

FILED
Court of Appeals
Division I
State of Washington
8/31/2021 2:07 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
9/1/2021
BY ERIN L. LENNON
CLERK

SUPREME COURT NO. 100155-0

NO. 80779-0-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GARVER,

Petitioner.

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

The Honorable Eric Lucas, Judge

PETITION FOR REVIEW

CHRISTOPHER H. GIBSON
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
<i><u>INTRODUCTION</u></i>	1
A. <u>IDENTITY OF PETITIONER</u>	3
B. <u>COURT OF APPEALS DECISION</u>	3
C. <u>REASON WHY REVIEW SHOULD BE GRANTED</u>	3
D. <u>STATEMENT OF THE CASE</u>	4
E. <u>ARGUMENTS</u>	12
1. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT’S DECISION IN <u>STATE V. ROLAX</u> .	12
2. THIS COURT SHOULD GRANT REVIEW IN ORDER TO PROVIDE GUIDANCE TO THE LOWER COURTS ON APPLICATION OF THE CONSTITUTIONALLY- BASED “APPEARANCE OF FAIRNESS” DOCTRINE.	14
F. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Eaton</u> 82 Wn. App. 723, 919 P.2d 116 (1996).....	14
<u>State v. Garver</u> No. 8-779-0-I (Slip Op. filed June 7, 2021).....	3
<u>State v. Madry</u> 8 Wn. App. 61, 504 P.2d 1156 (1972).....	17
<u>State v. Rolax</u> 104 Wn.2d 129, 702 P.2d 1185 (1985).....	3, 12, 13, 14
<u>State v. Schoel</u> 54 Wn. 2d 388, 341 P.2d 481 (1959).....	13
<u>State v. Smith</u> 68 Wn. App. 201, 842 P.2d 494 (1992).....	14
<u>State v. Witherspoon</u> 60 Wn. App. 569, 805 P.2d 248 (1991).....	14
 <u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 3.5.....	11
CrR 6.1.....	1, 11, 12, 13, 17
RAP 13.4.....	3, 14, 17
U.S. Const. Amend. VI.....	16, 17
Wash. Const. Art. I, § 22.....	16, 17

INTRODUCTION

Petitioner Anthony Garver was convicted by bench trial of first degree murder. As part of its oral verdict the court relied on information it learned about blood spatter evidence in other cases to self-interpret the blood spatter evidence at Garver's trial and relied on it to find him guilty.

On appeal, Garver challenged the trial court's reliance on what it learned about interpreting blood splatter evidence in other cases to find him guilty, arguing it violated his constitutional rights to due process and confrontation. Garver also challenged the trial court's failure to file written findings of fact and conclusions of law, as required by CrR 6.1(d).¹ Garver notified the prosecution of the missing written findings and conclusions several weeks before filing his opening brief.

Approximately one month after Garver filed his opening brief the missing findings and conclusion were filed. Notably absent was any reference to the trial court's reliance on its interpretation of the blood spatter evidence. Thereafter, the prosecution filed a response brief asserting that the trial court's written findings and conclusions supersede its oral findings

¹ CrR 6.1(d) provides:

Trial Without Jury. In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusion of law shall be separately stated. The court shall enter such findings of fact and conclusion of law only upon 5 days' notice of presentation to the parties.

and conclusion, and that the absence of any specific reference to blood spatter similar to that in the court's oral verdict cured any error.

Garver filed a reply brief arguing the omission from the late-filed written findings of fact and conclusions of law of the trial court's self-interpretation of the blood spatter evidence, even if not done purposefully to defeat Garver's appeal, violates the appearance of fairness doctrine.

The Court of Appeals agreed it is improper to rely on matters outside the record but concluded there was no error here because the written findings and conclusion cured any error in the trial court's oral ruling. Although the Court acknowledges Garver raised an appearance of fairness issue, it failed to directly address it, concluding only that Garver had failed to demonstrate the written findings and conclusions were purposefully tailored to defeat his claims on appeal. Left unresolved by the Court of Appeals, however, is whether the discrepancy between the written or oral rulings violated the appearance of fairness doctrine, under which a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.

