

**NO. 46741-1-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**FERNANDO P. HODGSON,**

Appellant.

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

The Honorable Scott Collier, Judge

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**BRIEF OF APPELLANT**

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A. ASSIGNMENTS OF ERROR

1. The trial court improperly imposed an exceptional sentence.
2. The exceptional sentence was improperly based on an aggravating factor that inheres in first-degree child molestation.
3. No substantial and compelling reason justifies an exceptional sentence.
4. The trial court erred in entering a sexual assault protection order prohibiting Mr. Hodgson's contact with W.M.G.
5. The trial court failed to adequately consider Mr. Hodgson's constitutional right to parent his two minor children before entering a community custody condition prohibiting Mr. Hodgson's contact with any minors absent approval of DOC and a sexual deviancy provider.
6. The trial court failed to adequately consider Mr. Hodgson's constitutional right to parent his two minor children before entering a community custody condition prohibiting Mr. Hodgson from having any position of trust or authority with his two minor children.
7. The trial court failed to enter written findings of fact and conclusions of law after the suppression hearing involving Corrections Deputy McCray and Officer Phelps as required by CrR 3.5(c).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An exceptional sentence may not be based on an aggravating factor that inheres in the crime charged. Here, the sentencing court based its exceptional sentence for first-degree child molestation on an “abuse of trust” aggravating factor. Did the sentencing judge base the exceptional sentence on a factor that inheres in first-degree child molestation?

2. A post-conviction sexual assault protection order can be issued only if the underlying crime is a sex offense or one of several other statutorily-prescribed offenses. Indecent exposure is neither a sex offense nor one of the other listed offenses. Did the sentencing court exceed its authority when, after Mr. Hodgson was found guilty of indecent exposure, it entered a sexual assault protection order prohibiting Hodgson from contacting the victim of that offense?

3. Community custody conditions must be narrowly tailored so as not to infringe on essential constitution rights such as the right to parent. Mr. Hodgson is the father of two minor children. Did the trial court improperly infringe on Mr. Hodgson’s right to parent his children when it imposed a condition that Mr. Hodgson have no contact with any minors without the approval of both DOC and a sexual deviancy treatment provider?

4. Similarly, did the trial court improperly infringe on Mr. Hodgson's right to parent his children when it imposed a community custody condition that he have no position of trust or authority over minor children without the approval of both DOC and a sexual deviancy treatment provider?

5. CrR 3.5(c) requires a trial court enter written findings of fact and conclusions of law after hearing a motion to admit an offender's custodial statements at trial. The court held a CrR 3.5 hearing and determined statements made by Mr. Hodgson in jail to Corrections Deputy McCray and Battleground Officer Phelps were admissible, but the court did not file written findings and conclusions. Has the trial court failed to abide by the requirements of CrR 3.5(c)?

#### C. STATEMENT OF THE CASE

Fernando Hodgson and Amy Grennell met through a mutual friend in November 2012. RP 5A at 916. They hit it off immediately and started dating. RP 5A at 916. Mr. Hodgson, who lived in Eugene, Oregon, frequently drove to Vancouver to stay with Ms. Grennell. Ms. Grennell has two children, W.M.G.,<sup>1</sup> and M.L.G.<sup>2</sup>

In March 2013, Mr. Hodgson lost his job in Eugene after being arrested for DUI. RP 5A at 916. With no immediate job prospects, and an

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<sup>1</sup> Born February 22, 2005. RP 5A at 9 15.

<sup>2</sup> Born August 31, 2008. RP 5A at 915.

income limited to a few months of naval reserve duty, Mr. Hodgson moved in with Ms. Grennell. RP 5A at 916, 929. Ms. Grennell worked full time. RP 5A at 930. Mr. Hodgson did not work. When Ms. Grennell worked late, Mr. Hodgson would pick the girls up after school. RP 5A at 930. Mr. Hodgson also pitched in at home by doing chores such as laundry. RP 5A at 1,020.

At home, M.L.G. and W.M.G. each had their own bedrooms. RP 5A at 918-19. Their bedrooms are downstairs. RP 9A at 917. Ms. Grennell and Mr. Hodgson shared the upstairs loft-type bedroom. RP 9A. at 917.

