71416-3

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No. 71416-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLAYTON GERLACH,

Appellant.

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

BRIEF OF APPELLANT

WHITNEY RIVERA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
whitney@washapp.org

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to enter written findings of fact and conclusions of law following a bench trial for residential burglary that resulted in a conviction.

2. The conviction for residential burglary violates due process because the evidence was insufficient to allow any rational trier of fact to find the elements beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 6.1(d) requires that, following a bench trial, the judge enter written findings of fact and conclusions of law. The purpose of requiring written findings and conclusions is to enable an appellate court to review the questions raised on appeal. Is vacation of the judgment and sentence and remand required because the record is devoid of any written findings and conclusions on the charge of residential burglary?

2. A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. Evidence is insufficient if no rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. Was there insufficient evidence to support the residential burglary conviction where there was

no evidence that Mr. Gerlach entered the residence and where the State only proved that he was merely present outside the residence?

C. STATEMENT OF THE CASE

Clayton Gerlach waived his right to a jury and proceeded to a bench trial on the charge of residential burglary.[1] CP 25-27. Mark Conner testified that upon returning to his residence, he observed a white sport utility vehicle (SUV) in his driveway. 11/18/13 RP 17. As Mr. Conner approached the vehicle, the driver honked the horn. 11/18/13 RP 27. Mr. Conner asked if he could help the driver, who indicated that he was having engine troubles. 11/18/13 RP 21. Mr. Conner told the driver that he was going to call 911. 11/18/13 RP 22. At trial, Mr. Conner identified the driver of that vehicle as Mr. Gerlach. 11/18/13 RP 30-31.

Mr. Conner then went into his house, which he noticed was not in the same condition as he had left it earlier that morning. 11/18/13 RP 23-24. He saw that property had been moved around, but nothing had been taken. 11/18/13 RP 31-32. When he went back outside, the

[1] Mr. Gerlach was also charged with bail jumping under the same cause number. CP 54. On the bail jumping charge, Mr. Gerlach stipulated to a bench trial on agreed documentary evidence. CP 25-27. The trial court found him guilty of bail jumping and entered findings of fact and conclusions of law with regard to that count. CP 28; 11/18/13 RP 139.

SUV pulled quickly from his driveway. 11/18/13 RP 26. Mr. Conner testified that he saw an unknown person run through some bushes and get into the SUV. 11/18/13 RP 27.

Law enforcement later detained Mr. Gerlach while he was walking down a street not far from Mr. Conner's residence. 11/18/13 RP 91. The SUV was left on the side of the road about 200 yards away from where Mr. Gerlach was seized. 11/18/13 RP 64. Despite using a K-9 track, no other suspect was located by law enforcement. 11/18/13 RP 107.

At trial, Mr. Gerlach admitted to being the driver of the SUV. 11/18/13 RP 117. He drove down Mr. Conner's driveway because he was having engine problems. *Id.* Mr. Gerlach explained that he is deaf and could not recall whether he honked the horn when approached by Mr. Conner. 11/18/13 118. Mr. Gerlach perceived that Mr. Conner was unhappy with his presence in the driveway, so he pulled out as Mr. Conner entered his residence. *Id.* Mr. Gerlach said that no one else entered his vehicle. *Id.* He testified that he had to start walking a short time later when his engine died. 11/18/13 RP 118-19. Mr. Gerlach denied any involvement in a burglary. 11/18/13 RP 121.

After listening to testimony and receiving evidence, the trial court scheduled a subsequent hearing to issue its decision. 11/18/13 RP 137. At that hearing, the trial judge stated:

> I have had a chance to review my notes as well as all the exhibits that were admitted in this case, and I am ready to make my decision. So, in this matter I find Mr. Gerlach guilty of the charge. I've already found him guilty of the bail jumping charge, but I find him guilty of the charge of residential burglary. What is the plan for sentencing?

11/26/13 RP 2. The trial court neither stated the elements on the record nor engaged in any further analysis regarding the facts relied upon to find each element of the crime. *See* 11/26/13 RP 2-3. The trial court did not enter any written findings of fact or conclusions of law to support the guilty finding.

