

71407-4

71407-4

NO. 71407-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JAMES. E. TYLER,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

James Tyler requests remand of his case to the trial court to enter written CrR 3.5 hearing findings. The State has subsequently prepared the findings. The RAP rules do not specifically require the State to seek permission of this Court prior to entry of those findings since there was no change in the decision in the trial court. Regardless, the State moves for this Court to accept the entered findings.

Remand to the trial court for entry of findings would be a useless act since the findings have been entered. Since there is no indication of tailoring of the findings, this Court should instead permit Tyler to file a new Appellant's Opening Brief raising any issues pertaining to the conviction and sentence.

II. ISSUES

1. Should this Court accept the trial court's findings regarding the CrR 3.5 hearing which were entered?
2. Should the case be remanded to the trial court, or should defense be permitted to file a new opening brief?

III. STATEMENT OF THE CASE

On May 1, 2012, James Tyler was charged with three counts of Rape of a Child in the Third Degree. CP 1-2. Prior to trial the information was

amended to allege four counts of Rape of a Child in the Third Degree, counts 1 to 4, Furnishing Liquor to Minors, count 5, and two counts of Communication with a Minor for Immoral Purposes, counts 6 and 7. CP 8-10.

On October 28, 2013, the case proceeded to trial.

On October 29, 2013, the trial court conducted a CrR 3.5 hearing during the trial. 10/29/13 RP 25-38 (Volume 1), 3-16 (Volume 2)¹. The military investigator who conducted the interview testified and a video recording of the interview was played. 10/29/13 RP 28, 34, (Volume 1), 6, 11 (Volume 2). Detailed oral findings were made by the trial court. 10/29/13 RP 37-8, (Volume 1), 15-6 (Volume 2). Those findings read:

And in terms of if we're going to call that a disputed fact, the Court would clarify that he was advised of each right individually. Then I would take the portion you're referring to as a waiver at the end of those rights: Do you wish to speak to me without a lawyer present at this time? There was a pause, and whether he was simply contemplating that question or whether he didn't even realize that it was a question to him that he needed to respond, to he then proceeded: Do you wish to talk without including the lawyer portion? However, she had very clearly earlier advised him

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

10/28/13 RP	Trial Day 1 (in volume 1) (Jury Selection & Motions)
10/29/13 RP	Trial Day 2 (in volume 1) (CrR 3.5 hearing and testimony) (CrR 3.5 hearing is also contained in volume 2 at pages 2-29)
10/30/13 RP	Trial Day 3 (in volume 1) (Testimony)
10/31/13 RP	Trial Day 4 (in volume 1) (Instruction and Closing)
11/1/13 RP	Trial Day 5 (in volume 1) (Verdicts and Jury Deadlock)
12/5/13 RP	Sentencing (in volume 2).

of his right to a lawyer, either he could retain privately or that the military would provide at no expense to him or both, and he chose not to exercise that. So the Court will find that he was properly advised of his rights; that he knowingly and voluntarily waived those rights, and any statement that he did make would be admissible. There's no argument that there was any use of threats or coercion. He appears in video. And the testimony, I assume, will bear out during the video that he was coherent, understood what was going on, not ill in any way, and the statements will be admissible at trial. Are there any other findings I can make for either side?

10/29/13 RP 25-38 (Volume 1), 3-16 (Volume 2).

On November 1, 2013, the jury returned verdicts of not guilty on two counts of Rape of a Child in the Third Degree in counts 1 and 2. CP 44, 45.² The jury found the defendant guilty of Furnishing Liquor to a Minor in count 5 and a single count of Communication with a Minor for Immoral Purposes in count 7. CP 48, 50. The jury did not complete the verdict forms on the remaining three counts. CP 46, 47, 49. The jury was unable to reach a verdict on those three counts. 11/1/13 RP 186-8, 191.

On December 5, 2013, Tyler was sentenced on the two charges to 45 days of jail time. CP 73. The other three charges remain pending in the trial court.

On January 3, 2014, Tyler timely filed a notice of appeal from the one conviction. CP 78-95. Tyler's notice of appeal did not "designate the

² Because Tyler does not raise any claims regarding the trial proceedings, the State has not presented a summary of the trial testimony.

decision or part of decision which the party wants reviewed” as provided in RAP 5.3(a)(3).