Since she was a baby, M.L.G. liked someone to stay with her until she fell asleep. RP 5A at 916. In the evening, either Ms. Grennell or Mr. Hodgson went to M.L.G.'s bedroom to read with her or simply to cuddle. RP 5A at 956. When it was Mr. Hodgson's turn to cuddle, he did so on top of the sheets. RP 5B at 1,186.

Mr. Hodgson did not sleep as easily or as deeply as Ms. Grennell. Sometimes she would wake up at night and find that he was not in their bed. RP 5A at 918. A few times, she found him downstairs in the hallway outside of the girls' rooms. RP 5A at 919-20. Mr. Hodgson occasionally opened the bedroom doors to check on the girls just as he had done when he was living with his own children. RP 6A at 1,209.

At bedtime on November 15, 2013, Mr. Hodgson was in M.L.G.'s bedroom spooning and snuggling with her. Afterwards, Mr. Hodgson went to his bedroom and told Ms. Grennell M.L.G wanted to say goodnight. RP 5A 932. She went downstairs. M.L.G. told her she needed to go to the bathroom and she wanted her mom come with her. RP 5A at 932. In the bathroom, M.L.G. told her mother, through tears that Mr. Hodgson was bothering her and wanted it to stop. RP 5A at 932. When asked for more detail, M.L.G. told her mother that Mr. Hodgson had rubbed his penis on her butt or bottom. RP 5A at 934. Ms. Grennell was surprised and upset. RP 5A at 944.

Mr. Grennell found Mr. Hodgson in their bedroom. She told him he would need to move out. RP 5A at 940. She did not explain why. RP 5A 942. She went back downstairs to M.L.G.'s bedroom and texted a friend. The friend encouraged her to call the police. And so she did. RP 5A at 943.

When Battleground police officers arrived, Mr. Hodgson was no longer in the house. RP 3A at 413. The police had no contact with him that evening. RP 3A at 426-27. With the help of Ms. Grennell and a friend, the police gathered M.L.G.'s sheets and pajamas as evidence. RP 3A at 417; RP 5A at 954, 1,049. The police took a report but did not interview M.L.G. RP 3A at 416-418.

Battleground detective Joshua Phipps was assigned to investigate the allegations. RP 4A at 5A at 1080-81. He arranged for both M.L.G. and W.M.G. to be interviewed by forensic interviewer Emily Watson at the Clark County Children's Justice Center. RP 5A at 1,081, 1084. Ms. Watson interviewed both girls twice. RP 3B at 532-33, 559. She interviewed each a second time when new allegations arose after the first interviews. RP 35 at 1,007. M.L.G. also started therapy with mental health provider Kelly Lash. RP 4A at 652-56.

M.L.G. told both Ms. Watson and Ms. Lash about what she believed happened on November 15, 2013. RP 3B at 536-544; 4A at 678-69; M.L.G. also told Ms. Lash that it happened five of six other times but was not specific about what happened or when. RP 4A at 678. W.M.G. told Ms. Watson Mr. Hodgson came into her room one night, removed his penis from his clothes, showed it to her, and moved it with his hand. RP 5B at 1,086.

Mr. Hodgson made himself available for an interview with Detective Phillips. RP 5B at 1,092. Prior to the interview, Detective Phillips arrested Mr. Hodgson. Post *Miranda*, and with Mr. Hodgson's consent, the interview was audio recorded. RP 5B at 1,093. Mr. Hodgson denied any inappropriate contact.

Detective Phillips obtained mouth swabs from both M.L.G. and Mr. Hodgson. RP 5B at 1,090, 1,122. The swabs, M.L.G.'s pajamas, and the sheets from M.L.G.'s bed were analyzed at the Washington State Patrol Crime Lab. RP 4A at 731-72. A mixed sample of Mr. Hodgson's DNA<sup>3</sup> and M.L.G.'s DNA was located on a floral sheet. RP 4A at 740-41, 748.

By amended information, the prosecutor charged Mr. Hodgson with two counts of Child Molestation in the First Degree (M.L.G.) and one count of Indecent Exposure to a Victim Under 14 (W.M.G.). CP 1-2. The prosecutor also alleged an aggravating sentencing factor that Mr. Hodgson used his position of trust or confidence to facilitate the commission of both molestation charges. CP 1-2.

