

COA No. 63512-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

J.A.S.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY
JUVENILE DIVISION

The Honorable Richard J. Thorpe

APPELLANT'S OPENING BRIEF

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FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON

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A. ASSIGNMENTS OF ERROR

1. In the respondent J.A.S.'s juvenile court bench trial on a charge of rape in the second degree, the juvenile court failed to hold a CrR 3.5 hearing.

2. The juvenile court failed to enter CrR 3.5 findings of fact and conclusions of law.

3. The juvenile court excluded relevant, admissible evidence and violated the respondent's right to present a defense, requiring reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the juvenile court erroneously failed to hold a CrR 3.5 hearing.

2. Whether the juvenile court erroneously failed to enter CrR 3.5 findings of fact and conclusions of law.

3. Whether the juvenile court excluded relevant, admissible evidence that the complainant, a developmentally delayed individual, had a medically documented tendency to harm herself physically, where the defense theory was that the complainant had injured herself and had falsely accused the respondent, and whether the exclusion of this evidence violated the respondent's right to present a defense, requiring reversal.

C. STATEMENT OF THE CASE

J.A.S., a juvenile (d.o.b. 7/17/93), was charged in Snohomish County Juvenile Court with the offense of rape in the second degree, pursuant to RCW 9A.44.050(1)(a). CP 70.

According to the State's allegations, A.W., age 17, alleged that J.A.S. had raped her vaginally and anally after the two, who were boyfriend and girlfriend, began sexual activity, but the complainant changed her mind and expressed her unwillingness to engage in intercourse. Supp. CP ____, Sub # 26 (State's trial memorandum).

The juvenile court retained jurisdiction following analysis of the Kent¹ factors. CP 66-67. J.A.S. was found guilty at an adjudicatory hearing in front of the Honorable Richard Thorpe. CP 66-67; 4/15/09RP at 35-36. The juvenile court heard testimony from a police officer regarding contradictory statements the respondent made after being advised of his Miranda rights, and was made aware of the need for a CrR 3.5 hearing, but failed to hold one. 4/14/09RP at 70-72; 4/15/09RP at 3.

The court entered findings of fact and conclusions of law pursuant to JuCrR 6.1, finding as follows:

¹See Kent v. United States, 383 U.S. 541, 566-67, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

1. On May 24, 2008, the respondent went to A.W.'s residence, which is located in Edmonds, Washington. The pair then agreed to go to a nearby park. After arriving at the park, A.W. and respondent agreed to engage in sexual intercourse. A. W. began having second thoughts about engaging in sexual intercourse with the respondent. At that point, the respondent flipped A.W over onto her stomach, forcefully pulled her pants down, bent her over a log pinning her there by the shoulders with his hands and penetrated her anus with his penis. A.W. repeatedly told the respondent to stop what he was doing to her, tried to physically resist, and managed to kick the respondent all to no avail.

2. The respondent then flipped A.W. onto her back and penetrated her vagina with, his penis. A. W. again repeatedly told the respondent to stop what he was doing to her and tried to physically resist, but the respondent continued his sexual assault. The respondent only stopped sexually assaulting A.W. when he noticed she was bleeding.

3. A.W.'s testimony was credible. Her demeanor was believable, and medical evidence was not inconsistent with her testimony.

4. The respondent engaged in both anal and vaginal intercourse with A.W. by forcible compulsion.

CP 4-5. J.A.S. was given a term of 15-36 weeks incarceration at the Juvenile Rehabilitation Administration. CP 48-63. J.A.S. appeals.

CP 7.

D. ARGUMENT

1. THE JUVENILE COURT VIOLATED THE RESPONDENT'S RIGHT TO PRESENT A DEFENSE.

a. The respondent sought to introduce evidence supporting his defense theory that A.W. fabricated the allegations of non-consensual intercourse and hurt herself physically. The evidence at trial showed that A.W. only reported the alleged non-consensual intercourse between her and J.A.S. after a significant period of time had elapsed. A.W., age 17, was a developmentally delayed person. 4/14/09RP at 10-11. Although the alleged incident occurred on May 24, 2008, A.W. only told her mother about the incident during a routine gynecological examination on June 4 of 2008. 4/14/09RP at 11-12.

