

62861-5

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No. 62861-5-I

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

STATE OF WASHINGTON, Respondent,

v.

A.R., Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KYLE MOORE
Deputy Prosecutor
Attorney for Respondent
WSBA #34181**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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CLERK OF COURT
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. WHETHER THE SUPERIOR COURT WAS IN ERROR TO REVIEW THE TRIAL RECORD WITHOUT WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE TRIAL COURT, WHEN THE TRIAL RECORD WAS SUFFICIENT TO REACH A DECISION ON GUILT?
2. WHETHER THE SUPERIOR COURT WAS IN ERROR TO REVIEW THE TRIAL RECORD AND FIND A.R. GUILTY OF DISORDERLY CONDUCT UNDER A THEORY OF ACCOMPLICE LIABILITY WHEN THE SUPERIOR COURT HAS DE NOVO REVIEW OF THE CASE?

C. FACTS

1. Procedural facts

A.R. was charged with two counts of assault in the fourth degree and one count of disorderly conduct in Whatcom County Juvenile Court. CP 249-250. A.R. went to trial on September 30, 2008 in front of Commissioner Thomas Verge. RP 20-214. At the conclusion of the trial, A.R. was acquitted on both counts of assault in the fourth degree, but was convicted on the disorderly conduct charge. CP 241-248. A.R. sought revision of the verdict to the Whatcom County Superior Court. CP 231-240. Findings of fact and conclusions of law were not entered following the conviction of disorderly conduct on October 3, 2008 by the trial court.

The revision was heard before Judge Steven Mura on December 22, 2008. RP2 1-33. Judge Mura reviewed the trial record, and after brief argument by A.R.'s counsel and the State, Judge Mura found A.R. guilty of disorderly conduct under a theory of accomplice liability. RP2 1-33. Findings of fact and conclusions of law were entered by the superior court on March 5, 2009. CP 257-259.

D. ARGUMENT

1. THE SUPERIOR COURT DID NOT ERR BY REVIEWING THE COMMISSIONER'S ORAL RULING ON THE MOTION FOR REVISION.

At the conclusion of the trial, Commissioner Verge acquitted A.R. of two counts of assault due to the questionable credibility of all of the witnesses, excluding law enforcement, who testified. CP 182. However, Commissioner Verge ruled that A.R. was guilty of disorderly conduct, and found that she had challenged both victims with abusive language. CP 182. Findings of fact and conclusions of law were not entered after the finding of guilt on the disorderly conduct charge.

JuCr 7.11(c) and (d) mandate that the court shall state its findings of fact and enter its decision on the record, and that written findings and conclusions shall be entered in a case that is appealed.¹ Also, RCW 2.24.050 requires that when a party requests a revision to the superior

¹ JuCr 7.11(c) reads: **Decision on the Record.** The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

JuCr.7.11(d) reads: **Written Findings and Conclusions on Appeal.** The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

court, that the “revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner.”²

In State v. Charlie, the court dealt with a situation in which findings of fact or conclusions of law were not entered after the decision made by the court commissioner. State v. Charlie, 62 Wn.App.729, 815 P.2d 819 (1991). The case was revised, and findings of fact and conclusions of law were not entered by the superior court; instead, the superior court remanded the case back to the court commissioner for additional findings after ruling that some of the testimony during the trial was improper. Charlie, 62 Wn.App.729 at 730-31. The court ruled that both the court commissioner and superior court should enter findings of fact and conclusions of law; however, to justify reversal, “it must be shown that the absence or tardiness of findings and conclusions prejudiced the appellant.” Charlie, 62 Wn.App.729 at 733.

² RCW 2.24.050: Revision by court. All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court. Any party in interest may have such revision upon demand made by written motion, filed with the clerk of the superior court, within ten days after the entry of any order or judgment of the court commissioner. Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

In State v. Witherspoon, the trial court found a defendant guilty of robbery, however, did not enter findings of fact and conclusions of law. State v. Witherspoon, 60 Wn.App.569, 570, 805 P.2d 248 (1991). The Witherspoon court ruled that due to non-compliance with JuCR 7.11(d), the court must reverse, because the defendant would suffer obvious prejudice by remand due to that fact that the State could enter findings after the appellant had framed the issues in his brief, and that the defendant had been in custody during the appeal process. Witherspoon, 60 Wn.App.569, at 572.

In this case, the State concedes that findings of fact and conclusions of law should have been entered by the court commissioner to be reviewed by the superior court on revision. However, findings of fact and conclusions of law were entered by the superior court after reviewing the full transcript of the trial, which included an oral ruling by the court commissioner as to his findings and conclusions. CP 20-214. The superior court has de novo review over the case, and after a review of the trial records, made a ruling based upon the evidence that was presented during the trial.

A.R. cannot show that she had been prejudiced by the failure of the State to present findings of fact and conclusions of law to the

commissioner for signature. In Charlie, there had been no findings of fact or conclusions of law from neither the court commissioner, nor the superior court. Charlie, 62 Wn.App.729 at 731-33. In Witherspoon, no findings had been entered, and remand would have been unfair, since the State could have tailored the findings to address the issues presented by the defendant, and the defendant had been in custody. Witherspoon, 60 Wn.App.569, 570-571. In this case, A.R. has findings of fact and conclusions of law from the superior court in which to frame her appeal issues, and has not been in custody while waiting for the appeal process to move forward. Had the findings of fact and conclusions of law from the court commissioner been entered for review by the superior court, they would have been superseded by the superior court's findings, which this appeal rests upon. And finally, there had been no objection by A.R. on December 22, 2008 at the revision hearing before the superior court judge about the lack of findings for the court to consider. *See* 2RP 1-33. The State therefore argues that since no prejudice to A.R. has been shown, the remedy should not be reversal.