A. IDENTITY OF PETITIONER

Petitioner Anthony Garver, appellant below, asks this Court to review the decision of the Court of Appeals referenced below.

B. COURT OF APPEALS DECISION

Garver seeks review of the Court of Appeals decision in State v. Garver, No. 8-779-0-I (Slip Op. filed June 7, 2021). A copy of the slip opinion subsequent ruling (entered August 3, 2021) denying Garver's motion to reconsider are attached a Appendices A & B, respectively.

C. REASON WHY REVIEW SHOULD BE GRANTED

Review is warranted under RAP 13.4(b) (1) because the decision conflicts with this Court's decision in State v. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), because it failed to address all of the issues raised by Garver on appeal. Review is also warranted under RAP 13.4(b) (3) & (4) because the decision involves a significant question of law under the state and federal constitutions and an issue of substantial public interest that should be determined by this Court. Specifically, in the context of an appealed bench trial, does omitting a key oral factual finding from the required written findings of fact and conclusions of law, entered only after the opening appellate brief was file, a brief which relied on the omitted the key oral factual finding as a basis to reverse, violate the constitutionally-based appearance of fairness doctrine?

D. STATEMENT OF THE CASE

The Snohomish County Prosecutor charged Anthony Garver with first degree murder with a deadly weapon. CP 214-21, 303-04. The prosecution alleged Garver tied Phillipa S. Evans-Lopez to a bed, stabbed her 24 times, slit her throat, and left her to die. CP 305-310. Garver waived his right to a jury trial. CP 140; 8RP 1-5.² A bench trial was held before the Honorable Judge Eric Z. Lucas. 9RP 117. The following evidence was adduced at trial:

On the morning of June 17, 2013, Phillipa Lopez-Evans was found dead at a house in the Lake Stevens area by Kayla Hingson and her father, Nate Hingson. 9RP 230, 237, 387, 528, 883. They called 911. 9RP 388.

When law enforcement arrived, they found Lopez-Evans tied spread eagle to a bed face up. Her body was clothed, and a shirt was tied around her head. 9RP 886. Her throat had been slit and it appeared she had been stabbed numerous times in the torso. 9RP 887, 1193. A team from the Washington State Patrol Crime Laboratory (WSPCL) was summoned to help process the scene for evidence. 9RP 1585-87.

² There are twenty-eight volumes of verbatim report of proceedings reference herein as follows: **1RP** – February 13, 2014; **2RP** – May 12, 2014; **3RP** – May 15, 2014; **4RP** – June 15, 2015; **5RP** – February 13, 2017; **6RP** -March 29 & July 2, 2019; **7RP** – April 8, 2019; **8RP** – September 27, 2019 and **9RP** – consecutively paginated twenty-volume set for the dates of October 1-, 7-11, 14-18, 21-22, 24-25, 29 & November 6, 2019.

The WSPCL team determined the home's master bedroom, where Lopez-Evans' body was found, was the primary focus of the investigation because it was the room where the most blood was found. 9RP 1589. As part of that process the team documented and classified the blood spatter evidence in the master bedroom, which can provide some basis for determining what occurred in the room, such as what direction the blood came from based on the shape of droplets that hit a surface. 9RP 1611, 1626. The team was able to conclude the blood spatter evidence indicated Lopez-Evans was bound to the bed when most of the blood-letting occurred. 9RP 1623-26, 1631. And blood spatter on the headboard of the bed Lopez-Evans was tied to and the wall behind the headboard indicated the spatter was deposited in a direction away from Lopez-Evans' body. 9RP 1649-57. Finally, the blood spatter on Lopez-Evans' arm showed it was deposited in a left to right direction based on the shape of the droplets. 9RP 1692.

Snohomish County Medical Examiner Dr. Norman Thiersch also view Lopez-Evans' body as it was found on the scene. 9RP 435-36. Dr. Thiersch, however, did not testify about or offer any opinion about the blood spatter evidence.

