

NO. 36945-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK CONDON,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01174-7

BRIEF OF RESPONDENT

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DATED May 15, 2008, Port Orchard, WA *[Signature]*

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Ferrier warnings were required in the present case when: (1) the officer never asked to come into the residence or to search the residence; (2) the defendant voluntarily invited the officer to come into the residence on his own accord; and, (3) the coercive aspects of a “knock and talk” procedure were not present?

2. Whether the Defendant’s claim that the trial court erred by not entering written findings of fact and conclusions of law regarding the CrR 3.6 hearing is without merit when the trial court entered written findings of fact on November 26, 2007?

3. The State concedes that remand for entry of written findings of fact regarding the stipulated facts trial is appropriate.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Patrick Condon, was charged by information filed in Kitsap County Superior Court with one count of unlawful possession of a firearm in the second degree. CP 1-6. Following a stipulated facts trial, the Defendant was convicted as charged, and the trial court entered a standard range sentence. RP 62, 74, CP 17. This appeal followed.

B. FACTS

Prior to trial, the Defendant filed a motion to suppress a firearm recovered from his residence. CP 7. A 3.6 hearing was held, and the State called Officer Kelly Meade as a witness. RP 7. Officer Meade explained that on August 18, 2007 he went to the Defendant's residence to follow up on a report from the previous evening in which a local restaurant had reported that they had delivered \$52 worth of food to a residence and the customer had taken the food but refused to pay. RP 7-8. Officer Meade initially investigated on the 17th, but no one had answered the door at the residence. RP 8. Officer Meade knew that the Defendant lived at the residence but did not know if anyone else lived there. RP 16.

When Officer Meade returned to the residence the following day (the 18th). RP 9. Officer Meade testified that his intention was to speak with the Defendant to find out who had been present at the house at the time of the theft. RP 16. Officer Meade testified that he was not planning to request permission to search for evidence of the theft. RP 35-36.

When Officer Meade knocked on the door it was answered by a person named James Nall. RP 9. Officer Meade asked to speak with the "resident," and Mr. Nall indicated he was not the resident and pointed out the Defendant to the officer. RP 9, 18. The Defendant was sitting in the living room. RP 9. The Defendant was sitting on a couch but got up and came to the door. RP 19. The Defendant was cooperative and spoke with Officer

Meade and asked him what he needed. RP 9-10, 21.

Officer Meade asked the Defendant where he had been when the theft of the food had occurred and asked him about his phone number, which had been used to place the food order. RP 10. The Defendant claimed he had at a State Park the previous night and had his phone with him. RP 10. The Defendant also indicated that he was the only resident and that he did not know who the male was that had taken the food. RP 21-22.

The Defendant then offered to let Officer Meade come in and look for the take-out food. RP 10-11. Officer Meade did not request permission to look for the food. RP 10. In addition, Officer Meade did not hint or insinuate in any way that he would like to look around or that it would be helpful if he could look around the house. RP 36. Rather, the Defendant invited the officer to come in and look around. RP 36. Officer Meade came in and looked in the kitchen and living room area but did not see any evidence of the take-out food. RP 10-11. Officer Meade then left the residence and went outside. RP 11.

As Officer Meade was heading out to the sidewalk, Mr. Nall approached him and stated that when he had arrived at the residence he thought that he had heard the sounds of a lady screaming from a back room of the residence. RP 11. Officer Meade then walked back to the door of the

residence and the Defendant saw the officer approach and came and talked to him again. RP 11. Officer Meade asked if there was anyone else inside the residence and explained that he had heard that there was a lady in the back room. RP 11-12. The Defendant replied, "No, but you can come in and check." RP 12. The Defendant then turned away from Officer Meade and waved his arm in a manner that seemed to indicate, "Come on in." RP 12, 26. Officer Meade, however, waited on the porch at the front door because he wasn't sure that that the Defendant was giving him permission to enter. RP 12, 26. Specifically, Officer Meade testified that,

A. The way that Mr. Condon had informed me that he wanted me to come in, I didn't feel comfortable that I had – that I was getting his permission to enter his residence to look for this lady. I wanted more of his consent in order for me to step through the threshold to look.

