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Court of Appeals  
Division I  
State of Washington

NO. 73363-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

OTIS BRYANT, JR.,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN S. LUM

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**BRIEF OF RESPONDENT**

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A. ISSUES

1. While a witness is not generally allowed to testify to his or her opinion regarding the guilt of the defendant, an opinion that does not go directly to the defendant's guilt and is based on the witness's personal observations of the defendant's conduct is admissible. Here, regarding an encounter he had with Bryant before the commission of the charged crime, a deputy sheriff testified to facts that established that Bryant did not cooperate with his attempts to verify Bryant's residence. Has Bryant failed to show that the trial court abused its discretion by allowing the officer to testify that Bryant was "being difficult?"

2. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. Here, findings of fact and conclusions of law from the CrR 3.5 hearing were recently entered, having previously been prepared by a prosecutor who was unfamiliar with the issues Bryant presented for review. Has Bryant failed to show that it is necessary to remand the matter to the trial court for entry of findings?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Otis Bryant, Jr., was charged by information with Assault in the First Degree and Assault in the Fourth Degree. CP 1-2. The State alleged that, on or about August 30, 2014, Bryant started a fire at the apartment of Monica Bissell, and further alleged that the arson was a crime of domestic violence. CP 1-3. The Assault in the Fourth Degree charge, also with Bissell as the charged victim, stemmed from a different date and was severed for trial. CP 1-2; RP<sup>1</sup>156.

Before the arson trial the court held a CrR 3.5 hearing to determine the admissibility of Bryant's statements. RP 107-224. The court concluded that all of Bryant's statements were admissible because they were made when he was not in custody. RP 224-29; Supp. CP \_\_\_\_ (Sub. No. 116) (Findings of Fact and Conclusions of Law).

During his testimony at the CrR 3.5 hearing, King County Sheriff's Deputy Robert Nishimura testified that during a contact he had with Bryant before the arson he had attempted to verify Bryant's address, but that "he pulled a bunch of stall tactics on us to pretty much prevent us

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<sup>1</sup> There are five consecutively paginated volumes of verbatim report of proceedings that will be referred to in this brief as "RP \_\_\_\_."

from verifying that.”<sup>2</sup> RP 166. Subsequently, referring to this testimony, Bryant made a motion in limine to preclude Nishimura from stating that opinion in front of the jury. Bryant’s attorney argued:

Deputy Nishimura made some mention of his opinion that Mr. Bryant was stalling or attempting to prevent verification of his address. I don’t mind the officer testifying as to everything that he saw Mr. Bryant say and do. My issue is with the interpretation he attaches to that, the opinion...

CP 237. After hearing from the prosecutor, the trial court ruled:

...I don’t think it is proper for the officer to offer his opinion.

Now you can describe what his behavior and actions were, and the jury very well may come to that conclusion that he was stalling and that counsel was clearly able to argue yes, he was stalling – no, he wasn’t stalling – you know, that kind of thing, but I don’t think the witness can offer an opinion as to whether it is – he was stalling.

So but certainly you are free to ask him a whole bunch of questions, which would arguably make it very clear that he was stalling, but you know there’s a bunch of ways you could do that without getting the officer to render his ultimate opinion about “he was stalling,” which I think is an opinion.

CP 238.

The jury found Bryant guilty of Arson in the First Degree, and found by special verdict that it had been a crime of domestic violence.

CP 238-40; RP 814. Bryant had an offender score of four and the trial

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<sup>2</sup> The encounter between Nishimura and Bryant occurred several hours before the fire when officers responded to a domestic dispute between Bryant and Bissell at the apartment complex where they lived in separate units. RP 163.

court imposed a standard range sentence of 45 months in prison.

CP 388-96.

## 2. SUBSTANTIVE FACTS

On August 21, 2014, King County Deputy Jaron Smith responded to a 911 call of a domestic dispute by going to the Creston Point<sup>3</sup> Apartments, a large apartment complex consisting of approximately 20 buildings. RP 283-84. Smith followed a “fair amount of blood” from a stairwell landing leading to Monica Bissell’s apartment. RP 285. Bissell was at the apartment and Smith saw that she had a lacerated lip. RP 287. Bissell was “a little amped up, excited,” and appeared to have been drinking “but she wasn’t incoherent.” RP 286-87. Bissell told Smith what had happened and Smith called for an aid car. RP 287. Bryant was not present. RP 287.

Eight days later, on August 29, 2014, Deputy Smith again went to Bissell’s apartment, this time in response to a request from Bissell to remove Bryant from her apartment. RP 293-94. When Smith met Bissell outside her apartment she appeared to be intoxicated. RP 294. Smith then went to Bissell’s apartment and found Bryant asleep. RP 295. Smith woke him up and found him also to be intoxicated. RP 294-95. Smith

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<sup>3</sup> The transcript in various places also refers to this same apartment complex as “Crescent Point” or “Preston Point.” E.g., RP 323, 339. There are 476 units with approximately 2500 residents at the apartment complex. RP 492-93.

told Bryant that Bissell didn't want him in her apartment, gave him time to get his shoes and belongings, then escorted him out of the apartment and to the front landing of the building. RP 295. Smith watched Bryant walk away, "and that was the end of it." RP 295. Bryant had been cooperative during his encounter with Smith. RP 301. Smith did not arrest Bryant for the August 21<sup>st</sup> incident because that case had been forwarded to the prosecutor and he had received no further direction on the case.

