

No. 49271-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JARED ALFONS HEMINGER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

JESSICA L. BLYE, WSBA No. 43759
Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Did the trial court err when it did not address the element of knowledge in its findings of fact and conclusions of law, and was this error harmless?
- B. The State cannot recover appellate costs with the amendment of RAP 14.2, as Heminger has been found indigent.

II. STATEMENT OF THE CASE

Jared Heminger was terminated from Drug Court in an uncontested hearing and proceeded to a stipulated facts bench trial on the charges of Trafficking in Stolen Property in the First Degree, Theft in the Second Degree, and Possession of Methamphetamine.¹ RP 2-4; CP 1-3. Heminger and the State presented proposed stipulated findings of fact and conclusions of law. RP 2; CP 22-24. The stipulated findings agreed Heminger had exchanged text messages with another person in an attempt to sell security equipment. CP 22-23. The text messages contained photos of the security equipment, which belonged to a man for whom Heminger's father worked. CP 23. Heminger's father told the investigating officer Heminger must have taken the security equipment from the father's work truck. CP 23.

¹ Heminger does not appeal his conviction for Possession of Methamphetamine, which was charged in a separate information with a separate findings of fact and conclusions of law.

After presenting the stipulated findings, Heminger raised the issue of whether the facts were sufficient for a guilty finding on the theft charge. RP 2-3. Heminger acknowledged there was sufficient evidence for the other charges. RP 3. After hearing brief argument from the State regarding the evidence of theft, the trial court reviewed the facts in the case. RP 3. The trial court found, while there was evidence the security equipment was stolen, there was insufficient evidence to find Heminger guilty of theft of the security equipment. RP 3-4. Based upon the finding of insufficient evidence, the trial court struck the proposed conclusion finding Heminger guilty of Theft in the Second Degree. RP 3-4; CP 23. The trial court then found Heminger guilty of Trafficking in Stolen Property in the First Degree and Possession of Methamphetamine. RP 3-4. CP 23. The element of knowledge was not expressly addressed by the trial court in either its oral ruling or in the findings of fact and conclusions of law. RP 3-4; CP 22-24. This appeal follows. CP 34.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE FINDINGS OF FACT AND CONCLUSIONS OF LAW DID NOT ADDRESS THE ESSENTIAL ELEMENT OF KNOWLEDGE. HOWEVER, THIS ERROR IS HARMLESS.

Heminger argues the trial court erred in not specifically addressing the element of knowledge in its findings of fact and conclusions of law. Brief of Appellant 4. Heminger argues the error was not harmless beyond a reasonable doubt because the facts could have supported finding Heminger lacked the necessary knowledge to find him guilty of Trafficking in Stolen Property in the First Degree. Brief of Appellant 4-5. The State concedes the element of knowledge was not specifically addressed in the trial court's findings of fact and conclusions of law. However, this Court should find the error was harmless.

1. Standard Of Review.

A trial court must enter written findings of fact and conclusions of law for criminal cases tried without a jury. CrR 6.1(d). The findings and conclusions must address each element of the offense and state each element was met. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) (citations omitted). Deficient findings and conclusions are subject to a harmless error analysis. *Id.* at 43-44. The deficiency is harmless when it appears beyond a reasonable doubt the error did

not contribute to the verdict obtained. *Id.* at 44 (citations omitted). If the deficiency is not harmless, the remedy is remand for entry of corrected findings and conclusions. See *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (remanding where JuCR 7.11(d) findings and conclusions did not include essential element); *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (remanding for entry of written findings and conclusions where CrR 6.1(d) findings and conclusions were wholly absent).

2. The State Concedes The Findings Of Fact And Conclusions Of Law Did Not Specifically Address The Element Of Knowledge.

To convict a defendant of Trafficking in Stolen Property in the First Degree, the finder of fact must believe, beyond a reasonable doubt, the defendant either (1) knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others; or (2) knowingly trafficked in stolen property, knowing the property was stolen. RCW 9A.82.050(1); See WPIC 77.31. A finder of fact may infer knowledge from circumstantial evidence. *State v. Leech*, 114 Wn.2d 700, 790 P.2d 160 (1990).

The State concedes the findings of fact and conclusions of law proposed by Heminger and the State, and entered by the trial court, did not specifically address knowledge. The State also concedes this

is an error. However, this error is harmless, and remand is unnecessary.

3. Failure To Specifically Address The Element Of Knowledge In The Findings Of Fact And Conclusions Of Law Is Harmless Error.

When failure to address an element in the findings of fact and conclusions of law is harmless, remand for correction is unnecessary. *State v. Banks*, 149 Wn.2d 38, 46-47, 65 P.3d 1198 (2003).