In superior court proceedings, CrR 3.5 and 3.6 require the court to make written findings of fact and conclusions of law if a hearing is

conducted.³ Failure to submit findings of fact and conclusions of law under CrR 3.5 and 3.6 constitute error, however, do not automatically bar appellate review. State v. Riley, 69 Wn.App.349, 352-53, 848 P.2d 1288 (1993), State v. Rakosky, 79 Wn. App. 229, 236, 901 P.2d 364 (1995); State v. Smith, 76 Wn. App. 9, 17, 882 P.2d 190 (1994), rev. den., 126 Wn.2d 1003 (1995); see also, State v. Holmes, 135 Wn. App. 588, 594, 145 P.3d 1241 (2006) (“court's failure to comply with CrR 3.5(c) is error, but the error is harmless if the court's oral findings are sufficient for appellate review of the issue”). “Although failure to submit written findings and conclusions pursuant to CrR 3.5 and 3.6 is error, such error is harmless where the trial court’s oral findings are sufficient to permit appellate review.” Riley, 69 Wn.App.349 at 352-53.

In this case, the superior court had sufficient information to make a determination as to whether to convict or acquit A.R. from the trial record without the written findings of fact and conclusions of law. The State would argue that not entering findings of fact and conclusions of law for

³ CrR 3.5 (c): Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

CrR 3.6 (b): Hearing. If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

the superior court to review, while error, is harmless error, and A.R.'s request for reversal or remand should be denied.

2. THE SUPERIOR COURT DID NOT ERR BY EVALUATING THE EVIDENCE AND FINDING A.R. GUILTY OF DISORDERLY CONDUCT AS AN ACCOMPLICE.

According to RCW 2.24.050, the superior court has de novo review over a court commissioner's ruling. "Such revision shall be upon the records of the case, and the findings of fact and conclusions of law entered by the court commissioner." RCW 2.24.050. The superior court has a duty to review the entire proceeding before the commissioner, as well as any findings made by the commissioner. In re Smith, 8 Wn.App.285, 287-88, 505 P.2d 1295 (1973). In Charlie, the court ruled that the superior court erred by remanding the case back to the court commissioner, because "the superior court's review of a court commissioner's findings and order is de novo on the record." Charlie, 62 Wn.App. 729 at 732, *citing* In re Smith, 8 Wn.App. 285, 288, 505 P.2d 1295 (1973). "This requires that the superior court determine its own facts based upon the record made before the commissioner, and/or conduct such further proceedings as in its discretion deemed necessary to resolve the matter." Charlie, 62 Wn.App.729 at 732.

A.R. cites In re Marriage of Moody, a case in which an appellant attempted to supplement the record with new evidence to support new issues during a revision hearing. In re Marriage of Moody, 137 Wn.2d 979, 991, 976 P.2d 1240 (1999). The superior court refused to consider the new evidence, and confined its review to the record that was before the court commissioner. Moody, 137 Wn.2d 979 at 991. The supreme court, in interpreting RCW 2.24.050, ruled, “generally, a superior court judge’s review of a court commissioner’s ruling, pursuant to a motion for revision, is limited to the evidence and issues presented to the commissioner.” Moody, 137 Wn.2d 979 at 992-93.

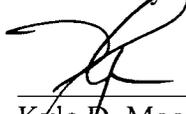
In this case, the superior court did not consider any new evidence, and was limited to the record that was before the court commissioner. While Commissioner Verge found A.R. guilty as a principal actor in the disorderly conduct charge, Commissioner Verge, had he seen fit, could have also found A.R. guilty as an accomplice to disorderly conduct. Judge Mura, after a review of the record, found sufficient evidence to convict A.R. as an accomplice to disorderly conduct. Given that the standard is de novo review, the superior court was proper in evaluating the record and making a decision based upon the evidence.

A.R. cites State v. Jackson to support the proposition that the court should refuse a theory of accomplice liability if not advanced by the prosecution. State v. Jackson, 137 Wn.2d 712, 976 P.2d 1229 (1999). However, Jackson can be distinguished from this case since the court found that accomplice liability, as written in the statute, did not encompass a duty to act, however, several criminal statutes did. State v. Jackson, 137 Wn.2d 712 at 724-25. The court ruled that since the State did not charge the defendant with the more specific criminal statutes, and since the State did not advance the theory that accomplice liability did in fact have a duty to act as the dissenting opinion favored, the trial court's accomplice liability jury instruction was improper. State v. Jackson, 137 Wn.2d 712 at 726. The court did not refuse, as A.R. suggests, to find accomplice liability where the issue was not advanced, argued, or briefed by the prosecution, but only that accomplice liability did not fit the circumstances of the case at hand.

E. CONCLUSION

For the reasons set forth above, the State respectfully requests that this court affirm the superior court's finding of guilt as an accomplice to disorderly conduct.

Respectfully submitted this 14th day of August 2009.



Kyle D. Moore, WSBA #34181
Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the mail with proper postage thereon, or caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Nielson, Broman, & Koch
1908 E. Madison Street
Seattle, Washington 98122

Margaret White
Legal Assistant

8-14-09
Date

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