RP 301-02.

Later that same night, just before 1:00 a.m. on August 30<sup>th</sup>, Deputy Robert Nishimura went to the apartment complex in response to a call from an apartment security officer. RP 323-24, 331. After contacting the security officer, Chad Mathis, Nishimura and his partner Deputy Devon Stratton spoke with Bissell, who appeared intoxicated. RP 324-26. After a brief conversation with Bissell, Nishimura and Stratton found Otis Bryant on a stairwell in the building. RP 326-28. Bryant denied that he had been in an altercation with Bissell. RP 330. Nishimura then re-contacted Bissell, who told him that she was tired of the police "not doing anything" and that she wanted a protection order against Bryant. RP 331-33. Nishimura then returned to Bryant and communicated that information to him. RP 334. Nishimura wanted to know whether Bryant had somewhere else to stay. RP 334. Nishimura testified:

Q. Did you talk to Mr. Bryant about whether he had another place he could stay?

A. Yes.

Q. What did he tell you?

A. He told me that he lived basically across the complex at the K-King building.

Q. Was it your understanding that this was his apartment or what was your understanding of the living arrangements in the K building?

A. He was staying with a friend.

Q. So after he gave you that information, what did you do with the defendant next?

A. We verified his residency by -- and we walked him over to escort him away from Monica.

Q. Did he tell you the name of the person he was staying with?

A. No. We asked him. He couldn't tell me the name.

Q. Okay. Did you go directly from Monica's building to the K building?

A. No, he wanted to go move his car. His car was by the -- I want to say the D building and we told him that we wanted him to go show us where he lived, and he told us he didn't have a key for the building, and that he didn't know the name of the person he was living with. And then he didn't know the unit. And he was just being difficult, so we finally get to the apartment and --

[Defense Counsel]: Objection. Opinion -- "being difficult"?

THE COURT: Okay, overruled. Proceed.

Q. (By [prosecutor]) So you got to the apartment?

A. We got to the apartment. He knocks on the door; nobody answers. At that point he told us he didn't have a key to the apartment and he said that Monica had the key.

Q. Were you able to get that key back from Monica?

A. So I went back to Monica and Monica produced me a single key for his apartment and verified that he lived in the K405 unit.

RP 334-35.

After getting the key from Bissell, Nishimura walked back to the K building with Bryant and left him there. RP 338. Nishimura then left the complex. RP 339.

At about 2:00 a.m., Alexander Uth arrived at the Creston Point Apartments. RP 257. He was there to visit a friend who lived in building D. RP 250. While parking, Uth saw an African American man around a small dark sedan with all the doors open. RP 255. Uth parked near the man and the man was mumbling and then said "something about being rufied" and "that he would get revenge on a girl or something." RP 255. Uth was able to quote the man: "On my mama's grave, I am going to get back at this bitch." RP 255. Uth didn't get a good enough look at the man to be able to identify him; it was dark and he hadn't been able to see his face. RP 256, 264. Uth then went up to visit his friend who lived on the third floor of the D building. RP 257.

Chad Mathis, an armed security officer at Creston Point, was on duty the night of the fire but left at 2:45 a.m. to 2:50 a.m., shortly before the fire. RP 481-82. About 10 minutes before he left he noticed Bryant remove a backpack from the trunk of his car, which was parked near the B building, and walk toward building B. RP 481-83.

About 30 minutes or an hour after Uth and his friend went into the friend's apartment they saw smoke coming out of the B complex. RP 257. Uth went down and stood in the parking area in front of building B and looked up and saw two men knocking on the apartment door, one using a large rock. RP 258. The two men eventually kicked the door down. RP 258. Uth could hear "little kid voices saying, 'help, help.'" RP 265. Uth saw a little boy run out of the apartment. RP 258. Uth then ran up the stairs to the apartment, went inside and pulled out a little girl who wasn't more than five. RP 258. Uth next took a woman in her 30's (Bissell) by the wrist and led her out of the apartment. RP 259. He then went back into the apartment using his phone for light, and got low, about knee level, to avoid the smoke. RP 259. There was a strong smell of gas near the door. RP 259, 267. The sprinkler system was on. RP 260. He then checked all the rooms, satisfying himself that everyone was out. RP 259-60. There were no active flames but Uth noticed that one of the couches near the door had been burned. RP 260-61. When Uth left the

apartment he was soaked from the sprinklers so he went back to his car to get a sweater. RP 262. He did not see the car that had been there when he parked. RP 262.

