

COA NO. 39371-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL DRAPER,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
OCT 30 2 11 PM '09  
09 NOV -2 AM 19:35  
STATE OF WASHINGTON  
BY  DEPUTY

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

The Honorable Richard Bosey, Judge

BRIEF OF APPELLANT

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 OCT 30 PM 4:46

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant for possession of a stolen vehicle under count II.

2. The evidence was insufficient to convict appellant for possession of stolen property under count IV.

3. The trial court erred in failing to enter written findings of fact and conclusions of law after a bench trial, in violation of CrR 6.1(d).

4. The trial court erred in failing to enter written findings of fact and conclusions of law justifying an exceptional sentence, in violation of RCW 9.94A.535.

Issues Pertaining to Assignments of Error

1. Must appellant's convictions for possession of a stolen vehicle under count II and possession of stolen property under count IV be reversed because the evidence was insufficient to prove appellant constructively possessed the vehicle and trailer at issue?

2. CrR 6.1(d) requires entry of written findings of fact and conclusions of law after a bench trial. Is remand required for entry of written findings and conclusions?

3. RCW 9.94A.535 requires entry of written findings of fact and conclusions of law justifying an exceptional sentence. Is remand

required for entry of written findings and conclusions in support of the exceptional sentence?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged Draper as follows: (1) possession of stolen vehicle, Chevrolet truck (count I); (2) possession of stolen vehicle, Toyota Solara (count II); (3) first degree possession of stolen property, flatbed utility trailer (count III); (4) first degree possession of stolen property, Mossyrock search and rescue trailer (count IV); (5) first degree possession of stolen property, search and rescue utility trailer (count V); (6) first degree possession of stolen property, Kitchens Complete, Inc. trailer (count VI); (7) first degree possession of stolen property, boat trailer (count VII). CP 24-27. Following a bench trial, the court acquitted Draper on counts III, V, VI, and VII, but found him guilty on counts I, II, and IV. 2RP 102.<sup>1</sup> The court imposed an exceptional sentence on Draper based on some current offenses going unpunished. CP 16, 19. Counts I, II, and IV, each of which carried a 57 month confinement term, were accordingly ordered to run concurrent with one another but consecutive to

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP - 2/25/09; 2RP - 2/26/09; 3RP - 5/8/09.

the sentence imposed in another cause number.<sup>2</sup> CP 19. This appeal follows. CP 2-13.

2. Trial

The verdict hinged on whether the State established a sufficient link between Draper and the various stolen items. 2RP 94-102. On July 23, 2008, officers received information that Draper was possibly across the street from the scene of an unrelated incident. 1RP 83. They searched the property and saw the vehicles and trailers at issue. 1RP 84-87. The fenced property consisted of brush, grass, a barn-style pole building, and a small wooden shed. 1RP 31; 2RP 9. The property owner locked the gate to the fence four years ago and had not been back since. 2RP 11. The owner did not give anyone permission to be on the property while he was gone. 2RP 12. Police did not see Draper on the property. 1RP 88-89.

The search and rescue trailers and the Kitchen Complete trailer were inside the barn. 1RP 34. The Chevrolet, Solara, flatbed utility trailer, and boat trailer were outside the barn. 1RP 33-34, 38. All of these things had been reported stolen. 1RP 34.

Thomas Anderson testified that he returned from vacation in July 2008 to discover his house had been robbed and his Chevrolet truck stolen.

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<sup>2</sup> Draper's total sentence, with the two sentences running consecutively, ended up being 213 months. CP 19; 3RP 24-25.

1RP 73. Anderson saw Draper sitting in his stolen truck near a swimming area a week after returning from vacation. 1RP 73-74. Anderson asked Draper whose truck it was. 1RP 74. Draper told Anderson the truck was his. 1RP 74. Anderson saw some of his belongings inside the truck. 1RP 74-75. Anderson then told Draper he "knew who he was" and "let him go." 1RP 75. Draper drove away. 1RP 75.

