

NO. 36506-5 II

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
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STATE OF WASHINGTON, RESPONDENT

v.

AARON DARNELL BARNES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 06-1-00994-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was defendant's guilty plea knowing, voluntary, and intelligent, when defendant was notified of all direct consequences of his plea, including that his sentence was an exceptional sentence, defendant was made aware of the constitutional rights he would be giving up by pleading guilty, and defendant received the sentence both he and the prosecutor recommended to the trial court?

2. Was it necessary for the trial court to exercise "special care" during defendant's plea hearing, when the trial court (1) properly determined that defendant's guilty plea was knowingly, voluntarily, and intelligently entered, (2) defendant received a reduced sentence in exchange for his guilty plea, (3) defendant stated that he was not coerced into pleading guilty, and (4) where defendant did not present any evidence that he was in fact coerced into pleading guilty; and was any error committed by the trial court harmless?

3. Did the State's failure to enter findings of fact and conclusions of law until after his appellate brief had been filed prejudice defendant, when defendant is unable to articulate any prejudice he suffered due to the late filing and there is no evidence the findings of fact and conclusions of law were tailored to the appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On March 2, 2006, the Pierce County Prosecutor's Office filed an information in Cause No. 06-1-00992-6, charging AARON DARNELL BARNES, hereinafter "defendant," with one count of unlawful possession of a controlled substance with intent to deliver, cocaine, with a firearm

enhancement, and one count of second degree unlawful possession of a firearm. CP 1-3. The matter proceeded to trial before the Honorable Kathryn J. Nelson on June 11, 2006, along with the trial of two co-defendants, Nicholas Lee on Cause No. 06-1-00992-6, and Karreim Ahkeen Shaheed, on Cause No. 06-1-00993-4. 3RP¹ 3.

On June 18, 2006, all three co-defendants, including defendant, reached a plea agreement with the prosecutor. 3RP 300-01, 303; CP 10-13. This plea was a “package resolution” contingent on all three co-defendants agreeing to the deal. 3RP 300. The State filed an amended information pursuant to the plea, which eliminated the firearm enhancement to the unlawful possession of a controlled substance with intent to deliver, cocaine, charge, and amended the other charge to first degree unlawful possession of a firearm for defendant. 3RP 303, CP 8-9. The State also filed separate amended informations for defendants Lee and Shaheed, in which they received reduced charges in exchange for their

¹ There are three volumes of verbatim reports of proceedings: 1RP, 11/29/06; 2RP, 12/1/06; 3RP, 6/11/07-6/29/07.

guilty pleas². 3RP 300-01. Defendant entered a plea in accordance with *Alford/Newton* and *In re Barr* to both charges³. CP 10-13; 3RP 309-10.

In the statement of defendant on plea of guilty, defendant stated in paragraph 8, “No one has threatened harm of any kind to me or to any other person to cause me to make this plea,” and in paragraph 10, “No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.” CP 10-13. Defendant stated that he was “entering this plea to take advantage of the State’s offer, and because if this case were to proceed to trial, there is a substantial likelihood that I would be found guilty.” *Id.*

Judge Nelson took the pleas from each co-defendant in succession, with defendant’s plea hearing occurring second. 3RP 303-26. At the plea hearing for defendant, defense counsel stated that he “went over all of the important constitutional rights that Mr. Barnes will be giving up by entering this plea,” and that defendant was “making this plea freely, voluntarily, and knowingly.” 3RP 305-06. Judge Nelson inquired

² Defendant Lee pleaded guilty to an amended information of unlawful possession of a controlled substance with intent to deliver, cocaine, and second degree unlawful possession of a firearm. RP 300-01, 314, 319. At trial, he faced a firearm enhancement on the unlawful possession of a controlled substance, cocaine, charge, and bail jumping. RP 314. Defendant Shaheed pleaded guilty to an amended information of unlawful possession of a controlled substance, cocaine, a reduced charge based on defendant Shaheed’s involvement, and the prosecution recommended that he receive a sentence of time served with 12 months of community custody. RP 300-01, 326, 328.

³ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976); *In re Barr* 102 Wn.2d 265, 269, 684 P.2d 712 (1984).

whether defendant had an adequate opportunity to go over his statement on plea of guilty with his attorney, and whether his attorney had answered all of his questions satisfactorily. 3RP 306. Judge Nelson asked defendant whether he understood the charges against him, and the elements of each crime. 3RP 307. Defendant answered affirmatively to all of these questions. 3RP 306-07. Judge Nelson also inquired whether or not defendant had been coerced into entering a guilty plea:

THE COURT: Now, did anyone threaten you in order to get you to plead guilty today?

DEFENDANT: No, ma'am.

THE COURT: Other than what's written in these documents, did anyone make some promises to you to cause you to enter a guilty plea?

DEFENDANT: No, ma'am.

THE COURT In Paragraph 11, it says that you are entering this pursuant to Newton and In re: Barr cases because you understand there are not facts sufficient to find you guilty of Count II, but you are pleading guilty to take advantage of the State's offer. Furthermore, you are pleading guilty not because you are guilty but to take advantage of the State's offer and because, if this case were to proceed to trial, there is a substantial likelihood you would be found guilty. Is that your statement?

DEFENDANT: Yes, ma'am.

3RP 309-10.

The prosecutor and defense counsel stated that part of the plea agreement was that each would recommend the high end standard range on both charges and that the sentences would run consecutively. 3RP 304-05. The trial court accepted defendant's guilty plea. 3RP 310.

At sentencing, both parties stated again that part of the agreed recommendation was that the sentences would run consecutively. 3RP 340-41. The trial court followed the agreed recommendation and sentenced defendant to 20 months on the unlawful possession of a controlled substance with intent to deliver, cocaine, charge and 34 months on the first degree unlawful possession of a firearm charge, to be served consecutively in the Department of Corrections, and nine to 12 months of community custody. 3RP 344, CP 17-29. From entry of this judgment, defendant filed a timely notice of appeal. CP 30-31.

The trial court entered findings of fact and conclusions of law on April 11, 2008. CP 37-39. In section III of the findings of fact, the trial court found:

"That AARON D. BARNES understands and acknowledges that he has the right to a jury determination of mitigating or aggravating circumstances and waives any right to appeal this exceptional sentence under Blakely v. Washington, 124 S. Ct. 2531, 159 L.Ed.2d 403, 2004 U.S. Lexis 4573."

Id.

In section one of the conclusions of law, the trial court concluded:

“That an exceptional sentence above the standard range is permitted as part of a plea bargain under State v. Hilyard, 63 Wn. App. 413 (1991). Such an agreement constitutes a substantial and compelling reason justifying an exceptional sentence outside the standard range.”

Id.

Both the prosecutor and defense counsel signed the findings of fact and conclusions of law entered by the trial court. *Id.*

2. Facts

On March 2, 2006, Tacoma Police Department Officers served a search warrant at 6410 S. 10th St. #702. CP 1-3. Inside the apartment, Lee and Shaheed were sitting on the couch. *Id.* Defendant was also in the apartment and when he saw the Officers enter the apartment, he went into the back bedroom and shut the door. *Id.* Defendant eventually emerged, and the Officers searched the bedroom, finding 24.2 grams of crack cocaine that field tested positive, as well as a handgun located under the bed. *Id.*

The officers also searched the closet near where Lee and Shaheed were sitting. *Id.* Inside the pocket of one of the jackets in the closet was 20 pieces of crack cocaine that field tested positive. *Id.* Inside the closet was a USPS Express package in Shaheed’s name and a copy of a search warrant in Lee’s name. *Id.*

C. ARGUMENT.

1. DEFENDANT'S GUILTY PLEA WAS KNOWING, VOLUNTARY, AND INTELLIGENT WHEN DEFENDANT WAS NOTIFIED OF ALL DIRECT CONSEQUENCES OF HIS PLEA, INCLUDING THAT HIS SENTENCE WAS AN EXCEPTIONAL SENTENCE, DEFENDANT WAS MADE AWARE OF THE CONSTITUTIONAL RIGHTS HE WOULD BE GIVING UP BY PLEADING GUILTY, AND DEFENDANT RECEIVED THE SENTENCE THAT BOTH HE AND THE PROSECUTOR RECOMMENDED TO THE TRIAL COURT.