Gary Cobb, a welder who lived at Creston Point, was awakened by alarms; when he looked out his window and saw firetrucks, he decided to go outside and watch. RP 517-18. He saw Bryant, whom he recognized from around the complex, walk toward the fire and watch for 10 to 20 minutes. RP 519-20. He then watched Bryant go to his car and drive away. RP 519. Cobb didn't know whether Bryant left the complex or just moved his car. RP 519.

At 3:38 a.m., about 90 minutes after he had left the scene, Deputy Nishimura and other officers were called back to the Creston Point Apartments in response to a report of the fire at Bissell's apartment. RP 339, 355. When Nishimura arrived there were several firetrucks and ambulances at the scene. RP 339. There was smoke billowing out of Bissell's unit. RP 339. Nishimura told the incident commander that at least two small children lived in the unit, but he was told that none were in the apartment at that time. RP 339-40. Nishimura then began assisting in the evacuation of the lower floors of the building. RP 340.

After the fire was controlled, Nishimura went to view the apartment with King County Sheriff's arson investigator Gerry Kenny.

RP 340. He saw that the vinyl siding by the deadbolt was melted; the door, which had been knocked off, was charred; soot was partway up the interior walls; there was significant smoke damage in the apartment; the apartment was flooded with water from the sprinkler system; and a sofa was burned and a lamp melted. RP 341, 347. The area near the door, according to Nishimura, "smelled overwhelmingly of the smell of gasoline." RP 349. Other apartments on the second, third, and fourth floors were also flooded because of the activation of the sprinkler system. RP 341.

Nishimura then located Bissell in a different apartment. RP 342. She was angry and yelled, "I told you he would come back." RP 342. Nishimura also testified that he noticed that after the fire Bryant's car was parked near the L building, whereas it had been parked near the D building when Nishimura had been there before the fire. RP 166, 349-50.

After firefighters had finished in the apartment, arson investigator Kenny processed the scene for evidence. RP 616-52. He immediately noted two small mats outside the front door that were burned. RP 616. He smelled gas when he lifted one of the mats. RP 619. A couch inside the apartment was burned on one end. RP 617. Having processed the scene and assessed the evidence, at trial Kenny opined that someone had poured gasoline underneath the door to Bissell's apartment, poured a

gasoline trail away from the door, and then ignited the trail of gasoline.<sup>4</sup>

RP 651-52.

After Kenny had finished processing the scene he was standing by his truck when he was approached by Bryant, who said something like, "I hear you're looking for me," or "you need to talk to me?" RP 659. Before Kenny asked Bryant if he could record an interview, Bryant told him Bissell had made him a couple of drinks and that he thought she had put "rufies" in his drinks. RP 661. Bryant then consented to a recorded statement, during which he admitted he was angry at Bissell for stealing his money and drugs. Ex. 57, at 4-7. However, he denied starting the fire. Ex. 57, at 8.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ALLOWING DEPUTY NISHIMURA TO TESTIFY THAT BRYANT WAS "BEING DIFFICULT."

Bryant claims that the trial court committed reversible error by allowing Deputy Nishimura to give his opinion that Bryant was guilty. Bryant's claim is without merit. Hours before the arson was committed, Nishimura personally observed Bryant engage in a series of behaviors that caused him to believe that Bryant was being uncooperative with his

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<sup>4</sup> A Washington State Crime Laboratory scientist tested a portion of the door mat, a wood splinter from the apartment door, and fire debris from inside the apartment and found that all of the tested items contained evaporated gasoline. RP 446-49.

attempts to verify Bryant's address. Nishimura's comment that Bryant was "being difficult" was not an opinion as to Bryant's guilt, but rather an opinion that was logically supported by his observations of Bryant's conduct. The trial court did not err in admitting the testimony.

a. Nishimura's Testimony Did Not Constitute An Impermissible Opinion On Bryant's Guilt.

Generally, a witness is not allowed to testify to his or her opinion regarding the guilt of the defendant or the veracity or credibility of the defendant or a witness, because such testimony invades the exclusive province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). However, a trial court's decision on whether to exclude evidence as an impermissible opinion on the defendant's veracity will not be overturned on appeal absent an abuse of discretion. Id. at 758. A trial court abuses its discretion only if no reasonable judge would adopt the same view. State v. Bourgeois, 133 Wn.2d. 389, 406, 945 P.2d 1120 (1997).

When determining whether testimony constitutes an impermissible opinion on guilt or veracity, the courts consider the circumstances of the case, including the specific nature of the testimony, the nature of the charges, the type of witness involved, the type of defense, and the other evidence before the trier of fact. State v. Kirkman, 159 Wn.2d 918, 928,

155 P.3d 125 (2007). This Court has “expressly declined to take an expansive view of claims that testimony constitutes an opinion on guilt.” City of Seattle v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

