IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,		
Respondent,	)	**No. 27580-9-III**
	)	**Consolidated with**
	)	**No. 27607-4-III**
v.	)	
	)	
LESLIE J. SANDERSON,	)	**Division Three**
	)	
Appellant.	)	
_____	)	**UNPUBLISHED OPINION**
	)	
STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
v.	)	
	)	
JOSEPHINE T. SANDERSON,	)	
	)	
Appellant.	)	
	)	
	)	

Brown, J.—Leslie Sanderson and his wife, Josephine Sanderson, appeal their first degree theft convictions and the special jury verdicts for breaching their position of

trust and victim vulnerability. The Sandersons mainly contend insufficient evidence supports their convictions and the trial court should have granted their suppression motion. We reject their contentions and decline to address their remaining contentions because our record is insufficient for review. Accordingly, we affirm.

FACTS

Theresa Hammer and her late husband, Lloyd Hammer, Sr., executed a durable power of attorney before Lloyd Hammer, Sr., died. The document gave power of attorney to their son, Lloyd Hammer, Jr. (Mr. Hammer), in the event either of them died or was unable or unwilling to act. Ms. Hammer lived with her daughter and son-in-law, Josephine Sanderson and Leslie Sanderson, from 2003 until shortly before she died in November 2007. Mr. Hammer had little contact with his mother from 1997 until 2007.

Mr. Hammer visited Ms. Hammer in late March 2007. Ms. Hammer was 85 years old, suffering health problems and was temporarily hospitalized following a March 25 stroke. Ms. Sanderson and Mr. Hammer agreed that Mr. Hammer would help transfer their mother to Franklin Hills, a nursing home. During the transfer, Mr. Hammer spoke with Ms. Hammer and perceived that she was very tired and forgetful. Ms. Hammer expressed concern for how she would pay for things.

Mr. Hammer unilaterally invoked his power of attorney on March 31. Ms. Sanderson met Mr. Hammer at the Bank of America in Spokane to close the account that she co-owned with Ms. Hammer. Ms. Sanderson gave Mr. Hammer the $23,000 that had been in the account. Mr. Hammer

also requested Ms. Hammer's financial paperwork from Ms. Sanderson. In response, Ms. Sanderson gave him two carbon copies of recent checks. Ms. Sanderson simultaneously told him that she had written a check on March 21, 2007 for $5.78 to the city of Coulee Dam, but neglected to inform Mr. Hammer that Ms. Hammer had written a $40,000 check the same day to Ms. Sanderson.

Mr. Hammer examined the check copies upon returning to his home. He saw the check for $5.78 to Coulee Dam and the $40,000 check to Ms. Sanderson. Ms. Hammer's signature on the $40,000 check appeared authentic. Mr. Hammer called Ms. Sanderson and asked about the $40,000 check. According to Mr. Hammer's recollection, Ms. Sanderson explained that she had forgotten to mention the check and that Ms. Hammer had given Ms. Sanderson the money because their mother wanted her to have the money because "she knew that [Mr. Hammer] would not take care of [Ms. Sanderson]." Report of Proceedings (RP) at 98. Mr. Hammer reported the matter to Adult Protective Services as a potential instance of fraud.

Sheri Ellis, an Adult Protective Services social worker, visited Franklin Hills to speak with Ms. Hammer. By chance, Ms. Ellis first spoke with Ms. and Mr. Sanderson, who were setting up a television in Ms. Hammer's room. Ms. Ellis told the Sandersons she was investigating a financial exploitation allegation. Ms. Ellis asked them whether they had received a $40,000 check signed by Ms. Hammer and made out to Ms. Sanderson. They said they did. Ms. Sanderson also reported that they had used some of the money. Ms. Ellis requested the

Sandersons arrange a later meeting with her and bring with them receipts to show how they had spent the money. The Sandersons then left to allow Ms. Ellis to speak with Ms. Hammer alone. She found Ms. Hammer to be content with her situation but unaware how long she had lived at Franklin Hills, how long she had lived with the Sandersons, and who was managing her finances. Ms. Hammer did not remember whether she had written a check for $40,000 to Ms. Sanderson.