A defendant must be informed of all direct consequences of his plea. *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298, 88 P.3d 390 (2004). "A 'direct' consequence is one that 'represents a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *State v. Matthews*, 128 Wn. App. 267, 271-72, 115 P.3d 1043 (2005) (quoting *State v. Ross*, 129 Wn.2d 279, 284, 916 P.2d 405 (1996)). The burden is on the State to show that the defendant knew of all direct consequences of his plea. *Ross*, 129 Wn.2d at 287 (citing *Wood v. Morris*, 87 Wn.2d 501, 507, 554 P.2d 1032 (1976)). The State may meet this burden through the record of the plea hearing or other "clear and convincing extrinsic evidence." *Ross*, 129 Wn.2d at 287 (citing *Morris*, 87 Wn.2d at 511). In regard to unexpected sentence provisions, a defendant must establish that the provision was a direct consequence of his plea. *State v. Smith*, 137 Wn. App. 431, 437, 153 P.3d 898 (2007).

As argued below, defendant knowingly, voluntarily, and intelligently entered into a plea agreement with the prosecutor in exchange for a sentence less than the one he faced if found guilty at trial. Part of the plea agreement was a joint recommendation that defendant receive the high end of the standard range sentences on both the unlawful possession of a controlled substance with intent to deliver, cocaine, charge and the first degree unlawful possession of a firearm charge. RP 304-05, 340-41. Defendant and the prosecutor also agreed to jointly recommend that those sentences run consecutively. *Id.* The trial court agreed to follow the recommendation and sentenced defendant to a total of 54 months in the Department of Corrections, plus community custody. RP 344, CP 17-29. Defendant thus received precisely the sentence for which he bargained. Even though the joint recommendation box is not checked on the statement of defendant on plea of guilty, it is clear from the record that defendant and the prosecutor agreed to and jointly recommended the consecutive sentences. RP 304-05, 340-41; CP 10-13.

Defendant was also aware that he was agreeing to an exceptional sentence. At sentencing, defense counsel stated that he had discussed with defendant “all of the important constitutional rights that Mr. Barnes will be giving up by entering this plea.” RP 305-06. The trial court asked defendant if he understood that he was giving up important constitutional rights, and defendant replied that he did. RP 309. In the findings of fact, the trial court found that the prosecutor and defense counsel “stipulated to

an exceptional sentence.” CP 37-39. The trial court also found that defendant “understands and acknowledges that he has the right to a jury determination of mitigating or aggravating circumstances and waives any right to appeal this exceptional sentence under Blakely v. Washington, 124 S. Ct. 2531, 159 L.Ed.2d 403, 2004 U.S. Lexis 4573.” *Id.* These findings of facts were agreed to and signed by defense counsel. *Id.*

In *State v. Hilyard*, 63 Wn. App. 413, 819 P.2d 809 (1991), this Court held that a defendant’s stipulation to an exceptional sentence was sufficient grounds for a court to impose an exceptional sentence. *Hilyard*, 63 Wn. App. at 419-20. If the trial court were to do otherwise, this Court held, it “would be rejecting the stipulation as a binding agreement and treating it as a useless act.” *Id.* at 420. Hilyard was charged with two counts of first degree assault after he stabbed two employees of a Tacoma Thriftway. *Id.* at 415. Hilyard pleaded guilty to reduced charges of two counts of second degree assault with a deadly weapon as part of a plea bargain. *Id.* Hilyard also agreed to an exceptional sentence based upon two consecutive terms of 38 months for each charge in exchange for the charge reductions. *Id.* On appeal, he challenged the exceptional sentence, arguing that there was an insufficient factual basis and record to support the imposition of consecutive sentences. *Id.* at 416. This Court held that

the stipulation on its own provides the necessary justification for an exceptional sentence, and that this holding promotes “strong public policy that plea agreements voluntarily entered into ought to be enforced.” *Id.* at 420 (citing *State v. Perkins*, 108 Wn.2d 212, 216, 737 P.2d 250 (1987)).

Defendant bargained for the consecutive sentences in exchange for reduced charges. Defense counsel and the prosecutor, per the plea agreement, recommended that defendant receive the high end of the standard range sentences on each charge. Defense counsel stated at the plea hearing that he had gone over with defendant *all* of the constitutional rights defendant would be waiving in exchange for the guilty plea.