More specifically, testimony by a witness regarding his or her own personal observations of the defendant’s conduct, and opinions or conclusions formed from those observations, do not constitute opinions on the guilt of the defendant. In State v. Allen, 50 Wn. App. 412, 416-19, 749 P.2d 702 (1988), a prosecution for murder, a police officer was properly allowed to testify that the defendant cried during an interview about the killing, but that “her facial expression, the lack of tears, the lack of any redness in her face did not look genuine or sincere.” This Court held that the testimony was based directly upon the personal observations of the officer and “was simply an explanation and summary of his admissible personal observations of [the defendant’s] reaction to [her husband’s] death.” Allen, at 418-19. Similarly, in State v. Day, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988), a prosecution of the defendant for murdering his wife, police officers were properly allowed to testify as to the defendant’s unemotional and “inappropriate” reaction when told of his wife’s death. The court held that opinion testimony regarding a defendant’s reaction is admissible if it is prefaced with a proper foundation: personal observations of the defendant’s conduct, factually

recounted by the witness, that directly and logically support the conclusion. Day, at 552.

In State v. Stenson, 132 Wn.2d 668, 722-24, 940 P.2d 1239 (1997), another prosecution of a defendant for killing his wife, the supreme court held that a paramedic who had been at the crime scene was properly allowed to testify to the defendant's calm demeanor and lack of emotion, and to testify that he was surprised to find out that the two were husband and wife. The testimony was admissible because: "The paramedic was not testifying as an expert and was not testifying based on assumptions that were unsupported by his direct observations... Instead, the paramedic testified as to personal observations of the Defendant's conduct." Id. at 724.

State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (1993), is also instructive. In Craven, a prosecution for assault of a 16-month-old child, this Court held that the trial court had properly allowed a hospital social worker to testify regarding the defendant's initial explanation for the child's injuries and to describe the defendant's demeanor as "withdrawn" and "somewhat unusual." Craven, at 586. This Court held that the proper foundation for such testimony is a showing that the witness personally observed the defendant's conduct, and that the facts recounted by the witness directly and logically support the witness's conclusion. Id.

Here, Deputy Nishimura was called to investigate a domestic dispute involving Bryant and Bissell at the apartment complex hours before the fire that resulted in the arson charge. Nishimura contacted Bryant in a stairwell at the complex and Bryant denied that he'd been in an altercation with Bissell. RP 330. At that point, Bryant was cooperative. RP 330. Nishimura then left Bryant to speak with Bissell, who told him she was tired of the police "not doing anything" and that she wanted a protection order against Bryant. RP 331-33. Nishimura then returned to Bryant and "communicated that information to him." RP 334. Nishimura wanted to know if Bryant had somewhere other than Bissell's apartment to stay, and Bryant told him that he lived with a friend in a different apartment across the complex in another building. RP 334. Rather than giving Nishimura information about the apartment or leading him directly to it for confirmation, Bryant wouldn't tell Nishimura the name of the friend who lived there or the unit number, he said he didn't have a key, and before going to the apartment he insisted on moving his car. RP 334-35. In describing Bryant's conduct, Nishimura said "he was just being difficult." RP 335. Bryant's objection: "Opinion – 'being difficult,'" was overruled by the trial court. RP 335.

The trial court did not abuse its discretion in allowing the testimony. Nishimura did not express an opinion as to Bryant's guilt. The

crime for which Bryant was on trial had not even occurred at the point of the interaction described by Nishimura, thus, logically, his opinion of Bryant's conduct being "difficult" could not have been an opinion as to his guilt of arson. In the above-cited authorities, the courts upheld opinion testimony from witnesses who were describing the demeanor of defendants *after* the commission of the crimes, which, at least, arguably, could indirectly be construed as opinions on guilt. Here, Nishimura was simply describing a defendant's conduct during an encounter before the crime, which cannot therefore be construed as an opinion on guilt of the subsequent crime. To hold otherwise would indeed be taking "an expansive view" of what constitutes an impermissible opinion on guilt.

Bryant, in his brief, points out that the trial court in a pretrial motion in limine ruled that Nishimura could not testify that Bryant was "stalling," and argues that the ruling during trial was inconsistent and, therefore, wrong. Without addressing the correctness of the pretrial ruling, the court's allowing at trial the opinion that Bryant was being difficult was not inconsistent. Nishimura's pretrial hearing testimony was a conclusory statement of Bryant's motives or intent when he described attempting to verify Bryant's address and said, "he pulled a bunch of stall tactics on us to pretty much prevent us from verifying that." The trial court's pretrial order precluding Nishimura from opining that "he was

stalling” thus prevented a conclusion as to Bryant’s motives. At trial, allowing Nishimura to testify that Bryant was being difficult was not a conclusory opinion as to Bryant’s motive, but, rather, was simply allowing an opinion that Bryant was being uncooperative after a foundation had been laid of Nishimura’s personal observations of Bryant’s conduct.

Bryant cites State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002), for the proposition that “a lack of cooperation can be interpreted as an indication of guilt.” Appellant’s brief at 15. But in Romero an officer testified that the defendant was “uncooperative” when describing that the defendant had refused to talk with him after having been read his Miranda<sup>5</sup> warnings. Romero, at 793. Romero’s conviction was reversed because the officer made an impermissible comment on the defendant exercising his right to remain silent, not because describing a defendant as uncooperative in some other context is an impermissible opinion as to the defendant’s guilt. Romero, at 794. If any reference to a defendant’s lack of cooperation were considered an opinion on the defendant’s guilt, then courts could never allow an officer to testify, for instance, that a suspect struggled when arrested.

