

**FILED**

**AUG 09 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 29553-2-III**

**STATE OF WASHINGTON  
COURT OF APPEALS - DIVISION III**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DOROTEO VILLANO, JR.,**

**Appellant.**

---

**APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

**SHAWN P. SANT  
Prosecuting Attorney**

**by: Kim M. Kremer, #40724  
Deputy Prosecuting Attorney**

**1016 North Fourth Avenue  
Pasco, WA 99301  
Phone: (509) 545-3543**

**FILED**

**AUG 09 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**NO. 29553-2-III**

**STATE OF WASHINGTON  
COURT OF APPEALS - DIVISION III**

---

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DOROTEO VILLANO, JR.,**

**Appellant.**

---

**APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

**SHAWN P. SANT  
Prosecuting Attorney**

**by: Kim M. Kremer, #40724  
Deputy Prosecuting Attorney**

**1016 North Fourth Avenue  
Pasco, WA 99301  
Phone: (509) 545-3543**

**TABLE OF CONTENTS**

CONTERSTATEMENT OF THE ISSUES ..... 1

**WAS THE TRIAL COURT’S VERDICT SUPPORTED BY  
SUBSTANTIAL EVIDENCE? ..... 1**

**IS DISMISSAL THE APPROPRIATE REMEDY WHEN  
FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE  
NOT ENTERED? ..... 1**

**IF A CONDITION OF SENTENCE IS UNCONSTITUTIONALLY  
VAGUE, MUST IT BE STRICKEN, OR MAY THE MATTER BE  
REMANDED TO THE SENTENCING COURT TO PROVIDE  
SPECIFICITY? ..... 1**

STATEMENT OF THE CASE ..... 1

RESPONSE TO ARGUMENT ..... 3

**THE TRIAL COURT’S VERDICT IS SUPPORTED BY  
SUBSTANTIAL EVIDENCE. .... 3**

    STANDARD OF REVIEW ..... 3

    SUFFICIENCY OF THE EVIDENCE ..... 3

**THE APPROPRIATE REMEDY FOR FAILURE TO ENTER  
FINDINGS OF FACT AND CONCLUSIONS OF LAW IS  
REMAND. .... 6**

    THE TRIAL COURT’S FINDINGS ARE ONLY ONE FACTOR  
    THIS COURT WILL CONSIDER. .... 7

    FAILURE TO ENTER FINDINGS IS HARMLESS ERROR. .... 8

    BECAUSE NO FINDINGS OF FACT AND CONCLUSIONS OF  
    LAW WERE SUBMITTED, REMAND, NOT DISMISSAL, IS  
    THE APPROPRIATE REMEDY. .... 9

**TABLE OF CONTENTS (Continued)**

WHERE SUFFICIENT EVIDENCE EXISTS TO SUPPORT A  
CONVICTION, REMAND FOR ENTRY OF FINDINGS DOES  
NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE  
UNITED STATES CONSTITUTION. .... 10

WHERE SUFFICIENT EVIDENCE EXISTS TO SUPPORT A  
CONVICTION, REMAND FOR ENTRY OF FINDINGS DOES  
NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE  
UNITED STATES CONSTITUTION. .... 10

**IF REVIEW OF A PROBATION CONDITION IS RIPE, REMAND  
IS THE APPROPRIATE REMEDY TO CLARIFY WHAT THE  
TRIAL COURT INTENDED WHEN IT IMPOSED “GANG  
CONDITIONS”. .... 11**

