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STATE OF WASHINGTON

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NO. 82671-4

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ABDINASIR A. OSMAN,

Petitioner.

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STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF PETITIONER OSMAN

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A. IDENTITY OF PARTY

Petitioner Abdinasir Osman submits this supplemental brief with the understanding that this court will consider the briefs filed in the Court of Appeals in connection with the petition for review.

B. ISSUES PRESENTED

1. RALJ 5.4 mandates a new trial when *any significant or material* portion of the electronic record is lost. When this decision is delegated to the trial court, it is subject to review by the superior court. The Court of Appeals held the trial court's decision is reviewed solely for an abuse of discretion. This is contrary to the well-established rule that application of a court rule to undisputed facts and mixed questions of law and fact –such as the materiality of the lost portion of the appellate record– are reviewed *de novo*. Did the superior court correctly determine the missing portion of the suppression hearing was material when it contained the end of the State's cross-examination and re-direct of Osman, admission of Exhibit D over defense objection, arguments of counsel, and the

only record of the district court's findings and conclusions which were contradictory and adverse to Osman?

2. The superior court may be affirmed on any alternative basis supported by the law and the record. Was the superior court required to remand the matter to the district court to determine if the missing portions were "significant or material"? Where the rule delegated that decision to the superior court for 14 years and assessment of the appellate record has traditionally been a function of the appellate courts, did the addition of the last sentence of the rule in 1995 remove that decision from the superior court to the district court?

C. STATEMENT OF THE CASE

Petitioner Osman relies upon the statement of facts set forth in the briefs and petition previously submitted.

D. ARGUMENT & AUTHORITY

1. RALJ 5.4 does not expressly delegate to the trial court's discretion whether a lost portion of the record is "significant or material." The application of this legal standard to the facts of this case is

reviewed *de novo*.

Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) 5.4 requires a new trial where a “significant or material” portion of the electronic record is lost. Neither the plain language of RALJ 5.4 nor the case law delegates to the trial court’s discretion whether the lost portion of the record is “significant or material” to the appeal. Neither the Court of Appeals nor the State provided any citation to authority or any rationale in support of the Court of Appeals’ holding that this decision is reviewed only for an abuse of discretion. Rather, the Court of Appeals’ decision is contrary to the well established rule that application of a court rule to the particular facts of the case is reviewed *de novo*. The Court of Appeals’ novel interpretation of RALJ 5.4 conflicts with this Court’s precedent.

The Court of Appeals correctly recognized the limitation on the trial court’s authority when an appeal is filed. RALJ 4.1(b)(lower court has “jurisdiction only to the extent provided in these rules”). RALJ 5.4 prescribes the limited role of the trial court.

The court of limited jurisdiction shall have the authority to determine whether or not significant or material portions of the electronic record have been lost or damaged, ***subject to review by the superior court upon motion.***

RALJ 5.4 (emphasis added.)

The Court of Appeals held that this language conveys broad discretion upon the lower court.

[T]he rule expressly delegates to the district court the authority to determine whether the lost or damaged portion of the electronic record justifies a new trial. This makes sense because the trial court is in the best position to determine if the missing portion is significant or material and is grounds for a new trial.

Using a de novo standard of review for the trial court's determination of whether the missing portions of the electronic record are significant or material *is contrary to the clear language of the rule that mandates remand to the court of limited jurisdiction to make that determination*. The cases Osman cites such as State v. Frankenfield, 112 Wash.App. 472, 475, 49 P.3d 921 (2002), City of College Place v. Staudenmaier, 110 Wash.App. 841, 43 P.3d 43 (2002), and State v. Dearbone, 125 Wash.2d 173, 178-79, 883 P.2d 303 (1994), are *inapposite*. Those cases stand for the proposition that when the trial court bases an otherwise discretionary decision solely on the application of a court rule to particular facts, the decision is reviewed de novo as a question of law. *Here, the court did not just apply the rule to a particular set of facts, but rather exercised its discretion under RALJ 5.4 in determining whether the missing portion was significant or material in the context of the trial.*

We conclude that an abuse of discretion standard of review applies to the decision of a court of limited jurisdiction of whether missing portion of the record is significant or material under RALJ 5.4. Consequently, we hold that the superior court erred in applying a de novo standard of review and impermissibly exceeded its authority by substituting its judgment for that of the district court and finding the missing portion of the record was significant and material under RALJ 5.4. Glaefke v. Reichow, 51 Wash.App. 613,

614-15, 754 P.2d 1037 (1988) (if the superior court substitutes its judgment for the district court, it exceeds its limited scope of review).