The trial court did not abuse its discretion in admitting the challenged testimony. When Deputy Nishimura testified that Bryant was

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<sup>5</sup> 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

“being difficult” he did not render an opinion on Bryant’s guilt, but rather he stated a conclusion based on his own personal observations of Bryant’s conduct. Moreover, the facts that Nishimura cited — that Bryant didn’t know the name of the “friend” he lived with, that he didn’t know the apartment number, that he didn’t have a key, and that he wanted to move his car first — amply supported his conclusion that Bryant was being less than cooperative.

b. Any Error Was Harmless.

Even if this court finds that the trial court did abuse its discretion in admitting Deputy Nishimura’s testimony, the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). A non-constitutional error is harmless if there is not a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Caselaw is not entirely clear on which standard applies to a witness’s improper opinion testimony as to the veracity of another witness.

Where the improper testimony is clearly an opinion on the defendant’s *guilt*, courts have treated the error to be of constitutional

magnitude. State v. Carlin, 40 Wn. App. 698, 700, 700 P.2d 323 (1985) (finding defendant raised a constitutional claim when asserting that testimony regarding “fresh guilt scent” was an opinion as to guilt), overruled on other grounds by Heatley, 70 Wn. App. 573. However, as noted previously, the courts take a narrow view of what constitutes an opinion on guilt. Heatley, 70 Wn. App. at 579. Even when police officers have explicitly testified to their opinion that a key witness told the truth, this Court has held that it did not constitute an opinion on the defendant’s guilt, and instead analyzed such testimony as an improper expert opinion, to which the nonconstitutional harmless error standard applies. State v. Wilber, 55 Wn. App. 294, 298-99, 777 P.2d 36 (1989).

Because Nishimura’s testimony did not constitute an opinion on Bryant’s guilt, this Court should apply the nonconstitutional harmless error standard if it finds that the trial court abused its discretion in admitting the testimony. However, the alleged error was harmless even under the higher constitutional standard.

Here, rather than being highlighted by a prosecutor’s question asking for an opinion, Nishimura’s comment that Bryant was “being difficult” was made as an aside during his narrative response detailing Bryant’s conduct. It is unlikely that the words “being difficult” had much of an impact on jurors given that Nishimura’s fact testimony drew a clear

picture of Bryant's lack of cooperation. Moreover, contrary to Bryant's argument on appeal, in closing argument the prosecutor did not refer to Nishimura's opinion that Bryant was "being difficult," but rather argued Bryant's credibility based only on Nishimura's description of Bryant's conduct.

Bryant, in his brief, argues that the prosecutor in closing argument "referred the jury to the offending testimony," and in rebuttal closing "reemphasized Nishimura's opinion testimony." Brief of Appellant at 19-20. These assertions are simply incorrect. In closing the prosecutor argued:

And they asked him where he was staying. He says he is in the K building, and you heard the description of how it took a little while for the defendant to explain where he was going. He could never name his roommate. He could never name where he was going, but they eventually got him to the K building.

RP 752. And in rebuttal closing the State argued:

Think about the defendant's credibility or lack of credibility when he is dealing with Deputy Nishimura. That is the 12:45 contact where Deputy Nishimura is trying to escort him and the defendant clearly did not want to tell him where he was going. He didn't tell them his roommate's name, he didn't go directly to the K building, he went over to move his car and kept making excuses to avoid going there.

There was no one there. He didn't have his key.

Now he had a key, but he clearly had something that he was trying to hide.

RP 801. In neither instance did the State refer to Nishimura's opinion that Bryant was "being difficult"; instead, the State used only reasonable inferences drawn from Nishimura's fact testimony to argue Bryant's evasiveness and lack of credibility. The State's arguments would have been the same even if Nishimura's opinion that Bryant was "being difficult" had been disallowed.

2. BRYANT WAS NOT PREJUDICED BY THE DELAY IN ENTRY OF CrR 3.5 FINDINGS.

Bryant argues that his case should be remanded for entry of findings of fact and conclusions of law under CrR 3.5. This argument should fail because the trial court entered written findings on March 17, 2016, and Bryant cannot show any prejudice. Supp. CP \_\_ (Sub. No. 116) (Findings of Fact and Conclusions of Law) (App. A).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no prejudice to the defendant by the delay and no indication that the findings and conclusions were tailored to meet the issues presented on appeal. State v. Quincy, 122 Wn. App. 395, 398, 95 P.3d 353 (2004), review denied, 153 Wn.2d 1028 (2005).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, the court held that

the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Bryant's appeal. There is no resulting prejudice.