Dr. Thiersch did conduct an autopsy on Lopez-Evans' body. 9RP 435. He identified 24 stab wounds and six cuts on her body and categorized her death as a homicide. 9RP 488. He could not, however, offer any

opinion about the position of her assailant, or whether that person was left or right handed. 9RP 496-97.

Based on her core temperature midday on June 18, 2013, and the size of the maggots in her body, Dr. Thiersch opined she died between two and four days before he arrived on scene. 9RP 487-88. During the autopsy, Dr. Thiersch collected oral, anal, and vaginal swabs from Lopez-Evans' body. 9RP 554, 571.

In the course of processing the scene the WSPCL team searched for DNA. On June 27, 2013, one sample collected from the ligature binding Lopez-Evans' left wrist to the bed produced DNA that was matched to Garver. 9RP 2431-33.

The WSPCL also tested the oral, anal, and vaginal swabs collect by Dr. Thiersch for DNA. 9RP 2436. The oral swabs produced no useful information. 9RP 2455. The vaginal swab, however, revealed Garver's sperm was present. 9RP 2455-56. Sperm was also found on the anal swab, but apparently not analyzed for DNA. 9RP 2457. The WSPCL technician who found the sperm in the anal swab noted they still had partial tails, which usually detach within 1-3 hours after being deposited. 9RP 2458. The technician theorized the tail may not have fallen off because of Lopez-Evans' death but did not elaborate. 9RP 2458-59.

Based on the discovery of the DNA on the binding, law enforcement focused its attention on finding and arresting Garver, which was accomplished without incident on July 2, 2013, although at the time Garver claimed he was his brother, Derek Garver. 9RP 908, 913, 911, 1060-61, 1075, 1231.

Garver agreed to be interviewed following his arrest. 9RP 1950. The interview was video/audio recorded and played for Judge Lucas at trial, with the understanding he would only take into consideration those portions of the interview not crossed out on the accompanying transcript of the interview. 9RP 1955-57, 1963; Exs. 469 (video) & 472 (transcript). Garver denied having any part in Lopez-Evans' death. Exs. 469 & 472.

At the time of Garver's arrest he was in possession of a folding knife. 9RP 915-16. It was analyzed by the WSPCL team. One analysis involved trying to determine if the knife had been used to cut the bindings that held Lopez-Evans to the bed. The team's toolmark expert concluded the knife may have cut some of the bindings, but not all. 9RP 2348-49, 2374-76.

The knife also tested positive for blood at the hinge area. 9RP 2461-62. The knife was then swabbed for DNA. 9RP 2463. Analysis of the DNA swabs showed DNA present from both Garver and Lopez-Evans. 9RP

2464-65. The blood in the hinge area was determined to be from Lopez-Evans. 9RP 2494, 2597.

Garver was the last witness to testify at trial. Garver denied killing Lopez-Evans. 9RP 2714 He said he met Lopez-Evans at some point at a bus stop. 9RP 2704. Sometime later, probably in late May or early June, 2013, Lopez-Evans gave Garver a pocketknife, the same knife law enforcement later found Lopez-Evans' blood on. 9RP 2713-14, 2749-50.

On June 14, 2013, Garver and Lopez-Evans met at a McDonald's restaurant in Everett to discuss credit card fraud schemes. 9RP 2703-06. Lopez-Evans wanted Garver's help converting credit cards into cash. Lopez-Evans offered to provide him with a better to computer to accomplish this goal. 9RP 2705. Video from the restaurant confirms Garver and Lopez-Evans were there together in the early morning hours of June 14, 2013. 9RP 1895; Ex. 115A.

Garver recalled leaving the restaurant with Lopez-Evans and driving to a house "in an area around Evergreen." 9RP 2706. Lopez-Evans smoked some "meth" and then she and Garver had sex. 9RP 2706-07. A short time later they went to Walmart. 9RP 2707. Surveillance video from the Walmart confirms Garver and Lopez-Evans arrived in a SUV at about 4:15 a.m., entered the store and did not leave until 5:55 a.m. 9RP 1463-65; Ex. 116.