CONCLUSION ..... 12

## TABLE OF AUTHORITIES

### **Cases**

<u>St. v. Alvarez</u> , 128 Wn.2d. 1, 904 P.2d 754 (1995) .....	9, 10
<u>St. v. Kindred</u> , 16 Wn.App 138, 533 P.2d 121 (1976), <i>review denied</i> , 89 Wn.2d 1001 (1977).....	5, 6
<u>State v. Banks</u> , 149 Wn.2d 38, 43, 65 P.3d 1198,1201 (2003).....	8
<u>State v. Despain</u> , 152 Wn. 488, 491, 278 P. 173, 174 (1929) .....	4
<u>State v. Gatlin</u> , 158 Wn. App. 126, 130-31, 241 P.3d 443, 446 (2010).....	7
<u>State v. Green</u> , 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980) .....	3
<u>State v. Hovig</u> , 149 Wn.App. 1, 8, 202 P.3d 318, 321 (2009) <i>review denied</i> , 166 Wn.2d 1020, 217 P.3d 335 (2009) .....	3
<u>State v. Iniguez</u> , 167 Wn.2d 273, 295, 217 P.3d 768, 779 (2009)...	9
<u>State v. Layne</u> , 196 Wn. 198, 204, 82 P.2d 553, 556 (1938).....	6
<u>State v. Lopez</u> , 105 Wn.App. 688, 693, 20 P.3d 978, 981 (2001) .	11
<u>State v. Plewak</u> , 46 Wn. App. 757, 764-65, 732 P.2d 999, 1005 (1987) .....	3, 4, 5
<u>State v. Treat</u> , 109 Wn. App. 419 426, 35 P.3d 1192 (2001).....	3
<u>State v. Valencia</u> , 169 Wn.2d 782, 786, 239 P.3d 1059, 1060 (2010).....	12
<u>State v. Walton</u> , 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992), <i>review denied</i> , 119 Wash.2d 1011, Wash., Jun. 03, 1992.....	6
<u>State v. We</u> , 138 Wn. App. 716, 729, 158 P.3d 1238, 1244 (2007) .	4
<u>State v. Wood</u> , 44 Wn.App. 139, 141, 721 P.2d 541, 542 (1986)....	5

**TABLE OF AUTHORITIES (Continued)**

United States v. Streich, 560 F.3d 926 (9th Cir. 2009) ..... 12

Walton v. Arizona, 497 U.S. 639, 653, (1990) *overruled*  
*on other grounds by* Ring v. Arizona, 536 U.S. 584, (2002) ..... 7

**Rules**

JuCR 7.11(d) ..... 6, 7

### CONTERSTATEMENT OF THE ISSUES

1. **WAS THE TRIAL COURT'S VERDICT SUPPORTED BY SUBSTANTIAL EVIDENCE?**
2. **IS DISMISSAL THE APPROPRIATE REMEDY WHEN FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE NOT ENTERED?**
3. **IF A CONDITION OF SENTENCE IS UNCONSTITUTIONALLY VAGUE, MUST IT BE STRICKEN, OR MAY THE MATTER BE REMANDED TO THE SENTENCING COURT TO PROVIDE SPECIFICITY?**

### STATEMENT OF THE CASE

Doroteo Villano appeals his juvenile adjudication for Arson in the First Degree. His statement of the case is substantially correct as far as it goes. However, the State makes the following additions, corrections and amplifications.

Captain Russ Akers of the Franklin County Sheriff's Office Reserve Unit took Mr. Villano into custody after the car in which Mr. Villano was riding stopped. 1 RP 39. As Capt. Akers patted down Mr. Villano, Capt. Akers noted a faint odor of gasoline. Id. at 40. While transporting Mr. Villano to the juvenile detention center, Capt. Akers had his window down. Id. at 41. Capt. Akers collected the clothing Mr. Villano was wearing at the time of his arrest and placed

the clothes in evidence bags and put those bags in the back seat of his patrol vehicle. Id. at 40, 41. The bags emitted a “very strong odor of gasoline.” Id. at 40.

The clothing taken from Mr. Villano and his co-defendant were later re-packaged into arson evidence bags. Id. at 62. A Washington State Patrol Laboratory scientist testified that all of the clothing items were tested for the presence of volatile evidence. 2 RP 5-6. The tennis shoes belonging to Mr. Villano’s co-defendant contained a “residue of gasoline.” Id. at 6. The scientist also testified that her conclusion that, “no ignitable liquids were identified” did not exclude the possibility that volatile evidence was present. Id. at 9. She testified that, to state the volatile evidence was present, the scientist must find sufficient quantities of volatile evidence. Id. There are threshold levels that must be met to state with scientific certainty that volatile evidence is present. Id. Because the evidence was initially stored in paper bags, any volatile evidence on the clothing may have evaporated prior to the items being placed in an arson evidence bag. Id. at 10.