Nor can Bryant establish unfairness or prejudice resulting from the content of these findings. The only substantive issue raised by Bryant on appeal, the admission of Deputy Nishimura's opinion testimony, is unrelated to Miranda or other issues associated with a CrR 3.5 hearing. Moreover, a review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp. CP \_\_ (Sub. No. 116) (Findings of Fact and Conclusions of Law) (App. A). The language of the findings is consistent with the trial court's oral ruling. RP 224-29. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Supp. CP \_\_ (Sub. No. 117) (Declaration of Bridgette Maryman) (Appendix B).

In light of the above, Bryant cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.5 findings of fact and conclusions of law are properly before this Court.

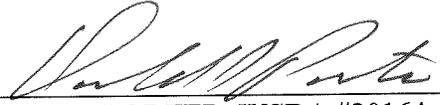
D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Bryant's judgment and sentence.

DATED this 28 day of March, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
DONALD J. PORTER, WSBA #20164  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

## **APPENDIX A**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

OTIS BRYANT, JR.,

Defendant.

No. 14-1-05869-8 SEA

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5  
MOTION TO SUPPRESS THE  
DEFENDANT'S STATEMENT(S)

A hearing on the admissibility of the defendant's statement(s) was held on February 24 and 25, 2015, before the Honorable Judge Dean Lum. The court informed the defendant that:

(1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial. After being so advised, the defendant testified at the hearing.

WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 1

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

1 After considering the evidence submitted by the parties and hearing argument, to wit:  
 2 testimony of Deputy Nishimura, Investigator Kenny, the defendant, and marked exhibits,  
 3 including the defendant's recorded statement,  
 4 the court enters the following findings of fact and conclusions of law as required by CrR 3.5.

5 1. THE UNDISPUTED FACTS:

- 6 a) In the evening of August 29, 2014, King County Sheriff's Deputy Robert Nishimura was  
 7 dispatched to a disturbance in unit B-401 of the Creston Point Apartments. Monica  
 8 Bissell had reported that she was afraid that Otis Bryant, Jr., her boyfriend, would hurt  
 9 her.  
 10 b) Deputy Nishimura and Deputy Stratton, who were in uniform and driving a marked patrol  
 11 car, arrived on scene and contacted Ms. Bissell.  
 12 c) After a brief contact with Ms. Bissell, Deputies Nishimura and Stratton found the  
 13 defendant sitting on the stairs between the third and fourth floor of the B building.  
 14 d) Deputies Nishimura and Stratton asked the defendant what had happened. The defendant  
 15 acknowledged that he and Ms. Bissell had dated for about six months. He denied any  
 16 verbal or physical altercation that night.  
 17 e) The defendant told Deputy Nishimura that he lived in unit K 405.  
 18 f) When Deputy Nishimura tried to verify the defendant's residence, the defendant did not  
 19 immediately answer. He said he needed to move his car, which was by the D building.  
 20 He then said that he did not have his key to the apartment where he was staying, but that  
 21 Ms. Bissell had his key. When asked, the defendant did not know the name of his  
 22 roommate.  
 23 g) Deputy Nishimura verified with Ms. Bissell that the defendant was staying in the K  
 24 Building, and retrieved the defendant's key.  
 h) Deputy Nishimura returned the key to the defendant and issued a trespass notice to the  
 defendant, prohibiting him from several units of the Creston Point apartments, including  
 the B Building.  
 i) Throughout the conversation, Deputies Nishimura and Stratton never advised the  
 defendant he was under arrest. They never handcuffed him or unholstered. They briefly  
 patted the defendant down, but found nothing in his pockets.  
 j) The defendant never asked to speak with an attorney when talking to Deputies Nishimura  
 and Stratton.  
 k) In the early hours of August 30, 2014, King County Fire Investigator Gerald Kenny was  
 dispatched to investigate a fire at Monica Bissell's apartment.  
 l) Investigator Kenny obtained information from fire fighters and law enforcement agents,  
 and then took a statement from Ms. Bissell.  
 m) Investigator Kenny subsequently had contact with the defendant at three different  
 locations: near Investigator Kenny's Car, at the defendant's car, and at unit # K405. The  
 first contact involved taking a recorded statement from the defendant near Investigator  
 Kenny's car just before 8:00 a.m.

WRITTEN FINDINGS OF FACT AND  
 CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
 SUPPRESS THE DEFENDANT'S STATEMENT(S) - 2

Daniel T. Satterberg, Prosecuting Attorney  
 WS54 King County Courthouse  
 516 Third Avenue  
 Seattle, Washington 98104  
 (206) 296-9000, FAX (206) 296-0955

- 1 n) Investigator Kenny did not advise the defendant of his Constitutional rights before taking  
2 the recorded statement.  
3 o) Investigator Kenny did not pat down the defendant or handcuff him before taking the  
4 statement.  
5 p) The defendant never asked to speak to a lawyer, nor did he indicate he wanted to remain  
6 silent.