Once outside the store, Garver and Lopez-Evans were approached by Nicole Larsen, who knew Lopez-Evans from a stint in jail together. 9RP 1496, 2708. All three sat in the SUV for about an hour and discussed Lopez-Evans' plan to work with Garver on committing identity theft. 9RP 1465, 1501, 2708.

Larsen eventually left on her own and Garver and Lopez-Evans went to a McDonalds in Lake Stevens. 9RP 2709. Video from the Lake Stevens McDonalds and a nearby bank confirm Garver and Lopez-Evans arrived at the restaurant in the SUV at about 7:25 a.m. and went inside together. 9RP 1064; Exs. 110 & 111.

Garver recalled that when they left the Lake Stevens McDonalds, they went to a house in the area so Lopez-Evans could retrieve something. 9RP 2709. Both of them went inside the house. 9RP 2709-10. A nearby neighbor confirmed seeing a man and woman at the house at about 8:30 a.m. on June 14, 2013. 9RP 1288.

While at the house Lopez-Evans gave Garver the computer she had promised him for their credit card fraud scheme. 9RP 2711. They left the house together and Lopez-Evans dropped Garver off in Everett. 9RP 2712. They planned to meet up later at the "house in Evergreen," but when Garver went there as planned, Lopez-Evans was not there. He never saw her again. 9RP 2712-13.

The defense rested at the conclusion of Garver's testimony, and the prosecution did not pursue a rebuttal case. 9RP 2757. The parties presented their concluding arguments to Judge Lucas, and then the matter was recessed for several days before Judge Lucas delivered his verdict. 9RP 2759-2850.

On October 29, 2019, Judge Lucas gave a lengthy oral ruling finding Garver guilty as charged that addressed various pertinent categories of issues and evidence, including the timeline, witness credibility, intent, opportunity, DNA, the pocketknife, sperm, and blood spatter. 9RP 2853-95. With regard to the blood spatter evidence, Judge Lucas opined:

In Exhibit 193, blood spatter in the master bedroom is mapped by the technicians. When you look at this exhibit it is clear that the pattern goes up and to the right, as you view it from the foot of the bed.

One of the things you get to know in doing this work is that physical damage is often inflicted from the dominant hand. So the person was -- so if the person was right handed leaning over the body, and swiped the throat with this amount of force, you would expect the blood spatter to go up and to the left. But it doesn't. It goes up and to the right.

When I was watching the video of Anthony signing his interview statement, I noticed that he signed left handed. The blood spatter pattern supports an inference that the assailant was left handed.

Now, any one of these categories that I discussed may be insufficient to tie Anthony to the crime scene; however, when taken all together in totality, these markers clearly identify Anthony and tie him to the crime scene as the perpetrator. This collection of factors is indeed unique and identified him as the assailant.

9RP 2886-87.

Garver was sentenced to 385 months of incarceration and appealed thereafter. CP 4-19, 20-34; 9RP 2920.

On appeal, Garver argued the trial court improperly relied on evidence outside the record (blood spatter interpretation) to find him guilty and failed to enter the written findings of fact and conclusions of law as required by CrR 3.5(c) and CrR 6.1(d). Brief of Appellant (BOA), et seq.

Despite several weeks advance notice to the trial court and prosecutor that the written findings of fact and conclusions of law required under CrR 6.1(d) and CrR 3.5(c) had not been filed, they were still not filed by the time Garver filed his opening brief on July 27, 2020. CP 317-320. Once they were filed on August 17, 2020, the CrR 6.1(d) findings and conclusions omitted any reference to blood spatter analysis that the trial court had relied on to find Garver guilty. CP 312-20.

In a reply brief, Garver argued the tardy CrR 6.1(d) findings and conclusions violate the appearance of fairness doctrine. Reply Brief of Appellant (RBOA), et seq. Garver claimed that even if the findings and conclusion had not been purposefully tailored to defeat his argument on appeal, they at least give rise to an appearance of unfairness because the trial court clearly relied on its interpretation of the blood spatter evidence to

find Garver guilty, yet the late filed finding and conclusion omit any reference to blood spatter evidence whatsoever. Id.

