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Division III
State of Washington
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No. 35352-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

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

AMENDED OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Click It RV reported stolen a Chevy Suburban that disappeared from its used car lot in broad daylight, while surrounded by Click It RV's employees. Over a month later, Mr. Dunbar was stopped by police in this same vehicle, which at that time had license plate holders and a license plate belonging to another used car dealership, Cliff's Auto, from whom Mr. Dunbar told police he purchased the vehicle.

The prosecutor charged Mr. Dunbar with possession of a stolen motor vehicle that Mr. Dunbar did not know was stolen. The prosecution tried to refute Mr. Dunbar's lack of knowledge the vehicle was stolen through a Cliff's Auto employee, who searched Cliff's Auto's inventory for the Suburban based on a VIN number provided to him by the prosecutor. But this VIN number was incorrect, and so the VIN number associated with the Suburban was never checked.

Mr. Dunbar's case proceeded to bench trial without him personally waiving his jury trial right, either orally or in writing, before trial. The trial court convicted Mr. Dunbar without providing a factual basis expressly supporting the conclusion that Mr. Dunbar knew he possessed a stolen vehicle. Because the court's findings of fact and conclusion of law fail to establish the material element of knowledge, reversal of Mr. Dunbar's conviction is required.

B. ASSIGNMENTS OF ERROR

1. The trial court failed to obtain a valid waiver of Mr. Dunbar's jury trial right.
2. The trial court erred in entering findings of fact and conclusions of law that failed to address each element of the crime separately.
3. The trial court erred in entering finding of fact number 16, absent sufficient evidence in the record.
4. The trial court erred in entering finding of fact number 22, absent sufficient evidence in the record.
5. The trial court erred in entering finding of fact number 27, absent sufficient evidence in the record.
6. The trial court erred in entering finding of fact number 35, absent sufficient evidence in the record.
7. The trial court erred in entering finding of fact number 36, absent sufficient evidence in the record.
8. The trial court erred in entering finding of fact number 40, absent sufficient evidence in the record.
9. The trial court did not find the prosecutor proved the essential element of knowledge beyond a reasonable doubt.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Mr. Dunbar had the right to be tried by a jury unless he knowingly, intelligently and voluntarily waived this right. U.S. Const. amend. VI, Const. art. 1 §§ 21 and 22. Was the trial court's failure to obtain Mr. Dunbar's personal oral or written waiver of his jury trial right prior to proceeding to bench trial constitutionally deficient, requiring reversal and remand for a new trial?

2. The State must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. U.S. Const. amend. XIV, § 1; Const. art. I, § 3. In criminal cases tried to the court without a jury, the court must enter written findings of fact that address each element of the crime separately, and each conclusion of law must be supported by a factual basis. The findings of fact are insufficient if there is a reasonable probability that the outcome of the trial would have been different had the error in the findings not occurred.

Here, where the findings of fact entered by the court did not provide the factual basis for the court's conclusion that Mr. Dunbar knowingly possessed the stolen vehicle, were the court's findings of fact and conclusions of law legally insufficient where Mr. Dunbar presented ample evidence that the prosecutor had not met its burden of proof that Mr. Dunbar knowingly possessed a stolen motor vehicle?

D. STATEMENT OF THE CASE

1. Mr. Dunbar's stated belief in his ownership of the Suburban.

Trooper Jason Bart stopped Daniel Dunbar on what proved to be a baseless suspicion that he was driving while impaired. RP 2/21/17; 11.

When Trooper Bart asked to see his license and registration, Mr. Dunbar was straightforward in his admission that he had a suspended license, and provided his Washington State ID card for identification. RP 2/21/17; 11; RP 3/21/17; 172.

Mr. Dunbar looked in the center console for the vehicle registration, but could not find it. RP 2/21/17; 12. In writing a citation for Mr. Dunbar driving without a valid license, Trooper Bart ran the vehicle's license plate through dispatch. 2/21/17; 14. The vehicle associated with the license plate was a 2001 Yukon, which he recognized to be a different vehicle than Mr. Dunbar's Suburban. RP 2/2/17; 14. He obtained the VIN number of the Suburban and ran it through dispatch. RP 2/21/17; 15. He learned that the Suburban had been reported stolen from Click It RV about a month prior. RP 2/21/17; 15. The stolen vehicle report described the Suburban as having a chrome grill and tires. RP 2/21/17; 18. When asked, Mr. Dunbar did not deny the Suburban at one time had chrome wheels, but he told the officer that they were stolen from the vehicle when he had a flat tire. RP 1/21/17; 25. Mr. Dunbar had actually sold the tires to his

brother for \$800 after having previously posted them for sale on-line. RP 3/22/17; 294. There were no other signs that the vehicle was stolen, such as an altered ignition. RP 3/21/17; 191. Mr. Dunbar possessed the key to the Suburban. RP 3/21/17; 191.

When Trooper Bart told Mr. Dunbar he thought the plates had been switched, Mr. Dunbar did not understand. RP 2/21/17; 15. Mr. Dunbar was adamant he had purchased the vehicle from Cliff's Auto. RP 2/21/17; 19; Mr. Dunbar repeatedly asked Trooper Bart to call Cliff's Auto to verify this. RP 3/21/17; 195-196.