Q. So you were waiting for it to be crystal clear to you?

A. Yeah. Exactly.

RP 37-38. The Defendant then turned around and said, "Come on in" and waived his arm again and waited for the officer to enter the house. RP 12, 38. Officer Meade then went into the house and the Defendant escorted him to the two back bedrooms. RP 12. Officer Meade never asked to enter the house to look for the woman. RP 12. Officer Meade looked in the first room and then in a bathroom and did not find anything of note. RP 12-13. The

Defendant then motioned the officer toward the bedroom door, and Officer Meade asked the Defendant if that was his room, as he wanted to make sure that the room belonged to the Defendant and not some other tenant. RP 13. The Defendant stated it was his room and that no one else lived there. RP 13. In the bedroom the officer saw bullets and noticed a closet that had an open door. RP 14. As the officer was walking toward the closet he saw a box of take-out food on the floor, and when the officer looked in the closet he found a rifle. RP 14. When the officer asked the Defendant about the rifle, the Defendant stated that he wanted to stop the search. RP 15. The Defendant was then arrested, and the rifle was seized. RP 15

The Defendant offered no witnesses or testimony at the 3.6 hearing, and the conclusion of the evidence the Defendant argued that his brief had outlined his position that Ferrier warnings were required. RP 40.

The trial court denied the Defendant's motion and outlined its findings as follows:

The constitution or the standard in determining a warrantless search is always a serious issue for the courts of this state. We start with the general proposition that subject to only a few carefully drawn and jealously guarded exceptions, a warrantless search is per se unreasonable under the Fourth Amendment. *Cooley v. New Hampshire* is the principle case, going back to 1978, where such a search and seizure is conducted outside the judicial process and without prior sanction by a neutral and detached magistrate, the State has the burden of justifying the search under one of the

exceptions to the warrant. Consent is one of the exceptions of this state.

With regard to the fundamental questions here in this case, as consent is an exception, the State must prove by clear, cogent, and convincing evidence that the consent was voluntary and given by someone with authority. The defense has argued that under certain circumstances, this being one of the circumstances, for a knock and talk, law enforcement must advise the defendant of his right to refuse to allow anyone to come in, and totality of the circumstances, including the education and intelligence of the consenter. And I would take into account also the state of mind versus inebriation, stupor or the like, something this court must take into account, and whether Miranda warnings were given.

I find that Miranda warnings were not given, but I find under the facts of this case there was a legitimate exception by consent.

The facts I base my finding upon was that there was a follow-through by the arresting officer of a previous incident the evening before, where there was a theft of delivered food, where information was given that a call had been made, food had been brought to the house, a 52-dollar check was given for the food, and the inhabitant was told no checks were accepted. But instead of handing the food back, the occupants of the house shut the door. The police report was filed.

The purpose of the officer's visit that evening was to talk with the owner of the residence or who was there about their knowledge of what happened. When he approached the door and knocked, it was opened by a person named James Nall who came to the door. Some other people were sitting in the living room, and the defendant came forward and was cooperative. It appeared that he had been drinking but that his demeanor was appropriate or cooperative and there was a discussion.

I find there was no request ever to enter the premises. When the discussion of the take-out food was raised, the defendant voluntarily offered, without being asked, to come in and look at the kitchen and living room, which the police officer did. No evidence was found, and the officer left the

residence and went out as far as the sidewalk, at which time the person known as Nall came out to the officer alone and informed the officer that he had heard a woman scream, upon his coming to the house originally or when they arrived, from the back room.

I find that the police officer then approached Condon and asked if anyone else lived there. He was informed no, but you can come in and check. At this time, the police officer I find was still reluctant, upon those words, to come in and remained in the doorway. As the defendant turned to walk into the house, the defendant then turned around and said no, "come on in," gesturing with his hand to come in also, and pointed to the bedroom. The purpose of the officer's entry the second time was to investigate whether there was an injured person or an incident involving illegal means maybe afoot involving the lady.

During the search, the defendant showed him through the back area, going to the north bedroom and then the south room, which he confirmed and said was his room, and that he had authority to allow him to go into that room. Upon entry into the room, during a plain view inspection, a rifle was observed with bullets along with the stolen or suspected stolen property. An arrest was made at this time.

Additional fact that are pertinent to my finding are that the officer id -- and I conclude, that the defendant had been drinking alcohol, but that he was coherent, sufficiently coherent, to give consent. He was sufficiently coordinated with his activities so as not to have been mentally impaired at the time to thwart the consent that he offered.

