

No. 34960-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB BUCHE,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

1. The court failed to enter findings of fact and conclusions of law.
2. Mr. Buche's constitutional rights were violated when evidence of a refusal of a search was introduced.

II. ISSUED RELATED TO ASSIGNMENTS OF ERROR

1. Was the failure to enter findings harmless?
2. Was there a violation of constitutional rights where the refusal to search was mentioned briefly in a bench trial, was not relied upon by the prosecutor or the judge in establishing guilt, and the mention was so de minimus no objection was made?

III. STATEMENT OF THE CASE

The court found the following facts. Summer Nelson returned home after being gone for about an hour and 15 minutes and noticed that someone had been in her garage, there were items missing and her dog was upset. RP 216. She called her husband and notified him. RP 217. She then went to her neighbor's Jose Alercon's home and asked if he had seen anything suspicious. *Id.* Mr. Alercon had arrived home about five minutes before Ms. Nelson. *Id.* As he was arriving home Mr. Alercon saw a vehicle with gold rims and two occupants that seemed out of place. *Id.* At about this time Officer Munro was responding to the scene and

obtained a description of the vehicle and its occupants. *Id.* Mr. Buche was the driver of the vehicle. The car had trouble and was stopped on the side of the road. *Id.* Mr. Nelson drove Mr. Alercon by the stopped vehicle. Mr. Alercon identified the vehicle as the same one he saw. *Id.* at 218. Mr. Nelson then dropped Mr. Alercon off and went back and looked inside the vehicle. He observed some of his property in the vehicle. *Id.* Mr. Nelson later identified the items in the vehicle as his after a search warrant. *Id.*

Officer Salazar took pictures of footprints at the scene that matched the general characteristics of the defendant's shoes. *Id.* The female passenger in Mr. Buche's vehicle did not have shoes that matched the general character of the footprints. *Id.* While being taken to jail Mr. Buche said "Don't worry, it's not your fault" to his female passenger. He also asked if she had said anything he should know about. *Id.*

During trial the State briefly asked Officer Munro about his contact with Mr. Buche. RP 137. Officer Munro testified that he asked Mr. Buche if he could search the vehicle. Mr. Buche at first opened the door to the car, Officer Munro saw some mechanic's tools, and then Mr. Buche refused Officer Munro permission to search the vehicle. RP 137-38. No one made any further comments regarding the search refusal. The court found Mr. Buche guilty of burglary in the second degree.

The State also admitted multiple documents and recordings showing that Mr. Buche was charged with burglary in the second degree, admitted to bail, was informed of a court date on July 11, 2016, and failed to appear. RP 170-90. At the conclusion of the case the court found Mr. Buche guilty of bail jumping as well. RP 220.

IV. ARGUMENT

A. The failure to enter findings was harmless.

CrR 6.1(d) requires entry of written findings of fact and conclusions of law following a bench trial. *State v. Head*, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The purpose for requiring findings and conclusions is to “enable an appellate court to review the questions raised on appeal.” *Id.* at 622. Each element must be addressed individually, setting out the factual basis for each conclusion of law. *Id.* at 623. *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003). Each finding must also specifically state that an element has been met. *Banks*, 149 Wn.2d at 43 (citing *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995)). Absent prejudice to a defendant from the failure to enter the findings and conclusions, the proper remedy is remand to the trial court for entry of findings. *Head*, 136 Wn.2d at 624.

Remand is not required if the failure to comply with CrR 6.1(d) is harmless, however. *Banks*, 149 Wn.2d at 43-44. To determine whether an

error is harmless, we examine “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 44 (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999))).

Here the trial judge gave a complete summary of the facts that led him to the conclusion the State had carried its burden in proving the burglary case. RP 216-220. The court also concluded, based on the record produced at trial, that Mr. Buche committed the crime of bail jumping. *Id.* While the court can remand for findings, and the State agrees that would be the appropriate remedy should the error not be found harmless, the process would be a mere formality.

B. There was no violation of Mr. Buche’s Fourth Amendment/Art 1 §7 rights.

Mr. Buche cites *State v. Gauthier*, 174 Wn. App. 257, 263-267, 298 P.3d 126 (2013), for the proposition that the mention of Mr. Buche’s refusal to consent of the search penalized his exercise of those rights. There are significant differences between *Gauthier* and this case. *Gauthier* was a jury trial; this case was a bench trial. The appellate court presumes the trial court disregarded inadmissible matters and followed the law. *In*

re Det. of H.N., 188 Wn. App. 744, 765, 355 P.3d 294 (2015), *review denied*, 185 Wn.2d 1005 (2016).

In this case the State elicited testimony that Mr. Buche had voluntarily showed the officer some items of interest, specifically tools, than refused to allow the officer to search further. RP 137-38. The tools were relevant evidence given the items taken from the garage. The search warrant found other items. The fact that Mr. Buche voluntarily showed Officer Munro some items, and the rest were found by a search warrant conducted at a different time, would clue in the judge that Mr. Buche probably stopped the search. In a jury trial the parties are required to dance around exactly what happened in the hopes that the jury will not figure out what exactly the defendant did. The effectiveness of this approach with juries is somewhat questionable. With a judge it would be futile. Here it was simpler to simply create a recitation of exactly what happened, and then move on, with everyone understanding that the court would not consider Mr. Buche's refusal as evidence of guilt.

Also different from *Gauthier* is the fact that the State never argued that the refusal was evidence of guilt. *State v. Threadgill*,

2016 Wn. App. LEXIS 1597 (Op. at 16-17)(2016) (Unpublished)¹.

Defense counsel, the State and the court apparently considered the issue unremarkable. Defense counsel never objected. The State did not argue an inference of guilt based on the refusal in its closing argument. The court, in summarizing the evidence, never mentioned the refusal, and only stated that a search warrant was issued and items were found. Everyone in the courtroom understood that the refusal to allow the search was not to be used as an inference of guilt, and no one used it as such.

Because no one used the passing reference to lack of consent as an indication of guilt, this is not manifest constitutional error. Nor is it ineffective assistance of counsel. If the reference did matter, there would be a tactical reason not to emphasize it. If the reference did not matter, there was no prejudice. The direct and circumstantial evidence in this case was strong enough that any possible inference of guilt was not sufficient to make a difference.

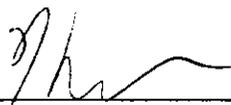
¹ Cited pursuant to GR 14.1 This decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. *Crosswhite v. Wash. Dep't of Social and Health Services*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017).

V. CONCLUSION

The oversight in failing to file findings of fact and conclusions of law was harmless in this case. If the court disagrees the appropriate remedy is to remand, at which time the State will be happy to propose such findings to the trial judge. No one used the refusal to allow the search of the vehicle to infer Mr. Buche's guilt. There was no error, much less manifest constitutional error. The trial court should be affirmed.

Dated: May 25, 2017.

GARTH DANO
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By: 

KEVIN J. MCCRAE
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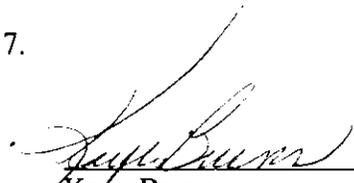
STATE OF WASHINGTON,)
)
Respondent,) No. 34960-8-III
)
vs.)
)
JACOB BUCHE,) DECLARATION OF SERVICE
)
Appellant.)
_____)

Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this
matter by e-mail on the following party, receipt confirmed, pursuant to the
parties' agreement:

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Dated: May 25, 2017.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

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