State v. Osman, 147 Wn.App. 867, 878-879, 197 P.3d 1198 (2008) (footnotes omitted, emphasis added). Yet, the court failed to identify any language in the rule or any authority which supports delegation of this appellate court function to the broad discretion of the trial court.

It appears the Court of Appeals based its holding upon the phrase “shall have authority” in the above quoted sentence in RALJ 5.4. This phrase only gives the trial court authority to act. An express authorization to act is necessary given the lower court’s limited jurisdiction during the pendency of the appeal. RALJ 4.1(b). But that phrase does not address the scope of the trial court’s authority or the manner in which it is exercised.¹ There is simply no language in RALJ 5.4 providing the

¹ The meaning of “shall” is not gleaned from that word alone because our purpose is to ascertain legislative intent of the statute as a whole.

In determining the meaning of the word “shall” we traditionally have considered the legislative intent as evidenced by all the terms and provisions of the act in relation to the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that would result from construing the particular statute in one way or

lower court with broad discretionary authority to determine whether the lost portion of the record is material to the appeal. In fact, the rule expressly makes the lower court's decision "subject to review by the superior court." RALJ 5.4. That phrase conveys the supervisory role the superior court provides as the appellate court. The plain language of the rule does not convey any discretionary powers to the trial court.

In contrast, the cases relied upon by the State below involve court rules and statutes containing express language which relegates the challenged decision to the trial court's discretion. *See* Petition for Review at 10-11; Respondent's Brief at 10-11. There is no such language in RALJ 5.4.

Moreover, the Court of Appeals offers no citation to authority for the conclusory statement that the trial court is in the best position to assess the materiality of the lost portion of the appellate record. The court did not address Osman's argument and authority that the sufficiency of the

another.

State v. Krall, 125 Wash.2d 146, 148, 881 P.2d 1040 (1994), *quoting* State v. Huntzinger, 92 Wash.2d 128, 133, 594 P.2d 917 (1979).

appellate record is traditionally a function of the appellate court. *See* Respondent's Brief at 13. The court offered no rationale for why a trial judge --whose decision is being challenged in the appeal-- should be given broad discretion to determine if the missing portion is material and there is none.

The decision at issue here does not require the exercise of discretion. RALJ 5.4 requires only the straight forward application of the legal standard to the undisputed facts of this case. The parties do not dispute what portion of the record is lost; only whether that portion is material to the appeal. Thus, *de novo* is the well established standard of review. *See* Petition for Review at 9-10, 12-13; Respondent's Brief at 12-13. Even if the decision were delegated to the lower court's discretion, the application of the court rule to the facts of the case is still subject to *de novo* review. Id. The Court of Appeals dismissed these well established precedent as "inapposite" because the district court "did not just apply the rule to a particular set of facts, but rather exercised is discretion under RALJ 5.4 in determining whether the missing portion was significant or material in the context of the trial." Osman 147 Wn.App. at 879.

Yet the court failed to identify any discretion exercised by the district court beyond an application of the legal standard to the facts of the case. The exercise of discretion by trial courts generally involves the balancing of the competing interests of the prosecution and the accused as was required by the discovery issues in *State v. Boyd*, 160 Wn.2d 424 (2007) and *State v. Uthoff*, 45 Wn.App. 261 (1986). Trial courts also exercise discretion by weighing the numerous factors to be considered to grant or deny motions for continuance as discussed in *State v. Downing*, 151 Wn.2d 265, 87 P.3d 1169 (2004) (*surprise, diligence, redundancy, due process, materiality and maintenance of order procedure*). Also, at least one court has observed, “there is no authority for the proposition that a trial court’s decision on a legal issue of first impression necessarily constitutes a proper exercise of discretion.” *State v. Tatum*, 74 Wn.App. 81, 86, 871 P.2d 1123 (1994).

The district court was only called upon to apply the legal standard in RALJ 5.4 to the missing portion of the record. The order remanding the case simply directed the court to determine “whether the lost portion of the record is material and significant, given the ruling from that lost portion are reflected in the docket.” CP 322. This decision does not

require the weighing or balancing of interests associated with rulings recognized as within the broad discretion of the trial courts.

In its reply brief below, the State argued that the district court's decision was entitled to deference and *de novo* review "would be a waste of time and judicial resources, to remand to give the District Court the opportunity to make the materiality and significance determination subject to *de novo* review by the Superior Court. . . . If the District Court is entitled to no deference, there is no legitimate reason to remand to have the District Court make that determination." Reply Brief of Appellant at 1-2. This is not an argument that *de novo* review does not apply to this case. This is an argument against *de novo* review. The State's bare assertions are not supported by any citation to authority. Consequently, this court may assume none exist. DeHeer v. Seattle Post-Intelligencer, 60 Wash.2d 122,196, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.")