D. ARGUMENT

1. The trial court's failure to enter written findings of fact and conclusions of law violated CrR 6.1(d).

Following a bench trial, the criminal rules for superior courts require that the judge enter findings of fact and conclusions of law:

> In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

CrR 6.1(d). Findings must address each element of the crime separately and indicate the factual basis for each element and conclusion of law. *State v. Banks,* 149 Wn.2d 38, 43, 65 P.3d 1198 (2003); *State v. Head*, 136 Wn.2d 619, 623, 964 P.2d 1187 (1998) (citing *State v. Wilks*, 70 Wn.2d 626, 628, 424 P.2d 663 (1967)).

Findings need not include all the evidence in the record, but only evidence that established the existence or nonexistence of determinative factual matters. *State v. Alvarez*, 128 Wn.2d 1, 18, 904 P.2d 754 (1995). "The purpose of CrR 6.1(d)'s requirement of written findings of fact and conclusions of law is to enable an appellate court to review the questions raised on appeal." *Head*, 136 Wn.2d at 622 (citing *City of Bremerton v. Fisk*, 4 Wn. App. 961, 962, 486 P.2d 294 (1974)).

The trial court disregarded the requirements of CrR 6.1(d). Moreover, even in its oral decision, the trial judge failed to separately address each element and provide the factual basis for each conclusion of law as required. *See* 11/26/13 RP 2-3. The judge did not discuss the evidence, neglecting to engage in any analysis of how the facts introduced at trial satisfied the elements beyond a reasonable doubt. *See id.* The meager assertion that the trial court was finding Mr.

Gerlach guilty, without any written findings and conclusions, was wholly insufficient to establish the record necessary for appellate review.

Failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires vacation of the judgment and sentence and remand for entry of findings and conclusions. *Head*, 136 Wn.2d at 625-26. Either party may then appeal those findings and conclusions in the usual course. *Id.* at 626.

2. The residential burglary conviction violates due process because there was insufficient evidence for any rational trier of fact to find the elements beyond a reasonable doubt.[2]

A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable

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[2] In a case tried to the trial court without a jury, an appellate court cannot determine whether evidence is sufficient to support a conviction without the required written findings of fact and conclusions of law. *State v. Denison*, 78 Wn. App. 566, 570, 897 P.2d 437 (1995). However, in the alternative to the assignment of error regarding non-compliance with CrR 6.1, Mr. Gerlach challenges the sufficiency of evidence upon which his residential burglary conviction was based.

doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). This standard of review ensures that the fact finder rationally applied the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt. *Jackson*, 443 U.S. at 317-18; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

A challenge to the sufficiency of evidence presented at a bench trial requires an appellate court to review the trial court's findings of fact and conclusions of law. *State v. Madarash*, 166 Wn. App. 500, 509, 66 P.3d 682 (2003). The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the trial court's findings of fact must be supported by substantial evidence in the record. *Id.* If the findings are supported by substantial evidence, then the appellate court must decide whether those findings of fact support the trial court's conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

As previously discussed, the trial court failed to make any oral or written findings of fact and thus Mr. Gerlach is unable to assign error to any specific finding. Because of the limitations imposed by the lack of a record below, Mr. Gerlach challenges the conclusion of law that the elements of residential burglary were supported by sufficient evidence. A trial court's conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

a. There was insufficient evidence to find Mr. Gerlach guilty of residential burglary as a principal.

The record is unclear whether the trial court found Mr. Gerlach guilty as a principal or as an accomplice. A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling. RCW 9A.52.025(1). There was no evidence introduced at trial to establish that Mr. Gerlach entered the residence. Rather, the evidence showed that he was present outside the residence in the driveway. 11/18/13 RP 17.

The State conceded during closing argument that there was insufficient evidence to convict Mr. Gerlach as a principal and urged the trial court to find him guilty as an accomplice. *See* 11/18/13 RP 126-17. The State claimed that Mr. Gerlach was "an accomplice and he

also was a look-out." 11/18/13 RP 126. The State's theory was that the evidence proved that "he was assisting in this burglary, he acted as a look-out and as a get-away driver for the second person who came from the residence." 11/18/13 RP 127. There was insufficient evidence for any rational trier of fact to find Mr. Gerlach guilty as a principal of residential burglary.

b. There was insufficient evidence that Mr. Gerlach was an accomplice to any crime.