Police lifted Draper's fingerprint from the passenger door (outside frame) of the Chevrolet. 1RP 91-92, 113. Police found a check with Draper's on it in the front seat. 1RP 39-40, 70. Police also found a tennis shoe matching the size worn by Draper inside the truck. 1RP 40, 60, 64, 66, 69. An acetylene tank was in the rear along with a cart for moving the tank. 1RP 59.

The Toyota Solara was stolen on June 27, 2008. 2RP 15. The Solara was covered when discovered by police. 1RP 41. Police lifted Draper's fingerprint from its rearview mirror. 1RP 93-94, 113-14. Upon recovery, the owner noticed the chrome fixtures had been removed from the back of the car, along with the back bumper, the license plate and its frame. 2RP 18.

The Mossyrock search and rescue vehicle was stolen around July 20, 2008. 2RP 51. Police found one of its doors had been detached and placed about eight feet away from the trailer itself. 1RP 45-47; 2RP 54,

59. Police lifted Draper's fingerprint off the exterior of the detached door. 1RP 99-100, 114. A cutting torch had been taken to the door hinges. 2RP 59. Part of the trailer was dismantled. 1RP 46; 2RP 53

The flatbed trailer was stolen July 20, 2008. 2RP 37. Its license plate was removed. 2RP 40. The Kitchens Complete trailer was stolen around July 2008. 2RP 29-32. Its license plate was removed. 2RP 33. The boat trailer was stolen on July 16, 2008. 2RP 22. A screwdriver and severed padlock were found next to the boat trailer. 1RP 56-57.

When a detective asked Draper about fingerprints found on the Chevrolet, Solara, and search and rescue trailers, Draper responded he was not saying he had nothing to do with any of the crimes, but was not going to take responsibility for everything.<sup>3</sup> 1RP 27-29.

Regarding count I, the court determined Anderson saw Draper in the stolen truck, Draper's fingerprint was lifted from the truck, a shoe consistent with Draper's shoe size was found in the truck, and a check with Draper's name on it was also found in the truck. 2RP 92-94.

Regarding count II, the court attached significance to the following: (1) the Solara was found on the same property in close proximity to the stolen Chevrolet; (2) Draper's fingerprint was on the car's

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<sup>3</sup> The detective testified he believed fingerprints were found on both search and rescue trailers, but in fact fingerprints were only found on the detached door of one of them. 1RP 29-30.

review mirror; (3) the license plate was removed; (4) some of the chrome and trim from the rear of the car was missing; (5) the car was under a cover; (6) no one had permission to access the property on which the Solara was found. 2RP 94-97.

Regarding count IV, the court attached significance to the following: (1) the Mossyrock search and rescue trailer was found in close proximity to the stolen Chevrolet; (2) Draper's fingerprint was on a door that had been removed from the trailer; and (3) an oxy-acetylene torch was used to remove the door and an acetylene tank was found in the back of the stolen Chevrolet truck. 2RP 97-99.

The court acquitted Draper on the remaining counts because the circumstantial evidence did not amount to anything more than supposition and assumption. 2RP 99-102. Draper could not be guilty by "association." 2RP 102. No one saw Draper on the property on which the vehicles and trailer found. 1RP 71-72, 88-89, 96, 106; 2RP 13, 19, 25-26, 34, 41, 47-48, 57. Except for Anderson's truck (count I), no one saw Draper in actual custody of any of the stolen items. 1RP 71-72, 88-89, 96, 106; 2RP 13, 19, 25-26, 34, 41, 47-48, 57.

C. ARGUMENT

1. THE STATE FAILED TO PROVE CONSTRUCTIVE POSSESSION BEYOND A REASONABLE DOUBT.

The State failed to prove the "possession" element for the stolen vehicle offense charge under count II and the stolen property offense under count IV. Those convictions must be reversed and the charges dismissed with prejudice due to insufficient evidence.

a. The Totality Of The Circumstances Must Provide Substantial Evidence For A Fact Finder To Reasonably Infer The Defendant Had Possession Of Contraband.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the State, a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

To sustain conviction following a bench trial, (1) the evidence must support the findings of fact; (2) the findings of fact must support the conclusions of law; and (3) the conclusions of law must support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008).