7 2. THE DISPUTED FACTS;

- 8 a) Investigator Kenny and the defendant gave different testimony regarding the other details  
9 of the three encounters.  
10 b) Investigator Kenny testified that the defendant approached him, saying, "I heard you  
11 were looking for me." After identifying the defendant, Investigator Kenny asked the  
12 defendant if he'd be willing to give a recorded statement and the defendant agreed.  
13 c) Investigator Kenny testified that the interview took place outside Investigator Kenny's  
14 truck.  
15 d) The defendant testified that he was leaving for work when an unknown Sheriff's deputy  
16 stopped him at his car and told him that an investigator was looking for him in connection  
17 to the fire.  
18 e) The defendant testified that the deputy told him he had no choice and he had to get in the  
19 backseat of the deputy's car.  
20 f) The defendant testified that the deputy did not pat him down, and drove him to see  
21 Investigator Kenny, where the defendant gave the recorded interview.  
22 g) Investigator Kenny testified that the next time he saw the defendant was at around 9:30  
23 a.m., when Investigator Kenny and his supervisor, Craig Muller, saw the defendant  
24 sleeping in his car parked outside the K building.  
25 h) Investigator Kenny testified that he parked his truck near the defendant's car. Although  
26 Investigator Kenny's truck was partially blocking the defendant's car, the defendant  
27 would have had enough room to back out of his parking spot.  
28 i) Investigator Kenny testified that they knocked on the defendant's window and asked if  
29 they could look in his trunk. The defendant rolled down the window and handed  
30 Investigator Kenny the key. Investigator Kenny found no evidence in the defendant's  
31 trunk.  
32 j) Investigator Kenny testified that they then asked the defendant if they could look at his  
33 shoe collection. The defendant agreed and invited them up to his apartment, asking them  
34 to wait outside.  
35 k) Investigator Kenny testified that they asked the defendant if he had any red high top  
36 shoes, but the defendant did not. At the Investigator's request, the defendant brought out  
37 a pair of shoes for them to examine.  
38 l) Investigator Kenny testified that they never threatened the defendant or displayed their  
39 guns while talking to the defendant.  
40 m) Investigator Kenny testified that they never used any racial epithet when talking to the  
41 defendant.

42 WRITTEN FINDINGS OF FACT AND  
43 CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
44 SUPPRESS THE DEFENDANT'S STATEMENT(S) - 3

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

- 1 n) The defendant testified that he returned to his apartment after giving his recorded
- 2 statement, and the second time he saw Investigator Kenny was when Investigator Kenny
- 3 knocked on his door.
- 4 o) The defendant testified that when he answered the door, Investigator Kenny propped the
- 5 door open with his foot and asked to see his shoes.
- 6 p) The defendant testified that when he asked to see a warrant, Investigator Kenny pulled
- 7 out his gun and said something to the effect of, "I'm sick of you niggers messing with our
- 8 white women."
- 9 q) The defendant testified that he then showed Investigator Kenny the shoes and
- 10 Investigator Kenny left.
- 11 r) The defendant testified that the next time he saw Investigator Kenny was when the
- 12 defendant was in his car, preparing to leave the apartment complex.
- 13 s) The defendant testified that Investigator Kenny and his partner blocked in his car with
- 14 their truck and demanded to look in his trunk.
- 15 t) The defendant testified that Investigator Kenny's partner pulled out a gun and again said
- 16 something to the effect of, "You niggers are messing with our white women."
- 17 u) The defendant testified that Investigator Kenny's partner ripped the key off the
- 18 defendant's finger and searched the trunk.

11 3. CONCLUSIONS AS TO THE DISPUTED FACTS:

- 12 a) Investigator Kenny's testimony regarding the events of August 30, 2014 was credible.
- 13 b) The defendant's testimony regarding the events of August 30, 2014 was not credible.

15 4. CONCLUSIONS OF LAW AS TO THE ADMISSIBILITY OF THE DEFENDANT'S STATEMENT(S):

16 a. ADMISSIBLE IN STATE'S CASE-IN-CHIEF

17 The following statement(s) of the defendant is/are admissible in the State's case-  
 18 in-chief:

19 Statements made to Deputy Nishimura on August 29, 2014.

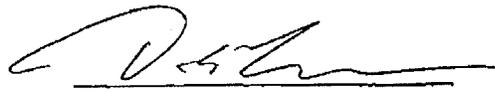
20 Statements made to Investigator Kenny on August 30, 2014, including the recorded  
 21 interview.

22 This/These statement(s) is/are admissible because Miranda was not applicable because  
 23 the defendant was not under arrest or in custody at the time that he spoke to Deputy Nishimura.

1 Likewise, the defendant was not under arrest or in custody during the times that he spoke with  
2 Investigator Kenny. The defendant was free to leave at any time and the statements that he made  
3 were given voluntarily.

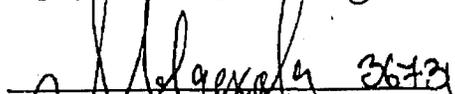
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5 In addition to the above written findings and conclusions, the court incorporates by  
6 reference its oral findings and conclusions.