A person is legally accountable for the conduct of another person when he is an accomplice of that other person in the commission of the crime. RCW 9A.08.020(2)(c). A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the crime, he (1) solicits, commands, encourages, or requests that other person to commit the crime, or (2) aids or agrees to aid that other person in planning or committing the crime. RCW 9A.08.020(3)(a)(i)-(ii).

To prove that Mr. Gerlach was an accomplice to a residential burglary, the State was required to prove beyond a reasonable doubt that he (1) knew his actions would promote or facilitate this crime, (2) was present and ready to assist in some manner, and (3) was not merely present at the scene with some knowledge of potential criminal activity.

See State v. Asaeli, 150 Wn. App. 543, 568, 208 P.3d 1136 (2009) (citing RCW 9A.08.020(3)).

To be an accomplice, a person must have knowledge that he or she was promoting or facilitating the crime charged. *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). The evidence must show that the accomplice aided in the planning or commission of the crime and that he had knowledge of the crime. *State v. Truong*, 168 Wn. App. 529, 539-40, 277 P.3d 74 (2012) (citing *State v. Trout*, 125 Wn. App. 403, 410, 105 P.3d 63 (2005)). A person knows or acts with knowledge when he is aware of facts or circumstances described by a statute defining an offense. RCW 9A.08.010(1)(b)(i). A fact finder may, but is not required to, infer knowledge from circumstantial evidence. *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980). However, the fact finder must still find subjective knowledge. *Id.* at 517.

Physical presence and assent, without more, are insufficient to establish accomplice liability. *State v. Roberts*, 80 Wn. App. 342, 355, 908 P.2d 892 (1996). "One does not aid and abet unless, in some way, he associated himself with the undertaking, participates in it as something he desires to bring about, and seeks by his action to make it succeed." *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161

(1979) (quoting *State v. J-R Distribs., Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). "The State must prove that the defendant was ready to assist the principal in the crime and that he shared in the criminal intent of the principal, thus 'demonstrating a community of unlawful purpose at the time the act was committed.'" *Truong*, 168 Wn. App. at 540 (quoting *State v. Castro*, 32 Wn. App. 559, 564, 648 P.2d 485 (1982)).

Even viewing the evidence in the light most favorable to the State, it does not permit a rational trier of fact to find the essential elements of accomplice liability beyond a reasonable doubt. At best, the evidence established that Mr. Gerlach was merely present in the driveway. The State produced no evidence to establish that Mr. Gerlach shared the criminal intent of any other individual. There was no evidence to support the conclusion that Mr. Gerlach had knowledge that his actions would promote or facilitate any crime and sought by his actions to make it succeed. As such, there was insufficient evidence to support the trial court's conclusion that Mr. Gerlach was guilty of the crime of residential burglary.

c. Because the residential burglary conviction violates Mr. Gerlach's due process rights, this Court should reverse and dismiss.

This court should reverse because there was insufficient evidence to find beyond a reasonable doubt that Mr. Gerlach was an accomplice to an unknown suspect in the crime of residential burglary. Mr. Gerlach was convicted without proof beyond a reasonable doubt in violation of the Fourteenth Amendment to the United States Constitution. A defendant whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981)). Consequently, this Court should reverse and dismiss the residential burglary charge with prejudice.

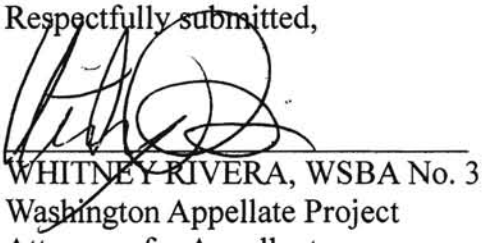
E. CONCLUSION

This Court should vacate the residential burglary judgment and sentence and remand for the court to enter written findings of fact and

conclusions of law. Alternatively, this Court should reverse for insufficient evidence and dismiss the charge with prejudice.

DATED this 3rd day of July, 2014.

Respectfully submitted,



WHITNEY RIVERA, WSBA No. 38139
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71416-3-I
	)	
	)	
CLAYTON GERLACH,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF JULY, 2014, 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:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X]	CLAYTON GERLACH C/O CORINA BEREND 2522 OLD HWY 99 S #6 MOUNT VERNON, WA 98273	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 3RD DAY OF JULY, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711