RCW 9A.56.140(1) defines the crime of possession of stolen property as follows: "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.068 pertains specifically to possession of stolen vehicles. It requires the State to prove Draper possessed a stolen vehicle. RCW 9A.56.068(1).

Possession can be actual or constructive. State v. Summers, 45 Wn. App. 761, 763, 728 P.2d 613 (1986). Actual possession requires personal, physical custody. State v. George, 146 Wn. App. 906, 193 P.3d 693, 699 (2008); State v. Plank, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987). The evidence does not show Draper had actual possession of the vehicle or trailer at issue for counts II and IV. No one saw Draper in actual custody of these items. See Plank, 46 Wn. App. at 731 (constructive possession of stolen vehicle needed to be proven where defendant present in car but not driving); United States v. England, 474 F.2d 1343, 1343 (4th Cir. 1973) (defendant in actual possession of vehicle because evidence showed he was the driver).

The State therefore needed to prove Draper had constructive possession of the vehicle and trailer. If the State proves dominion and control over the premises where contraband is found, it has established a

rebuttable presumption that the person has dominion and control over contraband on the premises. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). There was no evidence showing Draper had control and dominion over the barn or the real property where the car and trailer were found. He did not own, rent or live on the premises. There is no allegation here that Draper had dominion and control of the premises.

To establish constructive possession, the State thus needed to prove Draper had dominion and control over the items in question. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). "Dominion and control means that the object may be reduced to actual possession immediately." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

"The totality of the circumstances must provide substantial evidence for a fact finder to reasonably infer that the defendant had dominion and control." Enlow, 143 Wn. App. at 469. Speculation is not substantial evidence. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

i. The State Failed To Prove Draper Constructively Possessed The Toyota Solara Under Count II.

The possession of stolen vehicle conviction under Count II involved the Toyota Solara. To support conviction for that count, the trial judge found the Solara was on the same property in close proximity to the

stolen Chevrolet and Draper's fingerprint was on the Solara's review mirror. 2RP 95-97.

The evidence at most showed Draper touched the Solara and he was otherwise in proximity to that car. Mere proximity and evidence of momentary handling is insufficient to show constructive possession of contraband. State v. Lakotiy, 151 Wn. App. 699, 214 P.3d 181, 189 (2009). "To meet its burden on the element of possession the State must establish 'actual control, not a passing control which is only a momentary handling.'" State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (quoting Callahan, 77 Wn.2d at 29).

Based on principles drawn from established precedent, the evidence is insufficient to show Draper possessed the Solara in count II. See State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990) (sitting next to cocaine and momentary handling of cocaine insufficient to show possession); State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (passenger in vehicle where drugs found and fingerprints on jar containing drugs insufficient to show possession); Enlow, 143 Wn. App. at 469-70 (hiding in truck and fingerprints on items insufficient to show constructive possession of truck containing components of methamphetamine manufacture); Callahan, 77 Wn.2d at 30-31 (sitting next to drugs, earlier

handling of drugs, and admitted possession of drug paraphernalia insufficient to show possession).

Even assuming the fingerprint on the rearview mirror of the Solara established Draper was at one point inside the car, such evidence is insufficient to prove possession. Presence inside a stolen car as a passenger is insufficient to show possession. Plank, 46 Wn. App. at 733. The same rationale holds true here. Presence in a stolen vehicle, shown by way of fingerprint evidence, does not prove possession.