Defense counsel also signed the findings of fact and conclusions of law entered by the trial court that stated defendant was aware that he had agreed to an exceptional sentence. Therefore, defendant knowingly, voluntarily, and intelligently agreed to an exceptional sentence as part of his plea agreement, and his convictions and sentence should be affirmed.

2. IT WAS NOT NECESSARY FOR THE TRIAL COURT TO EXERCISE “SPECIAL CARE” DURING DEFENDANT’S PLEA HEARING BECAUSE (1) THE TRIAL COURT PROPERLY DETERMINED THAT DEFENDANT’S GUILTY PLEA WAS KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY ENTERED, (2) DEFENDANT RECEIVED A REDUCED SENTENCE IN EXCHANGE FOR HIS GUILTY PLEA, (3) DEFENDANT STATED THAT HE WAS NOT COERCED INTO PLEADING GUILTY, AND (4) DEFENDANT DOES NOT PRESENT ANY EVIDENCE THAT HE WAS IN FACT COERCED INTO PLEADING GUILTY; AND ANY POTENTIAL ERROR COMMITTED BY THE TRIAL COURT WAS HARMLESS.

Due process requires that when a criminal defendant pleads guilty, his plea be knowing, voluntary, and intelligent. *Isadore*, 151 Wn.2d at 297, 88 P.3d 390 (2004) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969)). “When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g), and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness.” *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982), *reversed on other grounds*, 87 Wn. App. 293, 941 P.2d 704 (1997) (citing *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980); *In re Teems*, 28 Wn. App. 631, 633, 626 P.2d 13 (1981); *State v. Ridgley*, 28 Wn. App. 351, 623 P.2d 717 (1981)). When the judge goes on to orally inquire of the defendant and satisfies himself on the record of the

existence of various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable. *Perez*, 33 Wn. App. at 261-62; *State v. Hystad*, 36 Wn. App. 42, 45, 671 P.2d 793 (1983).

“[A guilty plea] cannot be the product of or induced by coercive threat, fear, persuasion, promise, or deception.” *Woods v. Rhay*, 68 Wn.2d 601, 605, 414 P.2d 601, *cert. denied*, 385 U.S. 905, 87 S. Ct. 215, 17 L.Ed.2d 136 (1966). The burden is on the defendant to show an injustice that is obvious, directly observable, overt, and not obscure. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). More than the mere allegation of a defendant is necessary to overcome highly persuasive evidence that a guilty plea was voluntarily entered. *Id.* A defendant’s guilty plea is not involuntary if it is a calculated move to avoid what he considers a worse fate. *State v. Cameron*, 30 Wn. App. 229, 231 633 P.2d 901 (1981) (*citing Missouri v. Turléy*, 443 F.2d 1313, 1317 (8th Cir. 1971)).

Defendant has not met his burden of showing that he was coerced into entering a plea. In fact, defendant received reduced charges and a lenient sentence compared to the terms of confinement he faced if found guilty at trial. At trial, defendant was facing unlawful possession of a controlled substance with intent to deliver, cocaine, with a firearm enhancement, and second degree unlawful possession of a firearm. CP 1-3. Defendant, however, agreed to plead guilty to amended charges where the firearm enhancement was dropped in exchange for a guilty plea to

unlawful possession of a controlled substance with intent to deliver and first degree unlawful possession of a firearm. CP 8-9, 10-13; 3RP 303-10.

In *State v. Williams*, 117 Wn. App. 390, 401, 71 P.3d 686 (2003), *review denied*, 151 Wn.2d 1011, 89 P.3d 712 (2004), the court held that when "... there is no evidence of any promises or threats to the defendant other than those represented in the written plea agreement, where the defendant signs the written plea agreement acknowledging guilt in his own words, and where the defendant states that no promises were made other than those in the plea agreement, the trial court properly accepts the plea as being the result of the defendant's own volition and freely and voluntarily made." Williams and his son were charged as co-defendants with third degree assault of a child. *Williams*, 117 Wn. App at 394. Both Williams and his son reached plea agreements with the State and pleaded guilty to the reduced charge of fourth degree assault. *Id.* at 394-95. The prosecutor, however, failed to inform the trial court that Williams's plea was part of a package deal. *Id.* at 398-99. The day before sentencing, Williams moved to withdraw his guilty plea, claiming that he had been coerced into pleading guilty. *Id.* at 396. Williams argued that the State had forced him to plead guilty by telling him that the only way the State would offer his son a plea bargain is if Williams also agreed to enter a guilty plea. *Id.* at 396-97. Williams stated in an attachment to his motion that he only agreed to plead guilty in order to spare his son from the third

degree assault of a child. *Id.* The trial court ruled that Williams had not suffered a manifest injustice, and denied his motion. *Id.* at 397.