After the State received the Appellant’s Opening Brief herein, the State was able to contact Tyler’s new trial counsel for entry of the CrR 3.5 hearing findings. Those findings were entered January 8, 2015. CP ___ (Sub. No. 95, 3.5 Hearing Findings and Order Regarding Admissibility of Statements, filed January 8, 2015, Supplemental Designation of Clerk’s Paper’s Pending, see attached Appendix A for certified copy).

IV. ARGUMENT

1. This Court should accept the entered findings.

The CrR 3.5 hearing in the present case was conducted during the trial because the witness who interviewed the defendant was a member of the military and the interview occurred in Kuwait. 10/29/13 RP 29, (Volume 1), 7 (Volume 2). At the close of the hearing, the trial court made oral findings indicating Tyler had been properly advised of the Miranda warnings, and that all statements were admissible at trial. 10/29/13 RP 37-8, (Volume 1), 15-6 (Volume 2).

Written findings were not initially prepared. After the jury verdicts were returned on some of the counts, Tyler was sentenced on those counts. CP 73. The other three counts for which no verdict were entered remain

pending. The somewhat unusual circumstances of this case with part of Tyler's trial court case still pending resulted in the State not appreciating that the 3.5 hearing findings were not completed prior to the appeal.

Following the receipt by the State of the Appellant's Opening Brief, the State prepared written findings, which were approved by Tyler's new trial counsel. See Appendix A. Those findings can be compared against the oral findings which show they are nearly identical. 10/29/13 RP 25-38 (Volume 1), 3-16 (Volume 2).

The timing of the entry of findings appears to fall between provisions regarding settlement of the record and entry of a trial court order which would change the decision raised in the appellate court.

Pursuant to RAP 7.2(b), once the appeal has begun the trial court has the authority to settle the record as provided in RAP title 9. RAP title 9 contained no specific mention of entry of written findings for a proceeding conducted prior to commencement of the appeal. But RAP 9.10 provides:

If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional clerk's papers and exhibits or administrative records and exhibits certified by the administrative agency, or (2) correct, or direct the supplementation or correction of, the report of proceedings.

RAP 9.10.

RAP 7.2(e) does require the superior court to obtain permission from the appellate court before making any determination that would “change a decision then being reviewed by the appellate court.” Since Tyler did not appeal from any issues related to the substance of CrR 3.5 hearing, the trial court’s written findings did not alter the substance of the trial court decision. Only because Tyler raised the procedural issue of the lack of findings, could it be claimed that permission should have been sought. However under the language of RAP 7.2(e), there was no “change in the decision” in the trial court. Thus, the trial court’s entry of findings was appropriate. They should be accepted by the Court and the case should move forward.

2. Remand to the trial court would be a useless act and instead, Tyler should be permitted to file a new Brief of Appellant.

CrR 3.5 does provide:

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.

Although the court rule does provide for written findings, Courts have indicated that cases can be adequately reviewed without CrR 3.5 hearing findings. Failure to enter findings required by CrR 3.5 is considered harmless error if the court's oral findings are sufficient to permit appellate review. *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003)

citing *State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992), *aff'd*, 123 Wn.2d 51, 864 P.2d 1371 (1993).³ In other contexts, where rules provide for written findings, the Supreme Court has required remand for entry of findings. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (failure to enter bench trial findings under CrR 6.1(d) requires remand), *State v. Friedlund*, ___ Wn.2d ___, ___ P.3d ___ 2015 Wash. LEXIS 79, 9-11 (Wash. Jan. 15, 2015) (failure to enter written exceptional sentence findings). But such a rule has not been adopted for CrR 3.5 hearings.

Instead of raising any issues pertaining to the CrR 3.5 hearing in order to evaluate whether the oral findings were sufficient, Tyler seeks remand for entry of findings. However, given that the findings have now been entered, remand for that is pointless. And since Tyler did not raise any substantive issues relating to the CrR 3.5 hearing, he cannot establish the findings were tailored to address issues he raised on appeal.

Remand is unnecessary. Instead, Tyler should be permitted the relief of filing a new opening brief. RAP 1.2(a).

³ In accord with the language of *Cunningham*, the undersigned did include appellate counsel in the issue of entry of the CrR 3.5 hearing findings by including copies to appellate counsel of e-mails relating to the entry including proposed drafts.

V. CONCLUSION

For the foregoing reasons, this Court should deny the request to remand and instead permit Tyler to file a new Brief of Appellant.

DATED this 10th day of February, 2015.

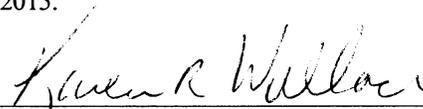
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; []ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: David B. Koch, addressed as Nielsen, Broman & Koch, PLLC, 1908 E. Madison Street, Seattle, WA 98122. . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 10th day of February, 2015.