## RESPONSE TO ARGUMENT

### 1. THE TRIAL COURT'S VERDICT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

#### A. STANDARD OF REVIEW

Mr. Villano states the correct standard of review. Because Mr. Villano is challenging the sufficiency of the evidence presented at trial, this court will draw “all reasonable inferences from the evidence ... in favor of the State” and interpret those inferences “most strongly against the defendant.” State v. Hovig, 149 Wn.App. 1, 8, 202 P.3d 318, 321 (2009) review denied, 166 Wn.2d 1020, 217 P.3d 335 (2009). The appellate court views the evidence in a light most favorable to the State to determine whether a rational trier of fact could find the elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); State v. Treat, 109 Wn. App. 419 426, 35 P.3d 1192 (2001). The appellant admits to the truth of the State’s evidence for the purposes of the examination. Id.

#### B. SUFFICIENCY OF THE EVIDENCE.

Our courts have recognized that arson prosecutions are often dependent upon circumstantial evidence. State v. Plewak, 46 Wn. App. 757, 764-65, 732 P.2d 999, 1005 (1987).

“Circumstantial evidence is sufficient to convict in an arson case.”  
State v. We, 138 Wn. App. 716, 729, 158 P.3d 1238, 1244 (2007).

At trial, Mr. Villano’s counsel specifically argued the same argument he makes on appeal: there was no evidence that he was directly involved in either the planning or execution of this crime. 1 RP 89-90. The State’s case was based upon circumstantial links to direct evidence; the State acknowledged that there was no physical evidence directly linking Mr. Villano with this crime. Id. at 82-83. The trial court found sufficient evidence, both direct and circumstantial, to believe Mr. Villano was directly involved in this arson. Id. at 92-93. “[W]e will not disturb verdicts of this character on the ground of alleged insufficiency of evidence where there is evidence to support the verdict, *although it may not be of the most convincing kind.*” State v. Despain, 152 Wn. 488, 491, 278 P. 173, 174 (1929) (emphasis added).

“A well-connected train of circumstantial evidence may be as satisfactory as an array of direct evidence in proving the crime of arson.” Plewak, 46 Wn.App. at 765, 732 P.2d at 1005. In Plewak, the appellate court found that the “smell of smoke” on the respondent’s person, along with the fact respondent admitted he’d been to the fire in question, were sufficient when considered with

other evidence before the trier of fact. Id. In State v. Wood, 44 Wn.App. 139, 141, 721 P.2d 541, 542 (1986) a prosecution witness testified he saw a car parked in an area where there usually are no cars, he observed a man run to that car, and then chased the car until he had to break off chase because he was low on gas. That car was ultimately traced back to the person who committed the arson that case. Id. In another arson case, the trial court's decision was affirmed where the defendant was one of three people seen in the area when a rival fisherman's boat burned. St. v. Kindred, 16 Wn.App 138, 533 P.2d 121 (1976), *review denied*, 89 Wn.2d 1001 (1977).

The State acknowledges that none of the cases it cites is exactly like this case. In Plewak, the respondent was charged with two counts of Arson in the First Degree. Plewak, 46 Wn.App. at 758, 732 P.2d at 1001. The respondent confessed to the arson giving rise to the second count. 46 Wn.App. at 765, 732 P.2d at 1005. On appeal, he challenged the sufficiency of the evidence against him to support a conviction on the first count. 46 Wn.App. at 764, 732 P.2d at 1004-05. The trier of fact noted the similar identical *modus operandi* of the two arsons. 46 Wn.App. at 765, 732 P.2d at 1005. Here, we do not have a confession on which to

rely. Although there was a prior incident in which a Molotov cocktail was thrown at the victims' home, 1 RP 102, 107, Mr. Villano was not charged in that incident. In Kindred, one of the co-defendants testified at trial regarding the defendant's involvement. 16 Wn.App. at 139, 533 P.2d at 123. Here, Mr. Villano's co-defendant's case was still pending; he was not available for trial. 2 RP 23.