Furthermore, there is no evidence Draper possessed keys to the stolen car or drove it. Cf. State v. Potts, 1 Wn. App. 614, 617, 464 P.2d 742 (1969) (finding dominion and control over a vehicle in which drugs were found when the defendant had keys to the car, had driven it, and was the sole occupant); United States v. Wolfenbarger, 426 F.2d 992, 994-95 (6th Cir. 1970) (evidence for constructive possession of stolen car, while meager, was sufficient where the defendant was found next to the stolen car, possessed the car's key, and intended to move it at another's request).

The fingerprint evidence only establishes Draper had access to the Solara. The fact does not establish dominion and control. See State v. McCaughey, 14 Wn. App. 326, 329, 541 P.2d 998 (1975) ("The inference that McCaughey had recently been in the station wagon establishes only that he had access to the stereo equipment. However, mere proximity to

the stolen merchandise is not enough to establish dominion or control over the merchandise or the vehicle."); George, 193 P.3d at 699 (insufficient evidence to support a finding of dominion and control over vehicle where defendant was mere backseat passenger, not driver or owner).

The trial court relied on the fact that Draper possessed the stolen Chevrolet and the Solara was found near the Chevrolet. The judge reasoned Draper's possession of the stolen Chevrolet supported the conclusion that Draper possessed the stolen Solara as well. No authority for this proposition was offered.

Appellate counsel is unaware of any Washington case holding possession of one piece of stolen property is a factor that can be used to infer possession of another piece of property. It is "illogical to extrapolate the inferred fact of defendant's knowledge into the inferential conclusion of defendant's possession." McCaughey, 14 Wn. App. at 329 (holding close proximity and access to stolen property insufficient to prove possession). Knowledge and possession are two separate elements of the crime. The fact that Draper knowingly possessed the stolen Chevrolet may have supported the conclusion that he knew the other things were stolen, but it does not show he possessed those other things. The fact does not support the conclusion. At most, the presence of the stolen Chevrolet establishes Draper's proximity to other contraband at some point in time.

Moreover, the judge's reasoning amounts to little more than saying Draper must have possessed the Solara because the judge had already determined Draper possessed the stolen Chevrolet. That reasoning is indistinguishable from the impermissible use of other crimes to show propensity for crime. "Once a thief, always a thief" is not a valid premise on which to base guilt because while propensity evidence may be logically relevant, it is not legally relevant. State v. Holmes, 43 Wn. App. 397, 399-400, 717 P.2d 766 (1986). Indeed, the trial court recognized Draper could not be guilty by "association" with other stolen contraband, but relied on this factor anyway in determining Draper's guilt on count II. 2RP 102.

Draper's case is a far cry from Lakotiy, where the court found sufficient evidence of possession of a stolen vehicle based on the totality of these circumstances: (1) Lakotiy was standing next to a stolen car in a small storage unit, (2) the car had been partially disassembled and the ignition removed, (3) several parts of the car were on the ground next to the car, (4) another individual in the storage unit was working on the stolen vehicle, and (5) when Lakotiy saw the officers, he reached back and

placed a set of jiggler keys and an ignition on the rear of the vehicle. Lakotiy, 214 P.3d at 189.<sup>4</sup>

Unlike Lakotiy, no one saw Draper with keys in his hand and no one saw him in the immediate presence of the Solara when it was being stripped. No evidence showed Draper was the one who stripped the Solara. Moreover, Draper was charged and convicted as a principal. Lakotiy was liable as an accomplice to the principal, who was actively stripping the car when police arrived. Id. at 189; see State v. Roberts, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000) (accomplice need only have general knowledge of the crime and does not need to know or aid in every element of the crime committed by the principal).

ii. The State Failed To Prove Draper Constructively Possessed The Trailer Under Count IV.

The possession of stolen property conviction under count IV involved the Mossyrock Search and Rescue utility trailer. On that count, the trial judge found (1) the trailer was found in close proximity to the stolen Chevrolet; (2) Draper's fingerprint was on a door that had been removed from the trailer; (3) an oxy-acetylene torch was used to remove the door and an acetylene tank was found in the back of the stolen Chevrolet truck. 2RP 97-99.