The court heard pre-trial motions. RP 1 at 46-169; RP 2 at 171 - 278. Under RCW 9A.44.120, the court found M.L.G. competent to testify and held her statements to her mother, Ms. Watson, and Ms. Lash admissible at trial. RP 2 at 271-78. The pre-trial CrR 3.5 hearing pertained only to Mr. Hodgson's conversation with Detective Phelps. The court held the statements were admissible. RP 2 at 253-55.

The court entered written findings of fact and conclusions of law to support its reason for both the RCW 9A.44.120 hearing and the pre-trial

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<sup>3</sup> the sample tested positive as semen

CrR 3.5 hearing. Supp. DCP, Findings of Fact and Conclusions on Law Regarding CrR 3.5 and Child Hearsay Hearing under RCW 9A.44.120 (sub. nom 148).

Mid-trial, the court held a CrR 3.5 hearing to address statements made while Mr. Hodgson was being booked into the Clark County Jail. RP 4A at 637-48. The court found the statements made to Corrections Deputy Timothy McCray admissible. RP 4A at 647-48. No written findings of fact and conclusions of law have been entered.

Mr. Hodgson testified at trial. RP 5B at 1,163–1,234. He had no explanation for why his DNA was on the floral sheet. RP 6A at 1,208.

The court instructed the jury on the definition of abuse of trust as follows:

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between the defendant and someone who entrusted the victim to the defendant's care.

11A Wash. Practice, Pattern Jury Instructions Criminal, WPIC 300.23 (3d Ed).

The jury found Mr. Hodgson guilty of Child Molestation in the First Degree under Count 1, the November 15, 2013 allegation. CP 1, 3. It also found he abused a position of trust in so doing. CP 5. The jury acquitted him on the second count of child molestation, Count II. CP 4. The jury also found guilt on the Indecent Exposure, Count 3. CP 5.

The court ordered and received the mandatory pre-sentence investigation. Supplemental Designation of Clerk's Papers, Pre-Sentence Investigation (sub. nom 137). Mr. Hodgson's standard range was 51-68 months to life on the molestation. CP 16. The court imposed 59 months plus an additional 16 months on the abuse of trust aggravating factor for a total of 87 months to life. CP 17; RP 7 at 1,587.

The court entered a sexual assault protection order as to W.M.G.. Supp. DCP, Sexual Assault Protection Order (W.M.G.) (sub. nom. 151). The court also imposed a life-long term of community custody and set conditions of sentence and conditions of community custody. CP 18. The conditions included that Mr. Hodgson could not have any contact with minor children, or be in a supervisory or trust relationship with minor children, unless the Department of Corrections (DOC) and a sexual deviancy treatment provider approved it. CP 28, 30. Mr. Hodgson has two

minor children born in 2003 and 2005. Supp. DCP, Pre-sentence Investigation at page 6.

Mr. Hodgson appeals all portions of his judgment and sentence. CP 34-35.

D. ARGUMENT

Mr. Hodgson is entitled to have his case remanded to the trial court for resentencing within the standard range because the exceptional sentence was imposed without a legal basis. On remand, the court must also strike the sexual assault protection order because it relates to W.M.G. and strike sentence conditions and conditions of community custody that unconstitutionally infringe on Mr. Hodgson's constitutional right to contact and parent his two minor children. The court must also enter CrR 3.5 findings and conclusions for custodial statements Mr. Hodgson made in jail.

**1. The trial court improperly imposed an exceptional sentence based on an impermissible factor.**

RCW 9.94A.535(3) sets out "an exclusive list of factors that can support a sentence above the standard range." An exceptional sentence may be imposed if "[t]he defendant used his or her position of trust, confidence, or fiduciary responsibly to facilitate the commission of the current offense." RCW 9.94A.535(3)(n). The legal justifications for an

exceptional sentence are reviewed do novo. *State v. Stubbs*, 170 Wn.2d 117, 124, 240 P.3d 143 (2010). A challenge to an unlawful sentence may be made for the first time on appeal. *State v. Sims*, 171 Wn.2d 436, 444, n. 3, 256 P.3d 283 (2011).

A sentencing court may impose an exceptional sentence above the standard range if there are “substantial and compelling reasons” justifying the exceptional sentence. RCW 9.94A.535. The court exceeds its authority when it imposes an exception sentence for reasons that are not substantial or compelling. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001).