In addition to that, I find that all of the people sitting in the front area, it is not known to this Court who they were, other than there was an indication it was some form of Alcoholics Anonymous meeting occurring. There were no questions asked of the other people in the living room upon entering the home by the arresting officer prior to going into the back area. I find that that was not required, given the exigencies of what was occurring and the options available to the officer and the circumstances of the concern over the woman who may have screamed.

Additionally, I accept the officer's statement as true that when he approached the house originally for the stolen food, there was no intended purpose to search and that he never gave a hint that he wanted to search. The principal worry of the officer was that there might be a lady in danger.

Plain view is another exception to the warrant requirement, and plain view was made both with regard to the gun and the food.

I believe those are the facts that are necessary with regard to my ruling.

RP 40-44.

Written findings and conclusions of law were entered on November 29, 2007. The findings specifically state as follows:

Findings of Fact

I.

That Officer Meade of the Bremerton Police Department went to the Defendant's residence on August 18, 2007 to follow up on a report of theft of services.

II.

That Officer Meade's purpose in going to the defendant's residence was to talk to the owner about the alleged theft.

III.

That the defendant was drinking at the time the officer arrived, but he was cooperative with Officer Meade and was coherent enough to give consent. He was sufficiently coordinated with his activities to not be at the level of mental impairment to thwart the given consent.

IV.

That Officer Meade never made a request to enter the residence. The defendant voluntarily offered to let him look for evidence of food and when he did not find any, Officer Meade left and went outside as far as the sidewalk.

V.

That after Officer Meade received information about a woman screaming from the back of the residence, he approached the front door again and asked the defendant if anybody else was in the house. The defendant responded no, but told him he could come in and check. Officer Meade was reluctant to enter so the defendant again said for him to come inside.

VI.

That the Defendant's consent was freely and voluntarily given.

VII.

That Officer Meade then proceeded inside the residence with the purpose of investigating whether there was a woman in need of assistance in the back rooms, not to search for physical evidence.

See, Findings of Fact and Conclusions of Law for Hearing on CrR 3.6, filed November 26, 2007. State's Supplemental Designation of Clerk's Papers.

Based upon these findings of fact, the trial court concluded that Ferrier warnings were not required. State's Supplemental Designation of Clerk's Papers.

The following day the Defendant agreed that the case would proceed via a stipulated facts trial. RP 59-63, 65, CP 16. The Defendant agreed that the evidence showed that a .22 caliber rifle was found in his bedroom and that he had previously been convicted of felony harassment on May 21, 2007. RP 60-61. The court found that this stipulation was freely and voluntarily entered. RP 61. Defense counsel explained that he hoped the court would

accept the stipulation and stated that the anticipation was that the court would find the Defendant guilty but that the Defendant would preserve his right to appeal the 3.6 issue. RP 62. The trial court then stated,

Based on all of the evidence that I have had and the stipulation, I am finding you guilty of the crime of illegal possession of a firearm in the second degree. The prior conviction that is stipulated to is a felony, and there would have been a prohibition against owning or possessing a firearm. And given the testimony that it was your bedroom and it was in your closet, that's why I am finding you guilty, just so you know the process. But you have preserved the issue of the 3.6 hearing for appeal.

RP 62.

III. ARGUMENT

- A. **ALTHOUGH FERRIER WARNINGS ARE REQUIRED IN A “KNOCK AND TALK” CASE (WHERE AN OFFICER KNOCKS ON A DOOR, CONTACTS THE RESIDENT, ASKS TO COME IN TO TALK ABOUT THE SUBJECT OF THE INVESTIGATION, AND THEN, WHEN INSIDE, ASKS PERMISSION TO SEARCH THE RESIDENCE), FERRIER WARNINGS WERE NOT REQUIRED IN THE PRESENT CASE BECAUSE THE OFFICER NEVER ASKED TO COME INTO THE RESIDENCE OR TO SEARCH THE RESIDENCE. RATHER, THE DEFENDANT VOLUNTARILY INVITED THE OFFICER TO COME INTO THE RESIDENCE ON HIS OWN ACCORD. THE COERCIVE ASPECTS OF A “KNOCK AND TALK,” THEREFORE, WERE NOT PRESENT AND FERRIER WARNINGS WERE NOT REQUIRED.**