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<sup>4</sup> A petition for review is pending under Washington Supreme Court number 837783.

For the same reasons set forth above in relation to the Solara, the factors relied on by the trial court to find possession of the trailer (proximity and fingerprint evidence) are insufficient. Furthermore, additional evidence that a torch was used to remove the trailer door and an acetylene tank was inside the Chevrolet truck does not prove Draper's possession of the trailer. Draper's fingerprints were not found on the acetylene tank. At most, this evidence established Draper possessed the door at some point, not the entire trailer. Evidence that a person possesses a stolen car part is insufficient to support a conviction for possession of an entire stolen vehicle. State v. Bobic, 94 Wn. App. 702, 715, 972 P.2d 955 (1999), aff'd in part, rev. in part on other grounds, 140 Wn.2d 250, 996 P.2d 610 (2000); see also State v. Rhinehart, 92 Wn.2d 923, 927-28, 602 P.2d 1188 (1979) (case dismissed for failure to make out prima facie claim where State proved possession of stolen vehicle part but failed to prove possession of stolen vehicle). It follows that possession of a stolen part is insufficient to support conviction for the entire trailer with which Draper was charged.

Ultimately, the State failed to meet its burden of showing dominion and control. While there is evidence a crime was committed, the State must clearly associate the crime with the defendant. George, 193 P.3d at 701. In determining the sufficiency of evidence, existence of a fact

cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Evidence regarding constructive possession here is simply too uncertain to provide the requisite degree of corroboration needed to prove that element.

b. Draper's Remedy Is Dismissal Of The Charges With Prejudice.

Draper's convictions for count II and IV must be reversed and the charges dismissed with prejudice because there is insufficient evidence to prove each element of those crimes. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

2. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE BENCH TRIAL.

CrR 6.1(d) requires the trial court to enter written findings of fact and conclusions of law after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767

(1996).<sup>5</sup> The case must be remanded to the trial court for entry of written findings and conclusions.

Written findings are essential to permit meaningful and accurate appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); State v. Mewes, 84 Wn. App. 620, 621-22, 929 P.2d 505 (1997). Equally important, written findings "allow the appealing defendant to know precisely what is required in order to prevail on appeal." State v. Smith, 68 Wn. App. 201, 209, 842 P.2d 494 (1992). "A court's oral opinion is not a finding of fact." State v. Hescoek, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Rather, an oral opinion is no more than a verbal expression of the court's informal opinion at the time rendered and "has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." Head, 136 Wn.2d at 622 (quoting State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966)). The court's factual findings must separately address each count and adequately identify the factual basis relied upon to support each element of each count. Head, 136 Wn.2d at 623. "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

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<sup>5</sup> Following the bench trial, the trial judge told the prosecutor he was charged with drafting appropriate findings, to which the prosecutor responded "Yes, sir." 3RP 106.

his or her conviction." Id. at 624. Remand for entry of written findings of fact and conclusions of law as required by CrR 6.1(d) is the ordinary remedy for an initial failure to make written findings. Id. at 623. Findings and conclusions may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced. State v. Hillman, 66 Wn. App. 770, 773-74, 832 P.2d 1369 (1992).

Reversal of conviction and dismissal is proper if prejudice can be shown from the initial lack of written findings. Head, 136 Wn.2d at 624; State v. Royal, 122 Wn.2d 413, 422-23, 858 P.2d 259 (1993). One example of prejudice is where written findings appear tailored to meet the errors asserted on appeal. Head, 136 Wn.2d at 624-25; State v. Pruitt, 145 Wn. App. 784, 794, 187 P.3d 326 (2008). Tailoring can be shown if the written findings and conclusions fail to track the oral opinion on the issues material to the appeal. State v. Eaton, 82 Wn. App. 723, 727, 919 P.2d 116 (1996), overruled on other grounds, State v. Frohs, 83 Wn.App. 803, 811 n.2, 924 P.2d 384 (1996); State v. Ritter, 149 Wn. App. 105, 109, 201 P.3d 1086 (2009). Draper reserves the right to challenge any written findings and conclusions entered after the filing of this brief.