The trial court's ruling was affirmed, and the court held that Williams had not presented any evidence that he had been coerced into entering his guilty plea. *Id.* at 401-02. The court took note that federal courts had become increasingly concerned with package deals, and that "they pose an additional risk of coercion not present when the defendant is dealing with the government alone." *Id.* at 399 (*quoting United States v. Caro*, 997 F.2d 657, 659 (9th Cir. 1993)). The increased concern on the part of the federal courts, the court concluded, was primarily regarding plea bargaining where the defendant would plead guilty in exchange for a lenient sentence for a third party. *Id.*

Therefore, the special care standard in *Williams* applies principally when a defendant pleads guilty in exchange for lenient treatment of a third party. *Id.* at 400⁴. Implicitly, the court also held that Williams was not harmed by the court going through the standard plea colloquy, because the

⁴ Division One defines "special care" as follows:

"Taking special care means that when a court is informed that a plea is part of a package deal, the court must specifically inquire about whether the co-defendant pressured the defendant to go along with the plea and carefully question the defendant to ensure he is acting of his own free will. The most crucial inquiry is whether the co-defendant pressured the defendant into going along with the plea. It is also important to determine whether the defendant has had sufficient opportunity to meet and discuss the case and alternatives with his attorney."

Williams, 117 Wn. App. at 400 (*citing Caro*, 997 F.2d at 660).

court determined that the trial court was aware that Williams was pleading guilty as part of a package deal and gave the standard plea colloquy anyway. *Id.* at 395, 400-01. The court further held that because: (1) Williams had signed a written statement on plea of guilty that no one had made promises or threatened harm to him or someone else that would cause him to plead guilty, (2) that he had affirmed he had not been forced to plead guilty during his plea colloquy, (3) that Williams's attorney told the court that he believed Williams was entering a knowing, voluntary, and intelligent guilty plea, and (4) that Williams was not claiming that he had not had sufficient opportunity to meet with his attorney and discuss alternatives to pleading guilty, the evidence "clearly indicate[s] that the guilty plea was freely and voluntarily made." *Id.* at 401.

The present case is analogous to *Williams*. The defendant and his defense counsel made all of the same statements to the court that Williams made. 3RP 303-10. Defendant does not claim that he was denied sufficient opportunity to meet with his defense counsel, nor did he make any allegation to the trial court after his plea that he was coerced. At the time of the pleas, the court also inquired as to whether or not defendant had been threatened or promised anything in order to induce his guilty plea. 3RP 309-10. Defendant indicated that no one had made any threats or promises. *Id.* Furthermore, the two main distinguishing characteristics between *Williams* and the present case are that here the prosecutor made the trial court aware at the outset that the plea agreement was part of a

“package resolution” and that defendant pleaded guilty in exchange for *his own* leniency. 3RP 300, 303-10; CP 10-13. Both of these factors make it clear that defendant was not coerced into pleading guilty. The court went through what it determined was the necessary plea colloquy after being informed that it was a “package resolution,” and defendant had a strong personal incentive to take a deal.

Errors of constitutional magnitude that are harmless beyond a reasonable doubt do not require reversal. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L.Ed.2d 321 (1986). Even if this court determines that the trial court should have exercised special care when it took defendant’s guilty plea, that error was harmless. Defendant pleaded guilty in order to take advantage of the State’s offer. CP 10-13, 3RP 309-10. Defendant signed a written statement on plea of guilty that stated he had not been forced to plead guilty through threat or promise. CP 10-13. The trial court confirmed that defendant had not been coerced into pleading guilty at his plea hearing, and defense counsel also stated at the hearing that he believed defendant was entering a guilty plea knowingly, voluntarily, and intelligently. 3RP 306, 309. Defendant also received a personal benefit in the form of a significantly reduced sentence compared to the one he faced at trial in exchange for his plea; changing the firearm enhancement, which carries a mandatory 60 month consecutive sentence, to first degree unlawful

possession of a firearm reduced defendant's sentence by 26 months, from 80 months to 54 months total. RCW 9.94A.530; RCW 9.94A.533; CP 8-9, 17-29. Finally, defendant presented no evidence that he was actually coerced into pleading guilty. Therefore, the trial court's acceptance of defendant's guilty plea should be affirmed.