A.W.'s claim of non-consensual intercourse was supported by contradictory evidence of physical findings. Nurse-practitioner Lisa Easton-Hummel testified that in the initial, June exam, A.W.'s anal area was "within normal limits." 4/15/09RP at 10. Easton-Hummel stated that A.W. had no "actual tearing" of her labia, but that her hymen was "partially intact," which "can be a tear." 4/15/09RP at 11. This confusing presentation was testified to by the witness as "consistent" with sexual intercourse. 4/15/09RP at 11.

Nurse Caryn Young, who subsequently examined A.W., stated that she located “mild irritation” in A.W.’s genital area, but explained that this could be caused by “any irritant.” 4/14/09RP at 29-30. She also stated that there was a “tag” of skin on the complainant’s anus that was “concerning,” and could have been caused by injury, or constipation. 4/14/09RP at 31.

During cross-examination of A.W., defense counsel attempted to inquire of her regarding her tendency to injure herself, and asked why she cut herself. 4/14/09RP at 61. The prosecutor objected that this question sought irrelevant testimony, and defense counsel argued that the theory of the case was that A.W. was seeking attention and had engaged in attention-seeking behavior by claiming non-consensual intercourse. 4/14/09RP at 62. The State responded to this argument by stating that there had been no testimony that the complainant ever engaged in attention-seeking behavior of this type. 4/14/09RP at 62. The trial court prohibited the defense from inquiring into this area, sustaining the State’s relevance objection. 4/14/09RP at 62.

b. The juvenile court excluded relevant, admissible evidence and violated the respondent’s right to present a defense. The respondent tried to inquire of the complainant in order

to determine whether it was possible that A.W. had made up the allegations of non-consensual intercourse, or had injured herself, in order to seek attention. This evidence, which was excluded by the juvenile court, was relevant and admissible to show that the respondent had not committed the offense of second degree rape. If the jury believed that A.W. had injured herself and fabricated the claim of rape, this would have defeated the State's allegation that the respondent committed the crime charged.

The juvenile court's exclusion of the evidence was an abuse of discretion in an evidentiary ruling, and a plain violation of the respondent's due process right to present a defense to the charges against him. The State was required, consistent with the Sixth and Fourteenth Amendments to the United States Constitution, to prove the offense of rape to the fact-finder, beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); U.S. Const. Amends. 6, 14.

The evidence offered by the respondent J.A.S. was relevant to the question whether A.W.'s claims were believable. A.W.'s mother testified that the complainant, along with suffering from depression and mood swings, had a "history of self-harm."

4/14/09RP at 19. Thus it was relevant for the defense to inquire of her regarding this tendency, particularly given that the late reporting of the incident, and other circumstances, tended to suggest that the claim of rape might be false. Notably, after the court disallowed this line of inquiry by the defense, the deputy prosecuting attorney was allowed to ask questions of A.W., in re-direct examination, as to whether she "made this up as a cry for attention," to which the complainant answered "no." 4/14/09RP at 65.

It is true that the admissibility of evidence generally is within the sound discretion of the juvenile court. State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998). The reviewing court will not reverse a juvenile court's decision regarding the admissibility of evidence absent an abuse of discretion, which "occurs only when no reasonable person would take the view adopted by the juvenile court." State v. Ellis, 136 Wn.2d at 504 (quoting State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)).