The Court of Appeals' application of the abuse of discretion standard of review to this case conflicts with this court's precedent that application of a court rule to a particular case and mixed questions of law and fact are reviewed *de novo*.

2. The existing record is not sufficient to permit appellate review of the district court's decision pursuant to CrRLJ 3.5 and 3.6 because there is no record of the findings of fact made in support of those rulings. Thus, the missing portion of the electronic record is significant and material under RALJ 5.4.

The superior court correctly ruled the missing portion of the suppression hearing was material where it contained the end of the State's cross-examination and re-direct of Osman, admission of Exhibit D over defense objection, arguments of counsel, and the only record of the district court's findings and conclusions which were contradictory and adverse to Osman. The lower courts' contrary decisions are not supported by the record or the law.

The missing portion of the record is significant and material because the failure to preserve a complete record of the evidence and the district court's oral findings of fact made in support of the decision to deny suppression of Osman's statements precludes meaningful appellate review in this case.

To admit statements under CrRLJ 3.5, the prosecution must first prove that custodial statements are voluntary by a preponderance of the evidence. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Language barriers may prevent a proper advisement of rights and

a knowing, intelligent waiver of such rights. State v. Teran, 71 Wn.App. 668, 671, 862 P.2d 137 (1993). CrRLJ 3.5 does not require written findings and conclusions. But the rule imposes a duty to make a record of the trial court's findings of fact in support of its conclusions of law. CrRLJ 3.5(c). Regardless of how those findings are recorded², review of a trial court's suppression decisions requires the appellate court to determine whether substantial evidence supports the trial court's findings of fact and whether those findings support the conclusions of law. State v. Grogan, 147 Wn.App. 511, 516, 195 P.3d 1017 (2008); State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). "Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." Grogan, 147 Wn.App. at 516, quoting State v. Solomon, 114 Wn.App. 781, 789, 60 P.3d 1215 (2002). Credibility determinations are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The failure to assign error to the trial court's findings on the voluntariness of such statements will leave them as verities on appeal.

²On appeal, the failure to enter the written findings required by CrR 3.5 is harmless where the court's oral findings are sufficient to permit appellate review. State v. Grogan, 147 Wn.App. 511, 516, 195 P.3d 1017 (2008).

Broadaway, 133 Wn.2d at 133. ³This is important to note here that *Broadaway* rejected the “principle of independent review of the record in a confession case.” Broadaway, 133 Wn.2d at 131. Thus, this court held that “ the findings of fact entered following a CrR 3.5 hearing will be verities if supported by substantial evidence in the record.” Id. Nonetheless, the appellate court will review *de novo* whether the trial court “‘derived proper conclusions of law’ from its findings of fact.” Grogan, 147 Wn.App. at 516. Here, no written findings were required and no record of the oral findings exists. Thus, the only record of the district court’s findings is the docket. The district court and the Court of Appeals opined that the findings and conclusions preserved in the district court docket were sufficient to permit appellate review without a record of the court’s oral ruling. Osman respectfully disagrees.

The findings and conclusions made in support of the district court’s suppression decisions are limited to the following.

COURT FINDS DEFENDANT WAS READ HIS RIGHTS IN THE FIELD AND UNDERSTOOD HIS RIGHTS IN THE FIELD. STATEMENTS MADE THERE AFTER WERE ADMISSIBLE. STATEMENTS MADE ARE A WAIVER BY CONDUCT THAT INCLUDES THE FACT THAT HE STATED HE HAD 2 BEERS AND WAS OKAY TO DRIVE.

COURT FINDS THAT THE DEFENDANT WAS READ HIS RIGHTS AT THE SEATAC FACILITY AND THAT HE INVOKED HIS RIGHTS AND ANY STATEMENTS MADE AFTER THE SECOND READING OF

RIGHTS ARE
SUPPRESSED.

COURT FINDS IMPLIED CONSENT WARNINGS FOR BREATH WERE
READ TO DEFENDANT IN THE FIELD AND AT THE SEATAC
FACILITY
COURT IS NOT SATISFIED THAT DEFENDANT UNDERSTOOD HIS
RIGHTS. THEREFORE, BAC REFUSAL IS SUPPRESSED.

COURT FINDS THAT THERE WAS PROBABLE CAUSE TO STOP
DEFENDANT BASED ON THE DEFENDANT'S DRIVING OBSERVED
BY
OFFICER JEFFRIES

COURT FINDS PROBABLE CAUSE TO ARREST DEFENDANT

CP 8.