The Court of Appeals affirmed Garver judgment and sentence. Appendix A. As to Garver's claim the tardy CrR 6.1(d) findings and conclusions violate the appearance of fairness doctrine, the Court never specifically address it. Instead, the Court treated the argument as a claim that the prosecution had *intentionally tailored* them to defeat his claim on appeal. Appendix at 5-7.

Garver filed a Motion to Reconsider, noting the Court's failure to address Garver's claim that the tardy findings and conclusions violate the appearance of fairness doctrine, even if the omission of the blood spatter evidence was not intentional. Motion to Reconsider, et. seq. That motion was denied without explanation. Appendix B.

E. ARGUMENTS

1. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS DECISION CONFLICTS WITH THIS COURT'S DECISION IN STATE V. ROLAX.³

While appellate review is merely a privilege under the federal constitution, in Washington, it is a right. State v. Schoel, 54 Wn. 2d 388,

³ 104 Wn.2d 129, 702 P.2d 1185 (1985).

392, 341 P.2d 481 (1959). The Washington Constitution guarantees criminal defendants “the right to appeal in all cases.” CONST. art. I, § 22. Included in this right to appeal is the right to have the appellate court consider the merits of all issues raised on appeal. State v. Rolax, 104 Wn.2d 129, 134-35, 702 P.2d 1185 (1985).

Here, Garver made two claims regarding the tardy CrR 6.1(d) findings and conclusions. First, Garver argued the findings were tailored to defeat his argument on appeal that the trial court relied on evidence outside the record to convict. RBA at 1-3. The Court rejected that claim. Appendix at 6.

But Garver also argued that even if the findings were not tailored to defeat his claim on appeal, there was at least an appearance of unfairness. That unfairness arises because of the gross discrepancy between the trial court’s oral remarks, which gave great significance to the fact that it had concluded the assailant was left handed and so was Garver, and its written findings and conclusion prepared by a prosecutor nearly a year after the trial, which omit any reference to the trial court’s reliance on evidence outside the record. ROA 3-5.

The Court of Appeals refused to address this aspect of Garver’s appeal in its current decision. Appendix B. That refusal conflicts with this

Court's decision in Rolax. Therefore, this Court should grant review under RAP 13.4(b)(1).

2. THIS COURT SHOULD GRANT REVIEW IN ORDER TO PROVIDE GUIDANCE TO THE LOWER COURTS ON APPLICATION OF THE CONSTITUTIONALLY-BASED "APPEARANCE OF FAIRNESS" DOCTRINE.

When the required findings are entered after an appellant has filed the opening brief, the appellant may have a basis to argue they give rise to an appearance of unfairness and/or that they were tailored to meet the errors asserted by the appellant on appeal. State v. Smith, 68 Wn. App. 201, 209–10, 842 P.2d 494 (1992). When tardy written findings track the oral opinion of the court with regard to the issues material to the appeal there is no appearance of unfairness. State v. Eaton, 82 Wn. App. 723, 727, 919 P.2d 116 (1996). But if the findings fail to track the oral ruling and implicate issues raised in the opening brief, there is an appearance of unfairness that should compel reversal. State v. Witherspoon, 60 Wn. App. 569, 572, 805 P.2d 248 (1991).

Here, the court's tardy written findings and conclusion do not track the court's oral ruling. The trial court's oral ruling shows it improperly relied on evidence about blood spatter interpretation introduced in other cases - which is necessarily outside the trial record in Garver's trial - to find him guilty. 9RP 2886-87.

Yet the late-filed written findings and conclusions make no reference to blood spatter evidence, which hand Garver signed his statement with or any evidence that supported interpreting that evidence the way the court had in its oral ruling. CP __ (sub no. 193, supra). Even assuming the deputy prosecutor who prepared the tardy findings and conclusions did not first review Garver's opening brief, it is not unreasonable to assume the deputy recognized the impropriety of the court's remarks and therefore omitted them from the written findings and conclusions. And even if that deputy did not make a conscious decision to omit that portion of the trial court's oral ruling from the tardy written ruling, there is at least an appearance of unfairness arising from the significant discrepancy between the court's oral ruling and the subsequent written findings and conclusions.