In *Banks*, the defendant was convicted of unlawful possession of a firearm in the first degree following a bench trial. 149 Wn.2d at 40. After Bank's trial, the Washington State Supreme Court held unlawful possession of a firearm included an element of "knowing possession." *Id.* at 42 (*citing State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000)). The State had not argued knowledge nor had the trial court addressed knowledge in its findings of fact and conclusions of law. *Id.* at 42. The trial court stated in its oral decision:

I know that Mr. Banks testified he didn't have the gun, he didn't have the jacket on, he doesn't know where the jacket is, it wasn't his. However, I think there is sufficient evidence, circumstantial and otherwise, for me to make a decision beyond a reasonable doubt that Mr. Banks, at one time, had a gun in a jacket he had his hands on, and the gun was still in that jacket after everyone was taken out of the car.... And so I will find that Mr. Banks had a firearm in his possession and control.

Id. at 41-42. The written findings stated, “Defendant [Banks] bent over and picked up the gun and got into his car, which was parked directly in front of the restaurant.” *Id.* at 42.

The Court found the requirements of CrR 6.1(d) had not been met because “the trial court did not specifically address knowledge in its findings of fact and conclusions of law.” *Id.* at 43. However, the Court found this error harmless. *Id.* at 46. The Court found Banks contested knowledge despite ignorance of the element and the Court did not need to speculate whether Banks would have proceeded differently had he known the correct elements of the case. *Id.* The Court found the uncontested findings and conclusions necessitated an inference of knowledge. *Id.* at 46. The Court held there was no reasonable probability the outcome would have differed had the trial court entered an express finding on knowledge. *Id.*

Here, knowledge was a known element of the crime of Trafficking in Stolen Property at the time of Heminger’s bench trial. RCW 9A.82.050(1); CP 1. The trial court had the opportunity to consider whether it believed Heminger knowingly trafficked in stolen property or knowingly initiated, organized, planned, etc. the theft of property for sale to others. Heminger had the opportunity to argue lack of knowledge. While he questioned sufficiency of the evidence

for a finding of guilt on the theft charge, he did not raise the issue of lack of knowledge. RP 2-3.

The fact the trial court found Heminger not guilty of the theft charge strongly indicates the trial court carefully considered whether there was sufficient evidence to prove each element of the charges beyond a reasonable doubt. The trial court did not merely sign off on the proposed stipulated facts and conclusions presented by Heminger and the State. Had the trial court doubted whether Heminger had knowledge, it would have acquitted on the charge of Trafficking in Stolen Property in the First Degree.

The stipulated facts established Heminger was selling security equipment that had been removed from his father's work truck and which belonged to his father's employer. CP 22-23. Heminger's father speculated to the investigating officer that Heminger must have taken the security equipment out of the work truck. CP 23. The trial court did not find this evidence sufficient to prove Heminger himself stole the equipment. RP 3-4; CP 23. However, the trial court, as shown by its finding of guilt, did find the evidence sufficient to prove Heminger knew the equipment was stolen or knowingly initiated, planned, managed, etc. the theft of the equipment. RP 3-4; CP 23.

There is no reasonable probability the outcome, trial court finding Heminger guilty beyond a reasonable doubt of Trafficking in Stolen Property in the First Degree, would have differed had the trial court entered an express finding on knowledge. Because it appears beyond a reasonable doubt the error did not contribute to the verdict, this Court should find the error harmless.

B. HEMINGER’S ISSUE REGARDING APPELLATE COSTS IS MOOT WITH THE COURT’S AMENDMENT OF RAP 14.2

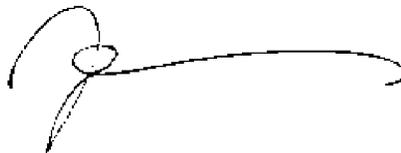
Heminger argues this Court should not impose appellate costs if the State prevails. This issue has been mooted by the amendment of RAP 14.2, as Heminger was found indigent for purposes of this appeal, and the State has no evidence that his circumstances have changed. See RAP 14.2; CP 48-49. The State does not know how it will ever meet RAP 14.2’s burden to show by a “preponderance of the evidence that the offender’s financial circumstances have significantly improved since the last determination of indigency.” The State has no ability to require an appellant to provide current financial information. RAP 14.2 guarantees there will be no appellate costs imposed upon Heminger in this case if the State is the prevailing party.

IV. CONCLUSION

The State concedes the element of knowledge was not expressly addressed in the trial court's findings of fact and conclusions of law, and this is error. However, this Court should find the error harmless, as there is no reasonable probability the outcome would have differed had the element of knowledge been specifically addressed by the trial court. The State will not be seeking appellate costs pursuant to the recently amended RAP 14.2. This Court should affirm Heminger's conviction.

RESPECTFULLY submitted this 10th day of February, 2017.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, consisting of a large, stylized initial 'J' followed by a long, horizontal, slightly wavy line that ends in a small loop.

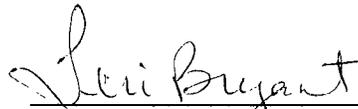
by: _____
JESSICA L. BLYE, WSBA 43759
Attorney for Plaintiff

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

STATE OF WASHINGTON, Respondent, vs. JARED ALFONS HEMINGER, Appellant.	No. 49271-7-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Jessica L. Blye, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 10, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Eric J. Nielsen, Nielsen, Broman & Koch, PLLC, attorney for appellant, at the following email address: sloanej@nwattorney.net.

DATED this 10th day of February, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 10, 2017 - 11:37 AM

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