The Defendant argues that the trial court erred by denying his motion to suppress based on the Defendant claim that the officer was required to give the Defendant warnings *Ferrier* warnings. This claim is without merit because *Ferrier* warnings are only required in “knock and talk” situations, and the present case does not involve a “knock and talk.” Officer Meade never asked to enter the residence and only entered the residence when the Defendant voluntarily asked him to come in, thus his conduct did not constitute the type of coercive knock and talk procedure addressed in *Ferrier*

The Defendant first argues that the trial court erred in not suppressing the evidence seized from his home because his situation is similar to that in

State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

The police in *Ferrier* had information that Ferrier was growing marijuana in her home. *Ferrier*, 136 Wn.2d at 106. Rather than seeking a warrant, the police decided to conduct a “knock and talk” procedure because they did not want to reveal the informant's name. *Ferrier*, 136 Wn.2d at 106-07. A “knock and talk,” according to one of the officers, was a procedure in which an officer would knock on the door, contact the resident, ask to come in to talk about the subject of the investigation, and then, when inside, ask permission to search the residence. *Ferrier*, 136 Wn .2d at 107. The police followed this procedure, obtained Ferrier's consent to search, but never informed her that she could refuse consent. *Ferrier*, 136 Wn.2d at 108.

In finding that this procedure violated article I, section 7 of the Washington Constitution, which protected her right of privacy in her own home, the Supreme Court announced the following rule:

[W]hen police officers conduct a knock and talk for the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.

Ferrier, 136 Wn.2d at 118-19. The court noted that it was significant to its holding that Ferrier was in her home when the police initiated contact and

that the officers “admitted that they conducted the knock and talk in order to avoid the necessity of obtaining a search warrant authorizing a search of the home.” *Ferrier*, 136 Wn.2d at 115.

The court addressed the scope of this rule the following year in *State v. Bustamante-Davila*, 138 Wn.2d 964, 966-67, 983 P.2d 590 (1999). There the court found *Ferrier* inapplicable where local law enforcement officers accompanied an Immigration and Naturalization Service (INS) agent to the defendant's home to arrest him under a removal order an immigration judge had issued. After the defendant allowed both the INS agent and the local officers into his home, the officers noticed a rifle in plain view. *Bustamante-Davila*, 138 Wn.2d at 968-69. The State then charged him with unlawful possession of a firearm. *Bustamante-Davila*, 138 Wn.2d at 970.

The Supreme Court affirmed the denial of the defendant's suppression motion and limited *Ferrier* to situations where

not having obtained a search warrant, police officers proceed to premises where they believe contraband will be found. Once there they knock on the door and talk with the resident, asking if they may enter. After being allowed to enter, the officers then explain why they are there, that they have no search warrant, and ask permission to search the premises.

Bustamante-Davila, 138 Wn.2d at 976-77 (footnotes omitted). As the law enforcement officers in *Bustamante-Davila* were not looking for contraband-

they merely accompanied the INS agent as backup-the *Ferrier* rule did not apply. 138 Wn.2d at 980, 984. See also *State v. Leupp*, 96 Wn. App. 324, 326, 333-34, 980 P.2d 765 (1999) (*Ferrier* rule did not apply where officer responded to 911 “hang-up” call and obtained permission to enter residence believing someone might be injured inside), *review denied*, 139 Wn.2d 1018 (2000).

Consistent with *Bustamante-Davila*, the Washington Supreme Court emphasized its rejection of *Ferrier* as a bright-line rule required in every case where police obtain search authority by consent. *State v. Williams*, 142 Wn.2d 17, 26, 11 P.3d 714 (2000). Rather, the Court limited its holding in *Ferrier* to ‘knock and talk’ procedures, reasoning as follows:

We do not find it prudent or necessary to extend *Ferrier* to require that police advise citizens of their right to refuse entry every time a police officer enters their home. Police officers are oftentimes invited into homes for investigative purposes ... and other routine responses. We do not find a constitutional requirement that a police officer read a warning each time the officer enters a home to exercise that investigative duty Instead, we limit the requirement of a warning to situations where police seek to conduct a search for contraband or evidence of a crime without obtaining a search warrant.

Williams, 142 Wn.2d at 26-28.