The fact that there is no case on point does not undermine the strength of the State's case, nor does it mean that the trier of fact's decision should be reversed. State v. Layne, 196 Wn. 198, 204, 82 P.2d 553, 556 (1938) ("Each case of this character must be determined upon its own facts."). It is the duty of the trier of fact to weigh the persuasiveness of the evidence; this court should give deference to the trial court's verdict. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992), *review denied*, 119 Wash.2d 1011, Wash., Jun. 03, 1992. The evidence heard by the court was sufficient for a rational trier of fact to find Mr. Villano guilty.

**2. THE APPROPRIATE REMEDY FOR FAILURE TO ENTER FINDINGS OF FACT AND CONCLUSIONS OF LAW IS REMAND.**

The trial court is required to enter written findings of fact and conclusions of law when a juvenile case is appealed. JuCR 7.11(d). The State acknowledges it had notice of Appellant's intent

to appeal, and it did not enter Findings of Fact and Conclusions of Law as required by JuCR 7.11(d). The State has no explanation for its failure to abide by its obligations. Mr. Villano contends that failure to enter court's findings of fact and conclusions of law requires reversal of his conviction. That argument fails on several counts.

A. THE TRIAL COURT'S FINDINGS ARE ONLY ONE FACTOR THIS COURT WILL CONSIDER.

Findings of fact do not stand alone. “[W]e do not review the court's findings of fact alone in reviewing an insufficient evidence claim. We review the entire record to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt.” State v. Gatlin, 158 Wn. App. 126, 130-31, 241 P.3d 443, 446 (2010). As discussed above, there was ample evidence before the trial court to support Mr. Villano’s conviction. “Trial judges are presumed to know the law and to apply it in making their decisions.” Walton v. Arizona, 497 U.S. 639, 653, (1990) *overruled on other grounds by Ring v. Arizona*, 536 U.S. 584, (2002). The evidence heard by the court was sufficient for a rational trier of fact to find Mr. Parks guilty.

**B. FAILURE TO ENTER FINDINGS IS  
HARMLESS ERROR.**

The test for whether an error is harmless is whether the error was “so intrinsically harmful as to require automatic reversal (*i.e.* ‘affect substantial rights’) without regard to its effect on the outcome.” State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198,1201 (2003). In Banks, the trial court failed to enter findings of fact and conclusions of law that the defendant knowingly possessed a firearm. Id. There, as here, the appellant “was tried before an impartial judge who was required to determine guilt beyond a reasonable doubt. He had assistance of counsel.” 149 Wn. 2d at 44, 65 P.3d at 1201. An error is harmless if “it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Id. In looking at the entire record, it is clear that the trial court considered all of the elements of Arson in the First Degree. There is no indication the State was relieved of its burden to prove any element of the crime. See Id. The State’s closing argument addressed each element it was required to prove. In finding Mr. Villano guilty, the trial court rejected the defense’s theory of the case that he was merely present at the victims’ home when the Molotov cocktail was thrown. Accepting Mr. Villano’s

argument that this is an error of constitutional magnitude would be tantamount to presuming the trial court did not know or follow the law.

C. BECAUSE NO FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE SUBMITTED, REMAND, NOT DISMISSAL, IS THE APPROPRIATE REMEDY.

Mr. Villano argues that this court should reverse his conviction and instruct the trial court to dismiss this case with prejudice. App. Br. 9. Dismissal is an extreme remedy. State v. Iniguez, 167 Wn.2d 273, 295, 217 P.3d 768, 779 (2009) (where the court found that an eight-month delay in bringing an incarcerated defendant to trial was not of a sufficient constitutional magnitude to warrant dismissal with prejudice). His argument assumes that there was insufficient evidence to support his conviction; however, as described above, this argument is without merit. It would be improper to dismiss this case solely because the State did not enter findings. St. v. Alvarez, 128 Wn.2d. 1, 904 P.2d 754 (1995).