Here, however, the juvenile court's exclusion of the respondent's evidence was an abuse of discretion. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; see

State v. Cheatham, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Only “minimal logical relevancy” is required for evidence to meet ER 401. State v. Bebb, 44 Wn. App. 803, 814, 723 P.2d 512 (1986). In the present case, if the complainant’s claims of non-consensual intercourse were brought falsely, to seek attention, and she had injured herself to support the claim, the respondent would have been found not guilty of rape. J.A.S.’s inquiry of the complainant during cross-examination sought relevant evidence, and “all relevant evidence is admissible.” ER 402; Cheatham, 150 Wn.2d at 644-45. The juvenile court has no discretion to disallow evidence that is relevant and admissible. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

Furthermore, because the juvenile court’s erroneous exclusion of admissible evidence regarding the truth of A.W.’s claims prevented J.A.S. from pursuing a viable theory that would have resulted in acquittal, the court violated the respondent’s due process right to present a defense. Due process was violated because the juvenile court’s ruling precluded the respondent from defending against the charges and rendered his trial fundamentally unfair, and the “touchstone of due process . . . is the fairness” of the

proceeding. United Smith v. Phillips, 455 U.S. 209, 219, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982); U.S. Const. Amend. 14.

The respondent had a constitutional right to cross-examine prosecution witnesses, including A.W. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); U.S. Const. Amend. 6. This right guaranteed his ability to question A.W. and elicit relevant admissible evidence to support his defense theory, which the juvenile court specifically precluded. 4/14/09RP at 62-65.

Second, the respondent had a right to present his own evidence, elicited from any witness, to support his defense. A defendant has an absolute right to present admissible evidence in his defense. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); see also Taylor v. Illinois, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). The Washington Supreme Court follows this rule. See State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). As the Court observed in Maupin, "[t]he right to offer the testimony of witnesses . . . is in plain terms the right to present a defense This right is a fundamental element of due process of law." Maupin, 128 Wn.2d at 924 (quoting Washington v. Texas, 388 U.S. at 19). The juvenile court struck the respondent's efforts to elicit relevant information from A.W., and

precluded him from further attempting to offer this evidence.

4/14/09RP at 62-65.

For purposes of the right to present a defense, if evidence that is admissible is wrongfully excluded, the constitutional question is whether the proffered testimony was material and relevant to the outcome of the case. State v. Atsbeha, 96 Wn. App. 654, 660, 981 P.2d 883 (1999). The criminal defendant has "the right to put before a jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987); Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("the right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations"); U.S. Const. Amend. 14.

Importantly, the question whether the reviewing court finds the evidence credible is not an issue, because it is the function and province of the jury to weigh the evidence, determine the credibility of the witnesses and decide disputed questions of fact. State v. Dietrich, 75 Wn.2d 676, 677-78, 453 P.2d 654 (1969). A defendant in a criminal case has a constitutional right to present relevant evidence establishing his version of the facts so that the trier of fact

can decide where the truth lies. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

For example, in State v. R.H.S., 94 Wn. App. 844, 974 P.2d 1253 (1999), the defendant argued that his conviction for second-degree assault should be reversed because the juvenile court erroneously excluded his testimony asserting his absence of the knowledge required for a finding of recklessness. The reviewing court agreed and overturned his conviction because the defendant's testimony that he had no knowledge that punching a person in the face could inflict substantial bodily harm, however self-serving, was material to the question of recklessness. State v. R.H.S., 94 Wn. App. at 849. As the Court stated,

While it is possible that RHS's testimony is "so incredible that its exclusion is harmless error," we are not the arbiters of credibility. We must take the testimony to be true and evaluate its likely effect on the outcome of the trial. Because the testimony, if believed, would establish a defense to second degree assault, we are unable to declare that the error is harmless beyond a reasonable doubt.

(Footnotes omitted.) R.H.S., 94 Wn. App. at 848-49 (citing State v. Maupin, 128 Wn.2d at 929-30).

Because the excluded evidence in this case would, if believed, defeat the State's charge of non-consensual intercourse, it was material and indeed highly probative as to a necessary element

of the State's proof of second degree rape, and its exclusion was constitutional error. See also State v. Atsbeha, 142 Wn.2d at 926 (excluding evidence of diminished capacity, which went directly to the question of intent, violated the right to present a defense). Where evidence has high probative value to a defense, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22." State v. Hudlow, 99 Wn.2d at 16.