3. THE STATE'S FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW UNTIL AFTER THE DEFENDANT FILED HIS APPELLATE BRIEF DID NOT PREJUDICE DEFENDANT BECAUSE DEFENDANT IS UNABLE TO ARTICULATE ANY PREJUDICE HE SUFFERED DUE TO THE LATE FILING AND THERE IS NO EVIDENCE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE TAILORED TO THE APPEAL.

Written findings of fact and conclusions of law are required for all exceptional sentences. RCW 9.94A.535. Although RCW 9.94A.535 mandates entry of written findings, the statute fixes no time limit for entry. In this situation, courts have allowed their entry after the case is appealed as long as it does not prejudice the defendant. *State v. Cruz*, 88 Wn. App. 905, 908, 946 P.2d 1229 (1997); *see also State v. Moore*, 70 Wn. App. 667, 855 P.3d 306 (1993), *review denied*, 123 Wn.2d 1008 (1994) (delayed entry of findings and conclusions after a suppression hearing has been held not to be reversible error where the delay did not prejudice the defendant or prevent effective appellate review); *State v. Eaton*, 82 Wn.

App. 723, 919 P.2d 116 (1996) (absent a showing of prejudice or some indication that they have been tailored to address issues on appeal, the late entry of 3.5 findings and conclusions is not a ground for reversal); *State v. Nelson*, 74 Wn. App. 380, 874 P.2d 170, *review denied*, 125 Wn.2d 1002 (1994) (because there is no fixed time limit for the entry of findings and conclusions following a bench trial and because there was no claim of prejudice or tailoring, there was no error).

The *Moore* court relied heavily on the case of *State v. Harris*, 66 Wn. App. 636, 833 P.2d 402 (1992). In *Harris*, the State did not submit findings and conclusions until after the defendant noted their absence in his appellate brief. The court declined to reverse the conviction on the basis of late findings, stating:

Here, the written findings have been entered, although late. They track the court's oral findings on the issues material to our resolution of this appeal. Accordingly, there is no appearance of unfairness in accepting them after Mr. Harris set forth his assignments of error in his opening brief. The late entry has not delayed the appeal and, thus, has not prejudiced Mr. Harris' liberty interest.

Moore, 70 Wn. App. at 671 (*quoting Harris*, 66 Wn. App. at 641).

In this case, findings of fact and conclusions of law were entered on April 11, 2008, approximately three and one half months after defendant filed his opening brief. CP 37-39. Defendant fails to articulate any prejudice resulting from the State's failure to file the findings *in a timely matter*, which is his burden. Defendant also contends that the

findings of fact and conclusions of law were specifically tailored to the appeal, yet has no evidence to support that contention. The defendant argues that the findings of fact and conclusions of law are per se evidence of tailoring because portions of them are relevant to the issues defendant raised on appeal. Br. of Appellant at 12-13.

It appears that trial counsel, but not appellate counsel, was provided notice regarding entry of the findings of fact and conclusions of law. It does not appear that presentment of the findings of fact and conclusions of law were conducted on the record.

This court should find that there is no evidence of tailoring and should therefore reject the defendant's claim as being without merit. If, however, this court is inclined, there are two additional remedies available to this court that would allow adjudication of the defendant's claim. First, this court could decline to review the defendant's claims and allow him to motion to withdraw his guilty plea. Second, this court could remand under RAP 9.11 for additional evidence on review, and a record regarding the allegations of tailoring can be fully adjudicated by the parties and the court. Under RAP 9.11(a), this court can remand for additional evidence if additional proof of facts is needed to fairly resolve the issues on review. In either a motion to withdraw his plea or an evidentiary hearing, a record could be developed regarding the defendant's allegation of tailoring.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions and sentence.

DATED: MAY 12, 2008.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



Date Signature