In Alvarez, the respondent was charged with harassment. 128 Wn.2d at 10, 904 P.2d at 759. On appeal, he argued the trial court's findings of fact and conclusions of law did "not contain ultimate facts sufficient to support his conviction." Id. Our supreme

court agreed that the findings of fact failed to meet the requirements because “[t]hey did not in specific words state that Appellant Alvarez by words or conduct made threats which placed his victims in reasonable fear that the threat would be carried out, a necessary element of the offense ... as charged.” 128 Wn.2d at 17, 904 P.2d at 763 (interior quotations omitted). That court affirmed the Court of Appeal’s ruling that the proper remedy was remand, as it was “apparent from the record that the trial court’s not entering findings of *ultimate* facts was not because the State had not met its burden of proof. It was instead simply the choice of words used in the findings of fact.” 128 Wn. 2d at 19, 904 P.2d at 764 (emphasis in original). There, as here, the trial court heard sufficient evidence to find the respondent guilty. Id.

D. WHERE SUFFICIENT EVIDENCE EXISTS TO SUPPORT A CONVICTION, REMAND FOR ENTRY OF FINDINGS DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION.

Mr. Villano implies that remanding this matter for entry of findings of fact and conclusions of law would violate the Double Jeopardy Clause of the United States Constitution. App. Br. 11-12. Because he was not acquitted at trial, his argument fails. Alvarez,

128 Wn.2d at 20, 904 P.2d at 764. Remand for entry of findings of fact and conclusions of law would not require the trial court to hear any additional evidence.

While Appellant cites State v. Lopez, 105 Wn.App. 688, 693, 20 P.3d 978, 981 (2001) for the proposition that reversal is required, that is not the holding of Lopez: “[U]ntimely written findings will not require reversal as long as the defendant is not prejudiced and the State does not tailor the findings to meet the issues raised in Mr. Lopez’s brief.” Appellant’s sufficiency of the evidence argument is no different than the argument his counsel made at trial. Because the trial court will not need to hear any new evidence to enter its findings and conclusions, Appellant will not be prejudiced by this court remanding this matter back to the trial court to enter findings of fact and conclusions of law.

**3. IF REVIEW OF A PROBATION CONDITION IS RIPE, REMAND IS THE APPROPRIATE REMEDY TO CLARIFY WHAT THE TRIAL COURT INTENDED WHEN IT IMPOSED “GANG CONDITIONS”.**

Mr. Villano was not placed on probation, Order on Adjudication and Disposition 3, and it is unlikely he will receive parole upon his release, 1 RP 112. Because it is unlikely such a condition will actually be imposed, the State questions whether this

issue is ripe for appeal. See United States v. Streich, 560 F.3d 926 (9th Cir. 2009). However, the State recognizes that if he is placed on parole, not addressing this issue may present an undue hardship to Mr. Villano, and this court should consider his argument. State v. Valencia, 169 Wn.2d 782, 786, 239 P.3d 1059, 1060 (2010).

Although the term “gang paraphernalia” is used routinely by the Juvenile Probation Counselors in the Benton-Franklin County Juvenile Justice Center, the State acknowledges that its meaning is not apparent on its face. In Valencia, our supreme court held the appropriate remedy for a vague sentencing condition was to strike the condition and remand the case for resentencing. 169 Wn.2d at 795, 239 P.3d at 1065. The State asks that this court do the same in this case.

#### CONCLUSION

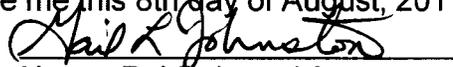
On the basis of the arguments set forth above, the States respectfully requests that the juvenile adjudication of Doroteo Villano be affirmed. The State requests this court remand this matter with instructions to enter findings of fact and conclusions of



98101-3635 by depositing in the mail of the United States of America  
a properly stamped and addressed envelope.

A handwritten signature in cursive script, reading "Deborah L. Ford", written over a horizontal line.

Signed and sworn to before me this 8th day of August, 2011.

A handwritten signature in cursive script, reading "Neil R. Johnston", written over a horizontal line.

Notary Public in and for  
the State of Washington,  
residing at Pasco

My appointment expires:  
September 9, 2014

df