Any factor inherent in the crime cannot justify an exceptional sentence. *Id.* at 647-48. A factor inheres in the crime if it was necessarily considered by the legislature in establishing the standard sentence range for the offense. *Id.* Thus, for example,

[C]onviction of the offense of *exposing another person to HIV with intent to do bodily harm* leaves no room for an additional finding of deliberate cruelty as justification for an exceptional sentence. A finding by the trial court that Petitioner's act constituted deliberate cruelty cannot be used to elevate the sentence to an aggravated exceptional sentence because intent to do bodily harm is an element of the offense charged under former RCW 9A.36.021(1)(e), and was already considered by the Legislature in establishing the standard sentence range.

*Id.* at 648; *see also Stubbs*, 170 Wn.2d at 127-49 (severity of injury already considered by legislature in setting standard range for first-degree

assault); *State v. E.A.J.*, 116 Wn. App. 777, 785, 789, 67 P.3d 518 (2003) (injuries caused by choking inhere in second-degree assault and cannot support manifest injustice disposition).

Abuse of trust inheres in the crime of first-degree child molestation. First-degree child molestation may be committed only when a person more than 36-months older than a child under twelve years of age, has sexual contact with, or causes another person to have sexual contact with, that child. RCW 9A.44.083. In the vast majority of cases, an offender has access to a child because of a trust relationship between the child's parent or caregiver and the offender. Because of this the legislature necessarily considered "abuse of trust" in setting the standard range for the offense. In addition, in this case the court did not find that this case presented any exceptional circumstances. Indeed, before adding the enhancement, the court sentenced only at the midpoint of the standard range. For these reasons, the aggravator cannot be used to justify an exceptional sentence in this case. *Ferguson*, 142 Wn.2d at 648-49.

Because the trial court erred by finding the "abuse of trust" aggravating factor, Mr. Hodgson's exceptional sentence must be vacated and the case remanded for resentencing within the standard range.

**2. The trial court acted without authority when it issued a Sexual Assault Protection Order requiring Hodgson have no contact with W.M.G.**

A trial court's authority to impose conditions of sentence is limited to the authority provided by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Because this issue involves a question of law, the reviewing court owes no deference to the trial court's decision. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

In this case, the trial court issued a post-conviction sexual assault protection order (SAPO) prohibiting Mr. Hodgson from having contact with W.M.G.<sup>4</sup> Supp. DCP, Sexual Assault Protection (sub. nom 151). The statute authorizing a SAPO provides:

When a defendant is found guilty of a sex offense as defined in RCW 9.94A.030, any violation of RCW 9A.44.096, or any violation of RCW 9.68A.090, or any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030, and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.

RCW 7.90.150(6)(a).

As relates to W.M.G., the jury found Mr. Hodgson guilty of gross misdemeanor indecent exposure in violation of RCW 9A.88.010(2)(b).

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<sup>4</sup> The order expires on October 17, 2017. Supp. DCP, Sexual Assault Protection Order (W.M.G.)

Indecent exposure is not a sex offense under RCW 9.94A.030.<sup>5</sup> Neither RCW 9A.44.096<sup>6</sup> nor RCW 9.68A.090<sup>7</sup> applies. RCW 9A.28 refers exclusively to inchoate sex offenses. Because Mr. Hodgson was not found guilty of any of the listed offenses, the trial court lacked authority to impose a sexual assault protection order.

**3. The imposition of community custody conditions barring Mr. Hodgson from having contact with or exercising authority over his minor children violated his fundamental right to parent.**

The Sentencing Reform Act of 1981, chapter 9.94A RCW, authorizes the trial court to impose “crime-related prohibitions” as a condition of a sentence. RCW 9.94A.505(9). A “crime-related prohibition” prohibits “conduct that directly relates to the circumstance of the crime for which the offender has been convicted.” RCW

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<sup>5</sup> Under RCW 9.94A.030(47), “sex offense” means:

- (a)(i) A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132;
- (ii) A violation of RCW 9A.84.020;
- (iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080;
- (iv) A felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; or
- (v) A felony violation of RCW 9A.44.132(1) (1) (failure to register) if the person has been convicted of violating RCW 9A.44.132(1)(failure to register) on at least one prior occasion;
- (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;
- (c) A felony with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135; or
- (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

<sup>6</sup> Sexual Misconduct with a Minor in the Second Degree

<sup>7</sup> Communication with a Minor for Immoral Purposes

9.94A.030(10). “[B]ecause the imposition of crime-related prohibitions is necessarily fact-specific and based upon the sentencing judge’s in-person appraisal of the trial and the offender, the appropriate standard of review [is] abuse of discretion.” *In re Personal Restraint of Rainey*, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010).

