Reversal of a juvenile conviction by the appellate court is appropriate if the juvenile can demonstrate actual prejudice from the absence of written findings and conclusions - or if the juvenile is prejudiced following remand and late entry of findings and conclusions.

Id. The supreme court noted that a juvenile could show prejudice following remand “where there is a strong indication that findings ultimately entered have been ‘tailored’ to meet issues raised on appeal.”

Head, 136 Wash.2d at 624-25.

2. The trial court disregarded substantial credible evidence that raised the issue of self-defense and then failed to conduct the required mixed subjective and objective analysis regarding the Defendant’s mental state; or put the State to the task of disproving self-defense beyond a reasonable doubt.

a. Standard of Review. The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, (1970).

The analytic formula for the beyond a reasonable doubt has been written in many hundreds of appellate courts at all levels. In *Jackson v. Virginia*, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 2787 (1979), the Court stated:

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.

The *Jackson* Court also recognized, “ ... that a conviction based upon a record wholly devoid of any relevant evidence of a crucial element of the offense charged is constitutionally infirm.” 443 U.S. at 314, 99 S.Ct. at 2786, Citing; *Thompson v. Louisville*, 362 U.S.199, 80 S.Ct. 624 (1960).

The Washington appellate courts have similarly formulated the beyond a reasonable doubt standard. Evidence is insufficient unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wash. App. 789, 796, 137 P.3d 892 (2006). The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the

facts in issue. *State v. DeVries*, 149 Wash.2d 842, 849, 72 P.3d 748 (2003).

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. On review, the appellate court must find the proof to be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wash.2d 387, 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wash. App. 589, 592, 123 P.3d 891 (2005).

The evidence must also be more than clear, cogent and convincing evidence, which is described as evidence "substantial enough to allow the [reviewing] court to conclude that the allegations are 'highly probable.'" *In re A.V.D.*, 62 Wash.App. 562, 568, 815 P.2d 277 (1991).

The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

b. Analysis.

Washington recognizes three definitions of assault derived from the common law: (1) an attempt to inflict bodily injury upon another with

unlawful force; (2) an unlawful touching with criminal intent; and (3) putting a person in apprehension of harm with or without the intent or present ability to inflict harm. *State v. Baker*, 136 Wash.App. 878, 151 P.3d 237 (Div. 3, 2007), (Quoting, *Clark v. Baines*, 150 Wash.2d 905, 908 n. 3, 84 P.3d 245 (2004)).

The Information indicates that Mr. Casillas “did intentionally assault another person.” CP 12-13. Although the record is not entirely clear which alternative was being considered by the juvenile court, it was probably the second alternative, “an unlawful touching with criminal intent.”

Mr. Casillas’s attorney filed Respondent’s Notice of Intent to Rely on Self-Defense at Trial (CP 33). The State and the defense elicited trial testimony from Veronica Herrera, that Mr. Casillas’s physical contact with her was done to prevent *her* from assaulting *him*. RP 16.

Self-Defense is a statutory defense that negates “unlawful touching.” RCW 9A.16.020(3). Washington courts have also determined that self-defense negates the intent element of assault. *State v. McCullum*, 98 Wash.2d 484, 495, 656 P.2d 1064 (1983), *See also*, 13B Wash.Prac., Criminal Law §3304 (2017).

To raise a claim of self-defense a juvenile respondent must first offer evidence tending to prove self-defense. *State v. Graves*, 97

Wash.App. 55, 61, 982 P.2d 627 (1999). The respondent is not put to the burden of presenting overwhelming evidence. “[T]here only need be some evidence, admitted in the case from whatever source to raise the issue of self-defense.” *State v. Summers*, 120 Wash.2d 801, 812, 846 P.2d 490 (1983) (Quoting *McCullum* at 500).

Once the juvenile respondent provides evidence that raises the issue, the State then has the burden of disproving self-defense with proof beyond a reasonable doubt. *State v. Walden*, 131 Wash. 2d 469,473, 932 P.2d 1237 (1997); *Graves*, 97 Wash.App at 61-62.

The juvenile court must undertake both a subjective and objective analysis of the evidence. *Walden*, 131 Wash. 2d at 474.

For the subjective analysis, the juvenile court must step into the respondent’s shoes and view respondent’s acts in light of all of the facts and circumstances the respondent would have known when the act occurred. *Id.* Then, the juvenile court must conduct an objective analysis and determine what a reasonable person would have done if placed in the juvenile respondent’s situation. *Id.*

On review, the appellate court’s analysis focuses on why the juvenile court refused to consider the claim of self-defense. If the juvenile court’s refusal to consider a self-defense claim is based on the court’s finding there was no evidence of the juvenile respondent’s subjective

belief he was in imminent danger of injury, a question of fact, the standard of review is abuse of discretion. *State v. Read*, 147 Wash.2d 238, 243, 55 P.3d 26 (2002). If the juvenile court refused to consider the claim of self-defense, because no reasonable person in the juvenile respondent's shoes would have acted as the respondent did, is an issue of law that the appellate court reviews de novo. *Id.*

Although the juvenile respondent here gave notice and presented evidence at trial that raised the issue of self-defense, there is nothing in the record that indicates that the juvenile court considered either the subjective or the objective tests; or performed *any* analysis before rejecting the self-defense claim. The sum total of the court's findings and analysis are summed up in just four words, "I disagree. Motion denied." RP 22.