Ms. Ellis later sent a letter to the Sandersons again requesting that they arrange an appointment to review receipts and the use of the money. The Sandersons scheduled and attended a meeting at the Adult Protective Services office on April 25. Ms. Ellis conducted the meeting along with Spokane Police Detective Kirk Kimberly. The detective participated in the meeting because a police report had been made around the same time as the Adult Protective Services referral. Neither Ms. Ellis nor Detective Kimberly advised the Sandersons of their protections against self-incrimination pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Sandersons provided receipts for how they had spent over $8,000 of the $40,000. Some of the expenditures were for Ms. Hammer, but most were for the Sandersons. The largest purchase was a used car for the Sandersons. The Sandersons produced a document purportedly dictated and signed by Ms. Hammer, Ms. Sanderson, and Mr. Sanderson on March 21, the same day of the $40,000 check. The document read as follows:

> I, Theresa L. Hammer, being of sound mind, will be giving Josephine T. Sanderson a check for an undisclosed amount of monies to be deposited into an account with just her name on the account. This is in case I cannot think or provide for myself in the future.
>
> The funds deposited into Josephine T. Sanderson's account will be for my part of the house payment and any accumulated bills that need to be paid.
>
> It was mine and Josephine's understanding that if my daughter and her husband, Leslie J. Sanderson, were to take care of me, that we would need a place where all of us could live. . . . So we found a house, and my daughter and I shared in buying it.
>
> My daughter and her husband have taken excellent care of me, making sure I always took my medication when needed and getting me to my doctor appointments. They have put their lives on hold just so they could take care of me only because they care so much for me. And this is one way for me to help them the way they have helped me.
>
> I have had Leslie J. Sanderson, my daughter's husband, type this out for me so that in the future there would be no confusion about any of this.
>
> So I say this the 21st day of March of 2007.

RP at 25-26.

The Sandersons ultimately returned around $31,000 to Mr. Hammer, in his capacity as Ms. Hammer's power of attorney.

The State charged Mr. Sanderson and Ms. Sanderson with first degree theft on July 27, 2007. The State charged two aggravating factors: the Sandersons (1) "should have known that the victim . . . was particularly vulnerable or incapable of resistance"; and (2) "used [their] position of trust, confidence, or fiduciary responsibility to facilitate the [theft]." Clerk's Papers (CP) (Case No. 27607-4-III, Josephine Sanderson) at 1; (Case No. 27580-9-III, Leslie Sanderson) CP at 1.

Trial began in October 2008. Before trial, the Sandersons moved to exclude statements they made in their meeting with Ms. Ellis and Detective Kimberly. Following a hearing in which the court heard argument from both parties and the testimony of Ms. Ellis and Detective Kimberly, the court orally ruled to admit the statements at trial. At the end of the oral ruling, the court contemplated entering written findings and conclusions, but none are in the record.

The jury found the Sandersons guilty as charged and returned special verdicts finding they knew or should have known the victim was particularly vulnerable and incapable of resistance and that they used their position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense. The Sandersons appeal.

ANALYSIS

A. Evidence Sufficiency

The Sandersons assail the evidence supporting their first degree theft convictions and argue the State's evidence did not disprove their good-faith-belief defense.

In reviewing a sufficiency of the evidence challenge, we view the evidence in the light most favorable to the State and ask whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Gentry*, 125 Wn.2d 570, 596-97, 888 P.2d 1105 (1995). A claim of insufficiency "admits the truth of the State's evidence and all inferences

that can reasonably be drawn from that evidence." *Gentry*, 125 Wn.2d at 597.

A person commits first degree theft when he or she commits theft of property or services exceeding $1,500 in value other than a firearm. Former RCW 9A.56.030(1)(a) (1995).[1] Theft, in relevant part, occurs when one "wrongfully obtain[s] or exert[s] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a). The State's theory at trial was that Ms. Hammer was incompetent to authorize control over her money. So, even if Ms. Hammer herself signed the $40,000 check, the Sandersons wrongfully obtained the check from her.