The trial court's reliance on evidence about how to interpret blood spatter evidence admitted in other cases was clearly improper. See Appendix A at 6 (noting reliance on matters outside the record would constitute acting "on untenable ground"). It was also prejudicial to Garver.

By relying on its personal knowledge about how to interpret blood spatter evidence obtained from prior cases, the court effectively became a witness for the prosecution; a witness that was never subject to cross examination by the defense. This violated the ER 605 prohibition on judged being a witness in a matter over which they presides. It also deprived

Garver of his constitutional right to confront the witnesses against him. Wash. Const. Article 1, § 22; U.S. Const. Amend. VI.

The trial court's reliance on matters outside the record was not harmless. Garver admitted spending time with Evans-Lopez but denied killing her or knowing how she died. 9RP 2702-57. The issue at trial was identity, and as noted in Garver's opening brief there were several potential suspects. BOA at 16-18. As the trial court's oral decision notes, "[t]his case is complex in many ways and has a host of difficult facts to digest." 9RP 2857. The court noted the evidence presented identified several possible killers, including several who testified at trial on behalf of the prosecution. 9RP 2862-2870. As the trial court's oral decision specifically noted, "any one of these categories that I discussed may be insufficient to tie Anthony to the crime scene; however, when taken all together in totality, these markers clearly identify Anthony and tie him to the crime scene as the perpetrator. This collection of factors is indeed unique and identified him as the assailant." 9RP 2887.

This shows it was a close case for Judge Lucas to decide, so close that he had to rely on evidence outside the record to make a final decision. An appearance of unfairness is inescapable under these circumstances and therefore the Court of Appeals should have reversal of Garver's judgment and sentence.

Although the Court of Appeals failed to address Garver's appearance of unfairness claim, this case still involves significant question of law under the state and federal constitutions because it raises an issue that implicates the 6th Amendment and Wash. Const. Article 1, § 22; U.S. Const. Amend. VI. Review is therefore warranted under RAP 13.4(b)(3).

This case also raises an issue of substantial public interest because the integrity of our court is crucial to maintaining the public's confidence in the administration of justice through the courts. State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156, 1161 (1972). The written CrR 6.1(d) finding of fact and conclusions of law here stray so far from the trial court's oral decision that it is just "as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." Id. Review is therefore warranted under RAP 13.4(b)(4).

F. CONCLUSION

For the reason stated, this Court should grant review.

DATED this 31st day of August, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC



CHRISTOPHER GIBSON, WSBA No. 25097
Office ID No. 91051
Attorneys for Appellant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY EDYLE GARVER,

Appellant.

No. 80779-0-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — Garver appeals from a judgment and sentence for first degree murder with a deadly weapon. First, he asserts the trial court made factual conclusions based on matters outside the trial record. Next, he argues the written findings of fact and conclusions of law filed after he filed his opening brief give rise to an appearance of unfairness. We affirm.

FACTS

On June 17, 2013, Phillipa Evans-Lopez was found dead in a Lake Stevens home. The medical examiner determined she had died by homicide a couple of days before her body was discovered. She had been bound to a bed and had 24 stab wounds to her chest. Her throat had been slashed.

The Washington State Patrol Crime Laboratory (WSPCL) sent a team to help process the scene for evidence. Blood spatter evidence indicated that Evans-

Lopez had been tied to the bed when most of the blood-letting occurred. It also indicated the blood spatter was deposited in a left to right direction.

The WSPCL team located deoxyribonucleic acid (DNA) and semen on Evans-Lopez's body that were a match for Anthony Garver. Garver's picture matched video surveillance from a McDonald's restaurant of a male seen with Evans-Lopez early in the morning on June 14, 2013. A witness later encountered Evans-Lopez and Garver at Walmart between five and seven in the morning. Evans-Lopez told the witness she and Garver were going to her house to get Garver a laptop. Garver had told Evans-Lopez that he was good with computers and could help her with identity theft.