For all of these reasons, because the respondent's proffered evidence, if believed, would have established a defense to second degree rape, the juvenile court's error violated his right to present a defense, the error was not harmless, and reversal is required. R.H.S., 94 Wn. App. at 848-49 (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)).

2. THE JUVENILE COURT FAILED TO HOLD A CrR 3.5 HEARING OR TO ENTER WRITTEN CrR 3.5 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

a. The juvenile court failed to hold a CrR 3.5 hearing on the admissibility of the juvenile respondent's statements. The State's case included evidence elicited from Lynnwood police officer Jerry Rittgarn. 4/14/09RP at 69. Rittgarn testified that he

interrogated J.A.S. at the Lynnwood Police Department, and that the respondent made inculpatory statements by denying that he and A.W. had engaged in intercourse, and stating that they had “oral sex.” 4/14/09RP at 72-73. These statements played a significant part in the State’s closing argument to the juvenile court, urging it to find the respondent’s guilt. See 4/15/09RP at 33.

The juvenile court was advised by counsel of the need for a CrR 3.5 hearing. 4/15/09RP at 3. However, the court never held such a hearing. This was error. CrR 3.5(a) provides, in pertinent part:

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.

Here, J.A.S. was convicted in a juvenile court bench trial without a separate hearing under CrR 3.5 to determine the admissibility of his statement to Officer Rittgarn. “[M]ost courts have held that there is no need for a separate voluntariness hearing in the case of a bench trial, reasoning that a judge is presumed to rely only upon admissible evidence in reaching a decision.” (Emphasis added.) State v. Wolfer, 39 Wn. App. 287, 292, 693 P.2d 154 (1984), abrogated on other grounds by State v. Heritage, 152 Wn.2d 210, 95 P.3d 345

(2004). In Wolfer, this Court of Appeals affirmed the admission of a confession when the juvenile court did not hold a CrR 3.5 hearing, but where both the juvenile defendant and the officer testified at trial in detail about the circumstances surrounding the juvenile's incriminating statements. Wolfer, 39 Wn. App. at 291. This was in accord with In re the Welfare of Noble, where the trial court engaged in fact-finding regarding voluntariness of the juvenile's statement and conducted a detailed analysis of the circumstances surrounding the confession, then admitted the statement only for impeachment purposes. Noble, 15 Wn. App. 51, 54-55, 58, 547 P.2d 880 (1976).

However, in State v. Tim S., the juvenile court admitted a juvenile's statement without Miranda warnings, allegedly only for impeachment purposes. Tim S., 41 Wn. App. 60, 62, 701 P.2d 1120 (1985). Division Three of the Court of Appeals held that the trial court actually treated the statement as substantive evidence of guilt even though it was "not clear from the record if the juvenile court considered whether Tim's statement had been voluntarily given." Tim S., 41 Wn. App. at 64. Under these circumstances, Division Three distinguished Noble and held that a separate CrR 3.5 hearing was required in a juvenile matter. Tim S., 41 Wn. App. at 63-64.

J.A.S.'s case falls somewhere in between the aforementioned authorities. The officer who interrogated the respondent claimed to have Mirandized the respondent, but this contention was never tested in cross-examination for purposes of a CrR 3.5 ruling by the trial court. 4/14/09RP at 72-73. Importantly, the deputy prosecutor then made much of the juvenile respondent's statements to the officer in arguing that the court should find J.A.S. guilty of second degree rape. In these circumstances, it was error for the juvenile court to fail to hold a CrR 3.5 hearing.

Furthermore, reversal is required. "[A] defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction." Jackson v. Denno, 378 U.S. 368, 376, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908, 1 A.L.R.3d 1205 (1964). J.A.S.'s custodial interrogation statements were relied on by the prosecutor to convince the juvenile court of the respondent's guilt, and the court's adjudication of guilty must be reversed.

b. CrR 3.5 also requires the trial court to enter written findings of fact and conclusions of law following a *Miranda* suppression hearing. Where the prosecuting party in a criminal case seeks to offer statements of the accused at trial, CrR 3.5 provides that a hearing must be held to determine the admissibility of the statements. CrR 3.5(a); State v. Myers, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976). Furthermore, pursuant to CrR 3.5(c):

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.