The Sandersons contend the State did not meet its burden on the element of first degree theft that the Sandersons wrongfully obtained or exerted unauthorized control over property of another. They argue the State did not prove Ms. Hammer's incapacity before or on March 21, 2007 beyond a reasonable doubt. However, the abundant trial evidence reviewed in the facts show Ms. Hammer experienced periods of confusion, memory problems, and cognitive deficit. The $40,000 check was unusually large and nearly depleted Ms. Hammer's account. The exculpatory document submitted by the Sandersons was suspicious. And, the Sandersons demonstrably used the money for their own purposes. From this evidence the jury could well find

[1] The amount in former RCW 9A.56.030 was raised after the Sandersons' convictions to $5,000. Laws of 2009, ch. 431, § 7 (effective July 26, 2009).

beyond a reasonable doubt all the necessary crime elements for first degree theft. Credibility on fact issues is left to the jury.

The Sandersons' trial defense for theft that the property was "appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." RCW 9A.56.020(2); *State v. Ager*, 128 Wn.2d 85, 92, 904 P.2d 715 (1995); *State v. Mora*, 110 Wn. App. 850, 855, 43 P.3d 38 (2002). "The matter is then for the jury to decide." *Mora*, 110 Wn. App. at 856. The jury was so instructed.

The primary evidence supporting the good faith claim of title defense was the document purportedly signed by Ms. Hammer that the Sandersons first shared at their meeting with Ms. Ellis and Detective Kimberly at Adult Protective Services. Both Ms. Sanderson and Mr. Sanderson testified that Ms. Hammer dictated and signed the document and that Ms. Hammer willingly and knowingly gave them the $40,000 check.

The State, by contrast showed the Sandersons did not mention any document signed by Ms. Hammer in their first meeting with Ms. Ellis at the nursing home. And they showed the Sandersons' stated reasons for Ms. Hammer giving them the money changed over time. Considering all, the jury was free to believe or disbelieve the Sandersons' good faith belief of ownership defense. *Mora*, 110 Wn. App. at 856.

B. Statements

The issue is whether the trial court erred in admitting the Sandersons' statements given during their second meeting with Adult Protective Services. The Sandersons contend the trial court should

have suppressed their statements without the warnings required by *Miranda*, before questioning the Sandersons. The State responds that *Miranda* warnings are not required in a non-custodial setting.

Initially, the Sandersons contend the trial erred in failing to enter written findings and conclusions following its oral denial of the Sandersons' motion to suppress. *State v. Thompson*, 73 Wn. App. 122, 130, 867 P.2d 691 (1994). They argue the failure to enter findings and conclusions reversibly prejudiced them by causing delay. *See State v. Byrd*, 83 Wn. App. 509, 512, 922 P.2d 168 (1996) (CrR 3.6 findings and conclusions).

CrR 3.5(c) requires a trial court to enter written findings of fact and conclusions of law. But failure to file written findings is harmless error if the trial court's oral opinion and the record of the hearing are so comprehensive and clear that written findings would be a mere formality. *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994); *see also State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 324 (2003). Moreover, if the oral ruling does not provide a sufficient basis for appellate review, a trial court's failure to enter written findings and conclusions typically requires remand for entry of findings and conclusions, not reversal. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

The trial court's oral ruling is sufficient to allow our review. The trial court found the first meeting between Ms. Ellis and the Sandersons was an interview to find out from Ms. Ellis's perspective "whether the

complaint she had before her was founded." RP at 52. The court further found that the second meeting occurred because Ms. Ellis "felt there was enough to go on to have a second conversation" and "invited the defendants to meet with her." *Id*. The Sandersons then "voluntarily appeared in her office and – I assume to explain themselves or explain the situation." *Id*. The court noted the detective stated "he was in a factual-gathering process and hadn't reached a decision [at the time of the second meeting]; was trying, again, to sort out what everyone's stories were, and so forth." RP at 53. The trial court concluded although "the second meeting takes on a little bit different tone [from the first meeting, at the nursing home], because the . . . detective is there . . . there is no real good indicia that it was a custodial interrogation other than being in the presence of the detective." RP at 52. And the court reasoned, "Certainly we have situations where police officers are asking citizens questions, and it doesn't rise to the level of a custodial interrogation." *Id*.