On July 2, 2013, Garver was arrested at the McDonald's on an existing warrant. He agreed to a recorded interview that was transcribed and admitted into evidence.

When arrested, Garver possessed a knife. DNA on the knife blade matched both Garver and Evans-Lopez. He also possessed a laptop used by Evans-Lopez. It contained documents related to killing someone with a knife and internet searches of a murder in Lake Stevens.

The State charged Garver with first degree murder with a deadly weapon. Garver waived his right to a jury trial. A CrR 3.5 hearing was held to determine the admissibility of Garver's postarrest statements to law enforcement. The statements were found admissible. No written findings of fact or conclusions of law were entered.

At the bench trial, the State entered blood spatter evidence, including exhibit 193, a photograph of Evans-Lopez's mattress and headboard. It did not offer expert witness testimony on how to interpret that exhibit.

On October 29, 2019, the trial court gave an oral ruling on the case. The trial court's remarks included the following statement,

In Exhibit 193, blood spatter in the master bedroom is mapped by the technicians. When you look at this exhibit it is clear that the pattern goes up and to the right, as you view it from the foot of the bed.

One of the things you get to know in doing this work is that physical damage is often inflicted from the dominant hand. So the person was -- so if the person was right handed leaning over the body, and swiped the throat with this amount of force, you would expect the blood spatter to go up and to the left. But it doesn't. It goes up and to the right.

When I was watching the video of Anthony signing his interview statement, I noticed that he signed left handed. The blood spatter pattern supports an inference that the assailant was left handed.

The trial court found Garver guilty as charged. Garver appeals.

DISCUSSION

In his opening brief, Garver argues that in opining on the blood spatter evidence, the trial court made factual conclusions based on matters outside the trial record. He argues the remarks constituted testimony under ER 605 and were not subject to judicial notice under ER 201. He further argues that remand is necessary to enter findings of fact and conclusions of law for both a hearing under CrR 3.5 to determine the admissibility of evidence and under CrR 6.1(d) after the bench trial.

I. Late Entry of Findings of Fact and Conclusions of Law

CrR 3.5(c) requires the court to enter written findings of fact and conclusions of law after the conclusion of hearings such as the hearing to determine the admissibility of Garver's postarrest statements to law enforcement. CrR 6.1(d) requires written findings of fact and conclusions of law be entered after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998).

After Garver filed his brief, written findings and conclusions were filed for both matters. Findings of fact and conclusions of law may be submitted and entered even while an appeal is pending if the defendant is not prejudiced by the belated entry of findings. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). This precludes the need to remand on the basis of their absence.

II. Omission of Oral Remarks from Written Findings and Conclusions

The written findings and conclusions for the bench trial do not include the challenged inference regarding blood spatter evidence. The State subsequently filed a brief arguing the written findings and conclusions under CrR 6.1(d) control and supersede the trial court's challenged oral inference regarding blood spatter.

A trial court's oral decision has no binding or final effect unless it is formally incorporated into the findings of fact, conclusions of law, and judgment. State v. Kilburn, 151 Wn.2d 36, 39 n.1, 84 P.3d 1215 (2004). An appellate court may consider a trial court's oral decision so long as it is not inconsistent with the trial court's written findings and conclusions. State v. Bryant, 78 Wn. App. 805, 812-13, 901 P.2d 1046 (1995). If an oral decision conflicts with a written decision, the written decision controls. Stiles v. Kearney, 168 Wn. App. 250, 258, 277 P.3d 9

(2012). An oral decision is “necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally incorporated into the findings, conclusions, and judgment.” Ferree v. Doric Co., 62 Wn.2d 561, 567, 383 P.2d 900 (1963).