7 Signed this 16 day of March, 2016.

8   
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10 JUDGE

11 Presented by:

12  38720  
13 Deputy Prosecuting Attorney

14  36721  
15 Attorney for Defendant

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24 WRITTEN FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON CrR 3.5 MOTION TO  
SUPPRESS THE DEFENDANT'S STATEMENT(S) - 5

Daniel T. Satterberg, Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000, FAX (206) 296-0955

## **APPENDIX B**

FILED

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KING COUNTY  
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CASE NUMBER: 14-1-05869-8 SEA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

OTIS BRYANT, JR,

Defendant.

No. 14-1-05869-8 SEA

DECLARATION OF DEPUTY  
PROSECUTING ATTORNEY

I, the undersigned, hereby declare that I am 18 years of age, I am competent to testify in a court of law, and I am familiar with the facts contained herein:

1. I am a Senior Deputy Prosecuting Attorney with the King County Prosecutor's Office.
2. I was the trial prosecutor in the above-captioned case.
3. Prior to sentencing, I created a draft set findings of fact and conclusions of law, pursuant to CrR 3.5.
4. Prior to sentencing, trial defense counsel moved to withdraw, filing a sealed letter in support of his motion. Ms. Evgeniya Mordekhova was appointed as new counsel. In the course of preparing for sentencing with new counsel, I neglected to send proposed CrR 3.5 findings to Ms. Mordekhova.

DECLARATION - 1

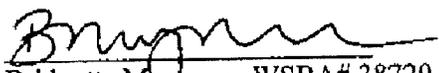
Daniel T. Satterberg, Prosecuting Attorney  
Criminal Division  
W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104-2385  
(206) 477-9497 FAX (206) 205-0924

- 1 5. On February 5, 2016, I received an email from my office's appellate unit, informing me that
- 2 findings of fact and conclusions of law could not be located in the electronic court record. I was
- 3 in trial at the time and was not able to take immediate action.
- 4 6. On March 1, 2016, I formatted the findings that I had originally drafted.
- 5 7. On March 2, 2016, I sent my proposed findings, as well as the transcript from the CrR 3.5
- 6 hearing to Ms. Mordekhova. We did not discuss the pending appeal.
- 7 8. On March 16, 2016, Ms. Mordekhova returned told me that she agreed with the proposed
- 8 findings and sent a signed copy to me.
- 9 9. On March 16, 2016, I presented the signed findings and conclusions to the Honorable Dean
- 10 Lum. The findings were signed by the Court and entered on March 17, 2016.
- 11 10. I have not reviewed the appellate file or any documents related thereto in the above-
- 12 captioned case. I have not spoken with anyone regarding the appellate issues being raised in
- 13 the above-captioned case. I have no knowledge of any appellate issue being raised in this
- 14 matter.

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Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct to the best of my knowledge and belief.

Signed and dated by me this 17 day of March, 2016, at Seattle, Washington.

  
Bridgette Maryman, WSBA# 38720  
Senior Deputy Prosecuting Attorney

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16 MAR 22 PM 1:44

KING COUNTY  
SUPERIOR COURT CLERK  
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CASE NUMBER: 14-1-05869-8 SEA

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

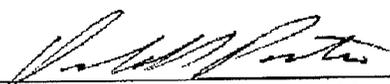
STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff, ) No. 14-1-05869-8 SEA
	)	
vs.	)	
	)	SUPPLEMENTAL DESIGNATION
OTIS BRYANT, JR,	)	OF CLERK'S PAPERS OR
	)	EXHIBITS
	)	
	)	Defendant. ) COA NO. 73363-0-I
	)	
	)	

To: The Superior Court Clerk

Please prepare and transmit to the Court of Appeals, Division I, the following documents and exhibits:

<u>Sub No. or Exhibit No.</u>	<u>Description of Document/Exhibit</u>	<u>Date Filed or Admitted</u>
Sub # 116	Findings of Fact and Conclusions of Law	3/17/16
Sub # 117	Declaration of Bridgette Maryman	3/18/16

Dated this 22 day of March, 2016.

  
 \_\_\_\_\_  
 Donald J. Porter, WSBA # 20164  
 Senior Deputy Prosecuting Attorney  
 Attorneys for Plaintiff

SUPPLEMENTAL DESIGNATION  
OF CLERK'S PAPERS OR EXHIBITS  
TO BE SENT TO COURT OF APPEALS - 1

Daniel T. Satterberg, Prosecuting Attorney  
 CRIMINAL DIVISION  
 W554 King County Courthouse  
 516 Third Avenue  
 Seattle, WA 98104-2385  
 (206) 477-9497 FAX (206) 205-0924

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Christopher H. Gibson, containing a copy of the Supplemental Designation of Clerk's Papers or Exhibits, in STATE V. OTIS BRYANT, JR., Cause No. 73363-0-1, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Done in Seattle, Washington

Date : March 22, 2016

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Christopher H. Gibson, containing a copy of the Brief of Respondent, in STATE V. OTIS BRYANT, JR., Cause No. 73363-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Done in Seattle, Washington

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Date : March 28, 2016