This rule is mandatory, and it also applies in juvenile court adjudicatory proceedings. See, e.g., State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994) ("the word 'shall' in a statute is presumptively imperative and operates to create a duty"); JuCR 1.4(b). It is the duty of the prevailing party to submit these written findings of fact and conclusions of law following such a hearing. See State v. Wilks, 70 Wn.2d 626, 628, 424 P.2d 663 (1967).

The purpose of these court rules requiring the entry of written findings of fact and conclusions of law is to enable, and not simply to assist, an appellate court in reviewing questions presented on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)

(construing similar requirement of CrR 6.1(d)). Written findings and conclusions provide the appellant with a determinate record on which to focus and allow both the appellant and the appellate court to concentrate on appropriate appellate issues. Head, 136 Wn.2d at 623. As the Head Court noted,

An appellate court should not have to comb an oral ruling to determine whether the appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

Head, at 624. Furthermore, a court's oral ruling in a case has no binding effect until expressly incorporated into a final written judgment. Head, at 622.

During J.A.S.'s fact-finding hearing, there was no CrR 3.5 hearing, but the juvenile court admitted his statements to Officer Rittgarn. And neither the prosecutor nor the juvenile court ensured that written findings of fact and conclusions of law pursuant to CrR 3.5 were entered. This error requires reversal, or in the alternative, remand.

Appellate courts of this State have routinely condemned the failure of attorneys and trial and juvenile courts to submit and enter written findings of fact and conclusions of law where required by court rule. See, e.g., State v. Smith, 67 Wn. App. 81, 834 P.2d 26

(1992), aff'd, 123 Wn.2d 51 (1993) (CrR 3.5 and CrR 3.6); State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1299 (1997) (CrR 3.6); State v. Portomene, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995), review denied, 129 Wn.2d 1019 (1996) (CrR 6.1(d)). J.A.S. argues that there are no compelling reasons for this Court to overlook the absence of written CrR 3.5 findings and conclusions in this case (or the holding of a hearing) by imposing less than the most significant remedy. Compliance with the requirements of CrR 3.5 regarding entry of written findings of fact and conclusions of law provides the consistency essential in criminal appeals. Head, 136 Wn.2d at 623. In Washington, a criminal defendant is entitled to only one direct appeal. Wash. Const. Art. 1, § 22. Thus, a juvenile court's failure to enter written findings of fact and conclusions of law in a timely manner prejudicially impacts a litigant's ability to file an appeal. Head, 136 Wn.2d at 624. Without filed written findings and conclusions, an appellant must speculate as to what facts and law were relied upon by the trial court in admitting statements or evidence, obviously impeding his pursuit of an appeal. See Head, 136 Wn.2d 619.

Because a court's failure to enter written findings of fact and conclusions of law may prejudice an appellant, there is therefore a

"strong presumption that dismissal will be the appropriate remedy."

State v. Smith, 68 Wn. App. 201, 209-11, 842 P.2d 494 (1992).

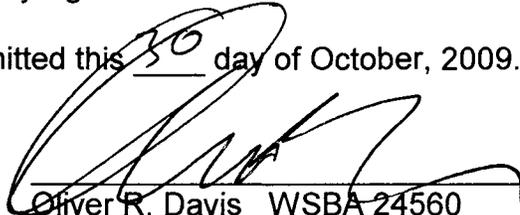
Where prejudice to the defendant can be shown, the proper remedy for failure to comply with CrR 3.5 is not remand, but reversal. See Head, 136 Wn.2d at 624.

In the alternative, J.A.S. asks this Court to remand the case for entry of written findings of fact and conclusions of law under CrR 3.5 and for permission to file supplemental assignments of error if necessary. Head, 136 Wn.2d at 624.

E. CONCLUSION

Based on the foregoing, the respondent respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 30 day of October, 2009.



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

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 63512-3-I
)	
J.A.S.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF OCTOBER, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF OCTOBER, 2009.

X _____ 