Because of the trial record's silence as to any evaluation of each of the factors that must be considered by a court when a claim of self-defense is properly raised, remanding for entry of such findings will cause actual prejudice to Mr. Casillas. The record is too sparse to conclude that sufficient evidence was presented or that the court conducted the required analysis. Further, the written findings and conclusions, after remand, will have necessarily been "tailored" to meet issues raised herein and therefore are actual prejudice per se. *Head*, 136 Wash.2d at 624-25.

3. The trial court erred by allowing the prosecuting attorney to tell the court what the witness wrote in a sworn statement and the statement was not presented or admitted as an exhibit.

Veronica Herrera testified that the physical confrontation with Mr. Casillas began after she “pushed him pretty hard.” Then, while still on direct, the State attempted to impeach her with her witness statement that she made for the arresting officers. This led to the following exchange.

Q: Do you recall what you told the police --

MR. SMITH: Objection. Hearsay.

THE COURT: Sustained. Are you offering this to impeach?

MS. FLICKNER: Yes, your Honor.

THE COURT: I’m sorry. Overruled.

...

THE COURT: She’s already -- What are you going -- What portion of her testimony are you attempting to impeach?

MS. FLICKNER: That she pushed him --.

THE COURT: Oh. In her statement she says she doesn’t push him?

MS. FLICKNER: She doesn’t mention anything about pushing.

THE COURT: She doesn’t mention it.

MS. FLICKNER: No.

THE COURT: Sustained.

RP 12-13. (The witness statement was never offered or admitted in evidence.)

Washington appellate courts have long held that concerns with evidentiary rulings are relaxed in a bench trial because the court is deemed to have only relied on proper evidence. *State v. Kinard*, 109 Wash.App. 428, 436, 36 P.3d 57 (Div. 3, 2001).

However, in the present case, the prosecutor was probably holding the original or a duplicate of the statement during her colloquy with the court and could have easily offered it as an exhibit. The failure to offer the statement, at a minimum, violated the best evidence rule ER 1002, 1004, and probably the rule of completeness, ER 106, and the rules prohibiting trial counsel from testifying.

In any event, if this case is remanded for entry of findings of fact and conclusions of law, the trial court is not permitted to admit the written statement into evidence and should be instructed to not consider any information in the record about Ms. Herrera's written statement.

4. The trial court erred by taking judicial notice that “the Respondent is very much physically superior” to the alleged assault victim.

The record in this case is totally silent about Mr. Casillas’s physical attributes. All we know about him is that he was 17 at the time of the offense (RP 13). As to Veronica Herrera, evidence was admitted that she was 29 years old (RP 13), 5’7” tall (RP 15), and weighed 250 pounds (RP 16).

However, while finding Mr. Casillas guilty the juvenile court stated:

THE COURT: I’m looking -- Ms. Herrera may in fact be a woman of more than average size. I do not find her obese in any -- at all. But it is plain to the court that the respondent is very much physically superior to her.

RP 25-26.

The defense asked whether the court was taking judicial notice that Mr. Casillas was physically superior to Ms. Herrera because there was no evidence in the record regarding his physical abilities. The court answered:

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

This situation is analogous to *State v. Payne*, 45 Wash.App. 528, 726 P.2d 997 (1986). There the trial court imposed an exceptional sentence based in part on the court's observation that the victim was a small and slight woman, not physically capable of resisting the defendant, and therefore "particularly vulnerable." *Id.* The appeals court rejected the State's contention that the trial court could make a finding of particular vulnerability because the court had the opportunity to observe the victim's small size in the courtroom during the trial. The court of appeals stated:

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. (Emphasis added).

See also; 5 Wash. Prac., Evidence Law and Practice § 201.3 (6th ed. 2017):

The notion of judicial notice should not be confused with a judge's personal knowledge about facts at issue. A judge may not dispense with the requirement of formal proof simply because he or she already 'knows' that something is true. A judge who does so becomes, in effect, a witness in the case—a practice that violates Rule 605.¹

Based on these authorities, it was clearly error for the juvenile court to take judicial notice, unsupported by any reviewable evidence, that Mr. Casillas was “physically superior” to Ms. Herrera.

It is also clear from the court’s comments noted above and later during sentencing (See RP 33) that the court’s personal opinion of Respondent’s “physical superiority” impermissibly influenced the court’s deliberations and led the court to overlook or impermissibly discount the evidence supporting Respondent’s claim of self-defense. This is an error that will not be able to be corrected merely by the entry of written findings and conclusions.

¹ ER 605 COMPETENCY OF THE JUDGE AS WITNESS. The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.

CONCLUSION

For the reasons stated, this Court should reverse and dismiss the Information, or in the alternative, remand to the juvenile court with directions to make detailed written findings of fact and conclusions of law based solely on the evidence properly introduced and admitted at trial. If the case is remanded, then Mr. Casillas should be permitted to offer further argument depending on the content of the court's written findings and conclusions.

DATED this 9th day of February, 2018.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I, Robert M. Seines, do hereby certify under penalty of perjury that on February 9, 2018 I provided e-mail service, by prior agreement, a true and correct copy of the annexed Appellant's Opening Brief to:

Randy Flyckt
randyf@co.adams.wa.us

Kyle Smith
Kyle@madalandsmith.com

And a paper copy to:

Emanuel Lopez Casillas
2255 Road E.5 NE
Moses Lake, WA 98837-9583



s/Robert M. Seines

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