Furthermore, a trial court’s findings of fact are reviewed for substantial evidence. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

“Substantial evidence exists when the record contains evidence of a sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.” *State v. Foster*, 135 Wn.2d 441, 471, 957 P.2d 712 (1998). If substantial evidence exists, an appellate court will not substitute its judgment for that of the trial court. *State v. Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). Credibility determinations based on witness testimony cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In the present case, the trial court specifically found that the officer’s “purpose in going to the residence was to talk to the owner about the alleged theft” and that “Officer Meade never made a request to enter the residence.” State’s Supplemental Designation of Clerk’s Papers. These specific findings have not been challenged, and thus, they are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). These unchallenged findings by the trial court were supported by Officer Meade’s testimony, and there is nothing in the testimony that would support a contrary conclusion that Officer Meade had a preexisting plan to search the house. Rather, as the trial court found, Officer Meade went to the residence to talk to the occupants about the theft the night before. That is precisely what Officer Meade then did. See *State v. Khounvichai*, 149 Wn.2d 557, 559, 69 P.3d 862 (2003) (*Ferrier* warnings are not necessary when entering a home to question a resident

during the course of an investigation. They are required only when the officers enter the home seeking to obtain a consensual search for contraband.).

In short, Officer Meade never asked to enter the house, but only entered after the Defendant invited him to come in and look around. The present case, therefore, does not involve a situation where the officer knocked on the door, asked to enter, is allowed to enter and then asks permission to search the premises. *Bustamante-Davila*, 138 Wn.2d at 976-77. As Officer Meade never even asked to enter or search the residence, his conduct did not constitute the type of coercive knock and talk procedure addressed in *Ferrier*. Officer Meade, therefore, was not required to advise the Defendant of his right to refuse consent.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED BY NOT ENTERING WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE CRR 3.6 HEARING IS WITHOUT MERIT BECAUSE THE TRIAL COURT ENTERED WRITTEN FINDINGS OF FACT ON NOVEMBER 26, 2007.

Condon next claims that the trial court erred by failing to enter written findings of fact following a 3.6 hearing. App.'s Br. at 12. This claim is without merit because the trial court did enter written findings.

As outlined above, the trial court did enter written findings of fact regarding the CrR 3.6 hearing. These findings were entered on November 29, 2007, approximately 40 days after the 3.6 hearing. It appears that the Defendant's initial designation of Clerk's papers was filed several days earlier (on November 27, 2007), thus explaining why appellate counsel was perhaps not aware of the written findings. The findings, however, were filed long before the Defendant's opening brief was filed in the present appeal.

In any event, the Defendant's claim that the trial court erred in failing to enter written findings of fact regarding the 3.6 hearing is without merit.

In addition, the parties did not dispute the material facts, as the sole issue was whether *Ferrier* warnings were required. Thus, even if there had been no written findings the Defendant would not have been prejudiced. *See State v. Stock*, 44 Wn. App. 467, 477, 722 P.2d 1330 (1986) (finding no prejudice to defendant from lack of findings of fact when there were no disputed issues of fact). Although the Defendant claims that he suffered prejudice because the trial court's decision is vague and unclear, the record demonstrates that the trial court's ruling was extremely detailed and clear. For instance, the trial court specifically found that:

- (1) "[T]he purpose of the officer's visit that evening was to talk with the owner of the residence or who was there about their knowledge of what happened." RP 42.
- (2) "I find there was no request ever to enter the premises.

When the discussion of the take-out food was raised, the defendant voluntarily offered, without being asked, to come in and look at the kitchen and living room, which the police officer did." RP 42.

- (3) "Nall came out to the officer alone and informed the officer that he had heard a woman scream, upon his coming to the house originally or when they arrived, from the back room." RP 42.
- (4) "I find that the police officer then approached Condon and asked if anyone else lived there. He was informed no, but you can come in and check. At this time, the police officer I find was still reluctant, upon those words, to come in and remained in the doorway. As the defendant turned to walk into the house, the defendant then turned around and said no, "come on in," gesturing with his hand to come in also, and pointed to the bedroom. The purpose of the officer's entry the second time was to investigate whether there was an injured person or an incident involving illegal means maybe afoot involving the lady." RP 42-43.
- (5) "Additionally, I accept the officer's statement as true that when he approached the house originally for the stolen food, there was no intended purpose to search and that he never gave a hint that he wanted to search." RP 44.

As the trial court's oral findings regarding the 3.6 hearing were sufficient to permit appellate review, any error in failing to enter written findings was harmless would have been harmless. This argument is essentially moot, however, since the trial court did enter written findings of fact.