It is presumed that a trial court does not consider inadmissible evidence when making its findings. State v. Gower, 179 Wn.2d 851, 856, 321 P.3d 1178 (2014). To overcome this presumption, the defendant must demonstrate that there is insufficient evidence to support the verdict, or that the trial court relied on impermissible evidence to make essential findings it would not have otherwise made. Id. The claimed error is prejudicial only if the outcome of the trial would have been materially affected had the error not occurred. State v. Ferguson, 100 Wn.2d 131, 137, 667 P.2d 68 (1983).

The blood spatter remarks were unnecessary to the judgment and the inference was not based on expert opinion presented at trial. But, the findings and conclusions do not incorporate these remarks. The written findings and conclusions control over any remarks made during the trial court’s oral decision. The remarks did not form a basis for the conclusions reached by the court.

III. Tailoring

Still, in his reply brief, Garver asserts the failure to include these oral remarks makes it appear as though they were tailored to address the main substantive issue raised in his appeal, creating at least an appearance of unfairness warranting reversal.

Absent a showing of prejudice or some indication that they have been tailored to address issues on appeal, the late entry of findings of fact and conclusions of law is not a ground for reversal. State v. Eaton, 82 Wn. App. 723, 727, 919 P.2d 116 (1996); overruled on other grounds by State v. Frohs, 83 Wn. App. 803, 811 n.2, 924 P.2d 384 (1996).

It is true that the written findings do not contain the contested remarks from the oral decision at the heart of Garver's appeal. But, Garver has not demonstrated that this omission was responsive to his briefing. As Garver contends, the inclusion of the remarks would have made an improper basis for the court's legal conclusions.

Further, had the court included the remarks, it would have been acting on untenable grounds by entering a factual finding unsupported by the record. See In re Marriage of Wicklund, 84 Wn. App. 763, 770 n.1, 932 P.2d 652 (1996) (noting the court acts on untenable grounds if its factual findings are unsupported by the record); State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (laying out the grounds by which a court abuses its discretion, including the factual findings being unsupported by the record). The finding would have been stricken, with the remaining factual findings to support the legal conclusions.

While Garver makes vague assertions that this was a close case, he assigns error to the fact that the omitted blood spatter inference was considered by the court in reaching its conclusions, not that the remaining findings were insufficient to support its conclusions.

Here, Garver's DNA and semen were found on Evans-Lopez's body. Video surveillance and witness testimony placed Garver with Evans-Lopez near the time of her death. DNA on Garver's knife blade matched both Garver and Evans-Lopez. He also possessed a laptop used by Evans-Lopez. It contained documents related to killing someone with a knife and internet searches of a murder in Lake Stevens. Proving the blood spatter evidence suggested the assailant was left-handed like Garver was unnecessary to support his conviction.

Garver has not demonstrated the findings and conclusions were inappropriately tailored. He has not demonstrated that he suffered any prejudice by the omission of the challenged remarks from the written findings. The omission of the oral remarks about blood splatter is not a reversible error.

We affirm.

Luppelwick, J.

WE CONCUR:

Brunson, J.

Mann, C.J.

APPENDIX B

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY EDYLE GARVER,

Appellant.

No. 80779-0-1

ORDER DENYING MOTION
FOR RECONSIDERATION

The appellant, Anthony Garver, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.


Judge

NIELSEN KOCH P.L.L.C.

August 31, 2021 - 2:07 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 80779-0
Appellate Court Case Title: State of Washington, Respondent v. Anthony Edyle Garver, Appellant
Superior Court Case Number: 13-1-01584-1

The following documents have been uploaded:

- 807790_Petition_for_Review_20210831140654D1470760_0703.pdf
This File Contains:
Petition for Review
The Original File Name was PFR 80779-0-I.pdf

A copy of the uploaded files will be sent to:

- Diane.Kremenich@co.snohomish.wa.us
- diane.kremenich@snoco.org
- shalloran@co.snohomish.wa.us

Comments:

Copy mailed to: Anthony Garver, 896492 Washington State Penitentiary 1313 N 13th Ave Walla Walla, WA 99362-

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Christopher Gibson - Email: gibsonc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20210831140654D1470760