KAREN R. WALLACE, DECLARANT

APPENDIX A

I, MAVIS E. BETZ, Clerk of the Superior Court of the State of Washington, for Skagit County, do hereby certify that this is a true copy of the original now on file in my office. Dated 2/1/15



MAVIS E. BETZ, County Clerk
By: [Signature]
Deputy Clerk

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SKAGIT COUNTY, WA

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4 SUPERIOR COURT OF WASHINGTON

5 COUNTY OF SKAGIT

STATE OF WASHINGTON, Plaintiff,	NO. 12-1-00352-1
v.	3.5 HEARING FINDINGS AND ORDER REGARDING ADMISSIBILITY OF
JAMES E. TYLER, Defendant.	STATEMENTS

6
7
8
9 THE COURT having heard the testimony of, and having considered the evidence and arguments of counsel, and the defendant, makes and enters the following findings:

10
11 **I. FINDINGS OF FACT**

- 12
- 13 1. Agent Courtnee Downs testified at the hearing. Downs was employed by the U.S. Army Criminal Investigations Command at Forth Worth, Texas.
 - 14 2. Downs was stationed at Camp Buerhing in Kuwait in 2011 and 2012.
 - 15 3. Downs had received a request for assistance from the Mount Vernon Police Department to interview the defendant, James Tyler, who at the time was a staff sergeant in Kuwait.
 - 16 4. Downs located the defendant by making a few calls and locating his commander.
 - 17 5. On April 5, 2012, the commander had someone escort the defendant to Downs' office.
 - 18 6. The defendant was not placed under arrest.
 - 19 7. Downs introduced herself and requested consent to video record the interview.
 - 20 8. The defendant agreed to be recorded.
 - 21 9. Downs first went over personal information with the defendant. (See Appendix A, Personal Data Sheet).
 - 22 10. Downs then went over a military form which is a rights warning of waiver certificate with the defendant. (See Appendices B (Rights Warning Procedure, Waiver Certificate), C).

- 1 11. The defendant's advice of rights was recorded.
- 2 12. The defendant was advised of each right individually.
- 3 13. At the end of the reading of the rights, the waiver question was asked: "Do you wish to
- 4 speak to me without a lawyer present at this time?" to which the defendant paused for a
- 5 moment and then proceeded.
- 6 14. The defendant was then asked if he wished to talk without including the lawyer portion and
- 7 the defendant proceeded to talk.
- 8 15. The defendant had very clearly earlier been advised of his right to a lawyer, either he could
- 9 retain privately or that the military would provide at no expense to him or both, and he
- 10 chose not to exercise those rights.
- 11 16. The defendant never indicated he did not understand his rights.
- 12 17. The interview was about two hours long.
- 13 18. The defendant never indicated he wished to stop talking.
- 14 19. The defendant never asked to talk to a lawyer or have one present.
- 15 20. There was no evidence to support any use of threats or coercion.
- 16 21. Had the defendant indicated he did not want to answer questions, he was free to leave and
- 17 would have been permitted to go right back to whatever work he was doing.
- 18

19 **II DISPUTED FACT**

- 20 22. The defendant disputes the fact of a delay in the defendant's response at the point where he
- 21 was asked to waive his rights, which this Court resolves by indicating that it appeared that
- 22 the defendant was contemplating that question, and did respond that he would proceed.
- 23

24 **III. CONCLUSIONS OF LAW**

25 NOW, THEREFORE, the Court finds that

- 26 1. The defendant was properly advised of his rights.
- 27 2. The defendant knowingly and voluntarily waived those rights.

- 1 3. The statements made by the defendant were voluntarily made and without coercion.
- 2 4. Any statements that the defendant did make during the interview are admissible at trial,
- 3 subject to objection on grounds other than voluntariness.
- 4

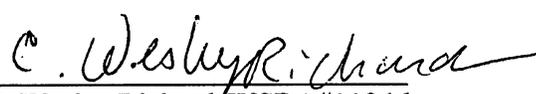
5 Dated this 1-8-15.

7 
8 _____
9 Judge David R. Needy

10 Presented by:

10 Approved as to Form:

11 
12 _____
13 Richard A. Weyrich, WSBA#7199
14 Prosecuting Attorney
15 Erik Nelson

11 
12 _____
13 C. Wesley Richards WSBA#11946
14 Attorney for Defendant