Counsel cannot assign error to that which does not exist. The only findings of fact preserved in the docket in support of the district court's decision under CrRLJ 3.5 are that Osman was "read his rights in the field" and the sweeping conclusory statement he "understood his rights in the field." While the first finding was not apparently disputed at the hearing, the second was the primary disputed question to be resolved.³ Osman, a native of Somalia, asserted that he did not understand the English speaking

³The court's "waiver by conduct" comment appears to be a conclusion of law, not a factual finding. Also, counsel was unable to discern the relevance of this comment to the court's decision regarding statements under CrRLJ 3.5. The only discussion of "waiver by conduct" that counsel could locate is not applicable to this case. *See City of Seattle v. Klein*, 161 Wash.2d 554, 562-63, 166 P.3d 1149 (2007) (discussing cases on waiver of counsel by conduct and waiver of appeal).

officer in the field. There is nothing in the docket that permits the appellate court to review the manner in which the district court reached that conclusion. Instead of recognizing the lack of any meaningful findings to review, the Court of Appeals instead speculated as to how the district court reached that conclusion and effectively engaged in an independent of the record that *Broadaway* precludes. State v. Osman, 147 Wn.App. 867, 881-82. Without referencing any finding of fact, the court independently opined as follows.

It is clear from the record, that the district court admitted Osman's statement based on finding Deputy Jeffries's testimony that he read Osman his rights more credible than Osman's testimony.

Osman, 147 Wn.App. at 881 (emphasis added). Later, rejecting Osman's argument that the district court's decisions to admit some statements and suppress others were inherently contradictory, the court again supplied its own findings to support the district court's decision.

While the *Miranda* warnings are straightforward and easy to understand, the implied consent warnings are not. The record also shows that because Osman exercised his right to an attorney after Officer Jeffries read the *Miranda* warnings, he understood those rights.

Osman, 147 Wn.App. at 882. But the district court made no such findings of fact. Even if those findings had been entered, the incomplete

record is not sufficient to determine whether those findings are supported by substantial evidence. The Court of Appeals is not permitted to supply the necessary findings of fact by speculation, conjecture or its own independent review of the record. *See Broadaway*, 133 Wn.2d at 133.

Finally, the admission of Exhibit D (and the other exhibits) appeared to be geared towards establishing Osman's experience with the criminal justice system. This may well be improper as there is nothing in the existing record which explains how it was used or why the court admitted it in the first place. Without such information, counsel cannot properly assign error to the district court's reliance upon this information.

Because the electronic record of the district court's oral rulings was lost, the court's decision to suppress Osman's statements in the field is not subject to appellate review. Those portions are material to the appeal.

The dearth of findings in the docket relative to the determination of probable cause suffer from the same defect. The probable cause determination under CrRLJ 3.6 is reviewed in the same manner as set forth above. *See Broadaway*, 133 Wn.2d at 131-33. But the only finding of

fact recorded in the docket in support of the district court's finding of probable cause to stop and arrest Osman is "the defendant's driving observed by Officer Jeffries." CP 8. The court does not state what it is about Osman's driving that constituted probable cause to stop him. Then the court cites no additional findings of fact to justify Osman's arrest. Driving alone, without some indicia of the consumption of alcohol or impairment due to alcohol, will not provide probable cause that the crime of DUI has been committed. See State v. Staudenmaier, 110 Wn.App. 841, 846-848, 43 P.3d 43 (2002). The Court of Appeals accepted the State's argument proffered below that the *record* supports the conclusions reached by the district court. Osman, 147 Wn.App. at 882 (Here, the docket contains the district court's findings and conclusions This record allows Osman to challenge whether Deputy Jeffries had probable cause to stop and to arrest.") See Amended Brief of Appellant at 18; Reply Brief of Appellant at 4. But appellate review of these suppression decisions does not start with the record. Review starts with the factual findings of which the district court has an affirmative duty to make a record. CrRLJ 3.5, 3.6. Those findings and conclusions are material and significant to the appeal. Thus, the loss of the district court's

contemporaneous oral findings requires remand for a new trial under RALJ 5.4.

The State may argue that this is a harsh result given the record that is available. Nonetheless, the court must give effect to the plain meaning of the rule. Osman, 147 Wn.App. at 877-78. RALJ 5.4 mandates remand for a new trial when “*any significant or material portion*” of the electronic record has been lost. As previously noted, the remedy this court fashioned for appeals under the RALJ is substantially different than that available under the RAPs. *See* Petition for Review at 8, 15. It is not the size or length of the missing portion that is determinative, but the significance. The lost portion of the regard here is clearly significant. The superior court did not err by ordering a new trial.

Respectfully submitted this 3rd day of August, 2009,

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