We review the trial court's denial of a suppression motion to determine whether substantial evidence supports the court's factual findings. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *Mendez*, 137 Wn.2d at 214. We review the court's conclusions of law de novo. *Id.* "[W]hether a suspect is 'in custody,' and therefore entitled to *Miranda* warnings, presents a mixed question of

law and fact" which also qualifies for de novo review. *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995); *State v. Solomon*, 114 Wn. App. 781, 787-88, 60 P.3d 1215 (2002).

Miranda warnings are required in the context of "(1) a custodial (2) interrogation (3) by a state agent." *Solomon*, 114 Wn. App. at 787. The parties here dispute whether the Sandersons were in custody at the time they spoke with Ms. Ellis and Detective Kimberly. The factual aspect of the inquiry concerns the circumstances that surrounded the Sandersons' interrogation. *Thompson*, 516 U.S. at 112. "The legal inquiry determines, given the factual circumstances, whether 'a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.'" *Solomon*, 114 Wn. App. at 787 (quoting *Thompson*, 516 U.S. at 112). A suspect is in custody for purposes of *Miranda* when the following objective test is satisfied: "whether there was a formal arrest or restraint of the defendant to a degree consistent with formal arrest." *State v. Grogan*, 147 Wn. App. 511, 517, 195 P.3d 1017 (2008) (citations omitted).

Substantial evidence supports the trial court's oral findings regarding the circumstances of the Sandersons' questioning by Ms. Ellis and Detective Kimberly. Ms. Ellis requested a meeting, but the Sandersons scheduled the time for the meeting by calling the Adult Protective Services office and drove themselves to the meeting. Although the detective was present at the meeting, he asked few questions, none coercive. At the end of the meeting, the

Sandersons left and drove themselves home. These findings support the conclusion that the Sandersons were not in custody for purposes of *Miranda*. The Sandersons fail to show a degree of restraint consistent with formal arrest. *Grogan*, 147 Wn. App. at 517-18. Given all, we conclude the trial court did not err in denying the Sandersons' statement-suppression motion and it was harmless error to not make written findings and conclusions pursuant to CrR 3.5.

C. Spectator Actions

The Sandersons contend a spectator, Ms. Sanderson's sister, shared her notes on previous testimony with witnesses still waiting to be called, violating the court's admonition not to talk to the witnesses about what was said in court and justifying a mistrial. The Sandersons' counsel acknowledges "nothing in the record reflect[s] this prohibited activity." Br. of Appellants at 19. Counsel candidly acknowledges that matters outside the record must be raised through a personal restraint petition. *State v. King*, 24 Wn. App. 495, 505, 601 P.2d 982 (1979).

We review a trial court's decision to deny a mistrial for an abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 565, 940 P.2d 546 (1997). Because nothing in our record supports the Sandersons' claim that the trial court should have granted a mistrial, we cannot analyze the issue on direct appeal. Where a claim of error involves matters outside of the record, the claim must be brought in a personal restraint petition. *See State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

D. Assistance of Counsel

The issue is whether the Sandersons' attorney rendered ineffective assistance.

We review ineffective assistance of counsel claims de novo. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). To prevail, the Sandersons must show both that their counsel's performance was deficient and that they were prejudiced by that deficient performance. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 204 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A defense attorney performs deficiently when his representation falls below an "objective standard of reasonableness based on consideration of all [relevant] circumstances." *Thomas*, 109 Wn.2d at 226. To satisfy the prejudice prong of the *Strickland* test, an appellant must show that "there is a reasonable probability that, but for counsel's . . . errors, the result of the [trial] would have been different." *Thomas*, 109 Wn.2d at 226; *McFarland*, 127 Wn.2d at 334-35. If either part of the test is not satisfied, the inquiry need not proceed further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Although, the Sandersons argue their trial attorney could have elicited exculpating testimony from Mr. Hammer, nothing in the record supports the Sandersons' ineffective assistance claim, and thus we cannot analyze their contention. Where a claim of error involves matters outside of the record, the claim must be brought in a personal restraint petition. *See McFarland*, 127 Wn.2d at 338 n.5.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Kulik, C.J.

Schultheis, J. Pro Tem