3. THE COURT ERRED IN FAILING TO ENTER WRITTEN FINDINGS AND CONCLUSIONS JUSTIFYING AN EXCEPTIONAL SENTENCE.

The trial court must enter written findings of fact and conclusions of law supporting an exceptional sentence. Its failure to do so here necessitates remand for entry of written findings and conclusions.

Exceptional sentences "may only be imposed under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a). The court imposed an exceptional sentence under RCW 9A.535(2)(c) (some current offenses going unpunished). RCW 9.94A.535 requires that "[w]henver a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law."

"An exceptional sentence may be imposed only where the trial court finds substantial and compelling reasons, set forth in written findings and conclusions, which support an exceptional sentence." State v. Gore, 143 Wn.2d 288, 315, 21 P.3d 262 (2001). A trial court imposing an exceptional sentence has an independent statutory duty to make findings that show the sentence imposed is consistent with the goals of the Sentencing Reform Act. In re Pers. Restraint of Breedlove, 138 Wn.2d 298, 300, 979 P.2d 417 (1999).

The fact that leaving some current offenses unpunished may be a substantial and compelling reason justifying an exceptional sentence does not relieve the sentencing court of its duty to enter findings of fact and conclusions of law explaining the reasons for the sentence. See Breedlove, 138 Wn.2d at 310 ("The fact that a stipulation may be a substantial and compelling reason justifying an exceptional sentence does not relieve the sentencing court of its duty to enter findings of fact and conclusions of law which explain the reasons for the sentence."). RCW 9.94A.535 "requires a trial court to enter written findings of fact and conclusions of law to justify its imposition of *any* sentence outside the standard range. The statutory language is clear and the trial court must enter findings and conclusions justifying its exceptional sentence." State v. Hale, 146 Wn. App. 299, 306, 189 P.3d 829 (2008).

"Written findings ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range." Breedlove, 138 Wn.2d at 311. Furthermore, "[t]he purpose of the requirement of findings and conclusions is to insure the trial judge has dealt fully and properly with all the issues in the case before he decides it and so that the parties involved and this court on appeal may be fully informed as to the bases of his

decision when it is made." In re Det. of LaBelle, 107 Wn.2d 196, 218, 728 P.2d 138 (1986). Sufficiently detailed findings give the reviewing court some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts and their application to the law. Nelbro Packing Co. v. Baypack Fisheries, L.L.C., 101 Wn. App. 517, 532-33, 6 P.3d 22 (2000) (addressing findings required for certification of final judgment under CR 54(b)).

The remedy for a trial court's failure to issue findings of fact and conclusions of law is remand for entry of findings and conclusions supporting the exceptional sentence. Breedlove, 138 Wn.2d at 311, 313. Draper reserves the right to challenge any written findings and conclusions entered after the filing of this brief.

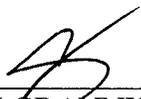
D. CONCLUSION

For the reasons stated, this Court should reverse the convictions on counts II and IV, dismiss those charges with prejudice, and remand for resentencing. In the event this Court declines to do so, then the case should be remanded for entry of written findings and conclusions justifying the exceptional sentence and convictions.

DATED this 30<sup>th</sup> day of October 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 vs. ) COA NO. 39371-9-II  
 )  
 MICHAEL DRAPER, )  
 )  
 Appellant. )

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] LORI SMITH  
LEWIS COUNTY PROSECUTOR'S OFFICE  
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CHEHALIS, WA 98532
  
- [X] MICHAEL DRAPER  
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WASHINGTON CORRECTIONS CENTER  
P.O. BOX 900  
SHELTON, WA 98584

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF OCTOBER 2009.

x Patrick Mayovsky

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