C. THE STATE CONCEDES THAT REMAND FOR ENTRY OF WRITTEN FINDINGS OF FACT REGARDING THE STIPULATED FACTS TRIAL IS APPROPRIATE.

Condon next claims that the trial court erred in failing to enter written findings of fact following the stipulated facts trial. The State concedes that remand for entry of findings regarding the bench trial is appropriate.

Although Washington courts have consistently held that failure to enter written findings following a 3.6 hearing can be harmless error if the trial court's oral findings are sufficiently clear to permit appellate review, the courts have seemed to hold that failure to enter written findings following a bench trial always requires remand or reversal. For instance, in *State v. Head*, 136 Wn.2d 619, 624-25, 964 P.2d 1187 (1998) the court held as follows

We hold that the failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions. An appellate court should not have to comb an oral ruling to determine whether appropriate "findings" have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction.

We note the possibility that reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. For example, a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been "tailored" to meet issues raised

on appeal.¹ The burden of proving any such prejudice will be on the defendant. *Cf. State v. Royal*, 122 Wn.2d 413, 423, 858 P.2d 259 (1993) (burden of proving prejudice resulting from late entry of written findings and conclusions on defendant; concerning JuCr 7.11(d)).

We will not infer prejudice, however, from delay in entry of written findings of fact and conclusions of law. In this case, petitioner has not established actual prejudice resulting from the absence of findings and conclusions, and accordingly remand for entry of written findings of fact and conclusions of law is the proper course.

Head, 136 Wn.2d at 624-25.

In the present case remand is appropriate, as the Defendant has not established actual prejudice. For instance, the Defendant cannot now claim that the findings have been “tailored” because the findings have not been entered as of yet. In addition, the bench trial below was a stipulated facts trial where the Defendant did not even argue that the facts were insufficient to support a finding of guilty, but rather explained that the expectation was that the trial court would find him guilty. RP 62. Similarly, there has been no claim on appeal that the stipulated facts were somehow insufficient to support the trial court’s finding of guilty. Rather, the stipulated facts process was used below to allow the Defendant to preserve his 3,6 issue for appeal. RP 62. As in *Head*, therefore, the appropriate remedy is remand for entry of findings regarding the stipulated facts trial.

¹ The *Head* court specifically noted that, “This kind of prejudice could be shown only, of

Despite the fact that the facts and the court's ultimate finding of guilt were not contested below or on appeal, and despite the fact that the trial court explained that it was finding the Defendant guilty because the firearm was found in the Defendant's closet and because he had a prior felony conviction, it appears that under Washington law a remand is still required pursuant to *State v. Head*. The State has been unable to find any authority for the position that failure to enter any written findings after a bench trial is subject to harmless error analysis.² Although the error in the present case certainly seems to be harmless, remand appears to be required under Washington law. Finally, the State also acknowledges that the Defendant will have the opportunity to challenge the trial court's findings once they are entered.

IV. CONCLUSION

For the foregoing reasons, Condon's conviction and sentence should

course, after remand and the entry of findings." *Head*, 136 Wn.2d at 625 n.3.

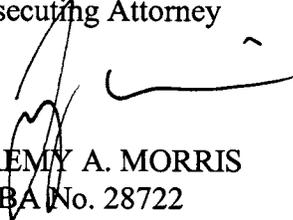
² Our Supreme Court has, however, stated failure to address a particular element in the findings of fact following a bench trial is subject to harmless error analysis. See, *State v. Banks*, 149 Wash.2d 38, 43-44, 65 P.3d 1198 (2003) (citing *Neder v. United States*, 527 U.S. 1, 7, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *State v. Brown*, 147 Wash.2d 330, 344, 58 P.3d 889 (2002)). In addition, to determine whether such an error is harmless, an appellate court examines whether "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Brown*, 147 Wash.2d at 341, 58 P.3d 889 (quoting *Neder*, 527 U.S. at 15, 119 S.Ct. 1827). "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wash.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). Although harmless error analysis applies when written findings fail to address a particular element, the State has been unable to find authority for the position that harmless error can apply to a trial court's failure to enter any written findings. Although this seems somewhat inconsistent, it appears to be the law in Washington.

be affirmed, but remand is appropriate for entry of written findings of fact and conclusions of law regarding the trial court's finding of guilty following the stipulated facts trial.

DATED May 15, 2008.

Respectfully submitted,

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