If the sentencing condition infringes on a constitutional right (such as the right to the care, custody, and companionship of one’s children), that condition can be upheld only if the condition is reasonably necessary to accomplish the essential needs of the state and public order. *State v Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *cert. denied*, 129 S.Ct. 2007 (2009) (“More careful review of sentencing conditions is required where those conditions interfere with a fundamental constitutional right.”)

The right to the care, custody, and companionship of one’s children constitutes a fundamental constitutional right. *Rainey*, 168 Wn.2d at 374. Thus, sentencing conditions burdening this right “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *Id.* at 373 (quoting *Warren*, 165 Wn.2d at 32).

Division One of this Court has held that a no-contact order prohibiting a defendant from all contact with his children was “extreme and unreasonable given the fundamental rights involved,” when less

stringent limitations on contact would successfully realize the State's interest in protecting the children. *State v. Ancira*, 107 Wn. App. 650, 655, 27 P.3d 1246 (2001). In *Ancira*, the trial court imposed the no-contact order prohibiting Mr. Ancira from all contact with his wife and children as a condition of his sentence for felony violation of a domestic no-contact order. *Id.* at 652-53. Although this Court recognized the state's interest in preventing the children from having to witness instances of domestic violence, it determined that the state had "failed to demonstrate that this severe condition was reasonably necessary" to prevent that harm." *Id.* at 654. Rather, this Court concluded indirect contact, such as mail, or supervised contact with the mother's presence might successfully satisfy the state's interest in protecting the children. *Id.* at 655.

Similarly, in *Rainey*, the Washington Supreme Court struck a lifetime no-contact order prohibiting Mr. Rainey from all contact with his children because the sentencing court did not articulate any reasonable necessity for the lifetime duration of the order. 168 Wn.2d at 381-82. In reaching its decision, the Court noted that the fact that the child was a victim of Mr. Rainey's crime did not necessarily mean the no-contact order was proper: "It would be inappropriate to conclude that, simply because [the child] was a victim of Rainey's crime, prohibiting all contact with her was reasonably necessary to serve the State's interest in her

safety.” *Id.* at 378. Recognizing the “fact-specific nature of the inquiry,” the Court remanded to the trial court for resentencing so that the court could “address the parameters of the no-contact order under the ‘reasonably necessary’ standard.” *Id.* at 382.

In *Rainey*, the Court was unable to determine whether, in the absence of any express justification by the trial court, a lifetime no-contact order was reasonably necessary to achieve the State’s interest in protecting a child from her father. 168 Wn.2d at 381-82. In addition, the Court concluded that the trial court, before pronouncing sentence, should have addressed Mr. Rainey’s argument that a no-contact order would be detrimental to his daughter’s interests. *Id.* at 382. Thus, the Court remanded for resentencing.

In this case, the trial court ordered Mr. Hodgson to have no contact with minor children and to never hold any position of trust or authority over minor children for the rest of his life, unless first approved by DOC and a sexual deviancy treatment provider. CP 28, 30. Because the no-contact provisions implicate Mr. Hodgson’s fundamental right to the care, custody, and companionship of his children, for the sentencing conditions to be constitutionally valid, “[t]here must be no reasonable alternative ways to achieve the State’s interest.” *Rainey*, 168 Wn.2d at 379; *Warren*, 165 Wn.2d at 34-35.

In imposing the challenged sentencing conditions, the trial court failed to address whether the no-contact conditions were reasonably necessary to protect Mr. Hodgson’s children—who were not victims in the case. Moreover, although the state has a compelling interest in protecting minor children from harm, the state did not demonstrate how prohibiting all contact between Mr. Hodgson and his children until they are no longer minors was reasonably necessary to effectuate that interest. Finally, the court failed to consider any less restrictive alternatives, an especially egregious omission given that for the foreseeable future any visits between Mr. Hodgson and his children will occur in a tightly controlled and monitored prison setting. Because the sentencing conditions implicate Mr. Hodgson’s constitutional right to parent his children, the state was required to show that no less restrictive alternative would prevent harm to the children.

Because whether a particular crime-related prohibition satisfies the “reasonably necessary” standard is a fact-specific inquiry, and the trial court failed to consider whether the no-contact order was reasonably necessary, this Court must strike the sentencing conditions prohibiting Mr. Hodgson’s contact with his children and remand for further proceedings.

4. **The trial court erred in failing to enter written findings of fact and conclusions of law under CrR 3.5.**

The trial court held a CrR 3.5 hearing to determine whether Hodgson's statements during booking were the product of police coercion. RP 4A at 637. However, the court failed to enter written findings of fact and conclusions of law as required by CrR 3.5(c). Even if this court concludes Hodgson's custodial statement was admissible, this court must nonetheless remand this matter for the entry of written findings of fact and conclusions of law, as the law requires.

After a CrR 3.5 hearing, the court must set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and reasons. CrR 3.5(c) ("Duty of Court to Make a Record"). This rule plainly requires written findings of fact and conclusions of law. The trial court ruled orally that Hodgson's statements to Clark County Corrections Deputy McCray and Battleground Police Officer Phelps were admissible, but it never entered written findings or conclusions. RP 4A at 647-48. The trial court's failure to enter written findings and conclusions violates the clear requirements of CrR 3.5(c).

Oral findings are necessarily preliminary and do not always reflect the court's complete thinking. *See Ferree v. Doric Co.*, 62 Wn.2d 561,

566-67, 383 P.2d 900 (1963) (noting that “a trial judge’s oral decision is no more than a verbal expression of his [or her] informal opinion at that time. It is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned.”). Moreover, an oral ruling “has no final or binding effect, unless *formally incorporated into* the findings, conclusions, and judgment.” *Id.* at 567 (emphasis added).

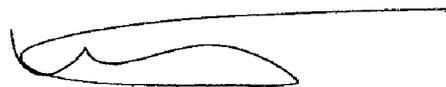
When the required findings are missing, dismissal is ordinarily the appropriate remedy. *See State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992) (“When a case comes before this court without the required findings, there will be a strong presumption that dismissal is the appropriate remedy.”) This is so because the court rules promulgated by the Washington Supreme Court provide the basis for a “consistent, uniform approach.” *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998). Indeed, “[a]n appellate court should not have to comb an oral ruling to determine whether appropriate ‘findings’ have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.” *Id.* at 624. However, when a defendant cannot show actual prejudice from the absence of written findings and conclusions, the appropriate remedy is remand for entry of written findings of fact and conclusions of law. *Id.*

In this case, the trial court did not enter written findings or conclusions following the CrR 3.5 hearing with Officers McCray and Phelps, and provided only an oral ruling. This court must therefore remand this matter to the trial court for entry of the findings and conclusions required by CrR 3.5(c).

E. CONCLUSION

Because the trial court imposed an exceptional sentence based on “abuse of trust,” a factor that inheres in first-degree child molestation, this court should remand this case to the trial court to impose a standard range sentence. In any event, the court should remand, ordering the trial court to strike community custody conditions interfering with Mr. Hodgson’s constitutional right to parent. Finally, the court should remand the case for entry of the missing CrR 3.5 findings and conclusions.

Respectfully submitted this 5th day of August 2015.



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LISA E. TABBUT/WSBA 21344  
Attorney for Fernando Hodgson

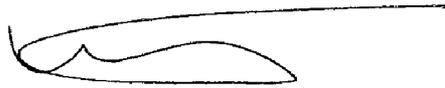
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief to: (1) Anne Mowry Cruser, Clark County Prosecutor's Office, at [prosecutor@clark.wa.gov](mailto:prosecutor@clark.wa.gov); (2) the Court of Appeals, Division II; and (3) I mailed it to Fernando Hodgson/DOC#376939, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 5, 2015, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Fernando P. Hodgson

## COWLITZ COUNTY ASSIGNED COUNSEL

**August 05, 2015 - 4:52 PM**

### Transmittal Letter

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Court of Appeals Case Number: 46741-1

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