Mr. Dunbar believed the vehicle's paperwork was in one of the numerous bags of belongings in the back of the Suburban. RP 2/21/17; 18.¹ Mr. Dunbar was in handcuffs, so could not search himself. RP 3/21/17; 196. He authorized Trooper Bart to go through his belongings, where the trooper found a lot of paperwork. RP /21/17; 19. Trooper Bart did not go through all of the items and did not find Mr. Dunbar's ownership paperwork. RP 2/21/17; 20; RP 3/21/17; 181. The Suburban

¹ The court's Finding of Fact 27 erroneously describes that Mr. Dunbar told the officer that the ownership paperwork was in the back of the vehicle. CP 29, Finding of Fact 27. During the 3.5 hearing, Trooper Bart said only that Mr. Dunbar "believed" the paperwork was in the vehicle. RP 2/21/17; 18.

was registered with the “On Star” system in Mr. Dunbar’s name. Finding of Fact 47; RP 3/22/17; 325.

Not finding the paperwork, the trooper arrested Mr. Dunbar, took all of his possession out of the Suburban, and placed them on the road. RP 3/21/17; 161, 179; 3/22/17; 286. Mr. Dunbar’s possessions were eventually retrieved by one of the passengers and Mr. Dunbar’s girlfriend, Brittney Snow. RP 3/21/17; 185. Mr. Dunbar’s belongings filled the entire trunk and backseat of Ms. Snow’s car. RP 3/22/17; 287.

Trooper Bart contacted Steven Myers, the manager at Click It RV who had reported the vehicle stolen. RP 2/21/17; 21. Mr. Myers came and said he recognized the Suburban, even though it lacked the distinctive chrome rims and grill in his stolen vehicle report. RP 3/21/17; 44, 66. He did not provide proof of ownership for the vehicle to police at that time but was allowed to take the Suburban home based on his previous stolen vehicle report. RP 2/21/17; 29, 210-211. The Suburban still had many of Mr. Dunbar’s personal belongings in it, which Mr. Myers threw out. RP 3/21/17; 69.

2. *The Suburban’s strange disappearance in broad daylight, surrounded by Click It RV employees.*

Mr. Myers last saw the Suburban parked in front of Click It RV on the morning of September 5, 2017. RP 3/21/17; 35-36, 50-51. The

Suburban was featured prominently because it was one of the nicer vehicles the dealership had in years. RP 3/21/17; 44, 50-51. It was easy to see. RP 3/21/17; 36. It had distinctive chrome tires and front grill. RP 3/21/17; 42.

The keys to all of the Click It RV vehicles in the lot are kept in an open area inside the building. RP 3/21/17; 36-37, 60. Click It RV has 100-110 employees among its six lots. RP 3/21/17; 48-49, 51; CP 27, Finding of Fact 8. The day the Suburban went missing, there were at least 13 employees working at that Click It RV lot, including Mr. Myers. RP 3/21/17; 49-50. There were eight salesmen, and at least five people inside the area where the keys to the vehicles were kept. RP 3/21/17; 49-50. In addition to the numerous employees with access to the keys, there are numerous outside vendors who are able to take the keys from the tower and remove the cars from the lot for servicing. RP 3/21/17; 58-59. No one working that day saw the Suburban disappear. RP 3/21/17; 51. And no one saw anyone suspicious enter around the key tower. RP 3/21/17; 51.

Mr. Myers reported the Suburban stolen one day after he noticed it missing from the Click It RV's lot. RP 3/21/17; 34; CP 28, Finding of Fact 17. He explained that before reporting it police, he checked to see if it had been checked out by a Click It RV employee or outside vendor, or taken to another Click It RV lot. RP 3/21/17; 37-38; CP 28, Finding of Fact 9-11.

Around midnight, while driving from the last Click It RV lot checking for the Suburban, Mr. Myers thought he saw the Suburban he had been searching for sitting at a stoplight. RP 3/21/17; 39. He tried to get closer and recognized the vehicle as having Click It RV's license plate frames and distinctive chrome features, but he did not see the driver. RP 3/21/17; 40-41. He tried to follow the vehicle, but was stopped by a Washington State Patrol officer for speeding. RP 3/21/17; 41. Mr. Myers told the patrol officer he was "pretty sure" he saw the stolen Suburban. RP 3/21/17; 41.² He waited to make his stolen vehicle report until he returned to the Click It RV lot that night. RP 3/21/17; 42.

Deputy Christopher Nogle met Mr. Myers at Click It RV to take the stolen vehicle report. RP 3/21/17; 135. Mr. Myers relied on his Click It RV's internal records to report the vehicle—he did not show the title or DOL registration to the deputy. RP 3/21/17; 135-136. In fact, when the Suburban's VIN number was run through dispatch, it came back as registered to a private party. RP 3/22/17; 138. Mr. Myers said that Click It RV obtained the Suburban through a trade-in. RP 3/21/17; 29. Both Cliff's Auto and Click it RV said that dealerships are not required to file a

² This is in contrast to the court's Finding of Fact 16, which described Mr. Myers as "convinced" he saw Click It RV's Suburban that night. CP 16.

transfer of title with the Department of Licensing when they buy or transfer vehicles. RP 3/21/17; 53, 117. The DOL history of the Chevy Suburban showed that the vehicle was never registered by Click It RV. RP 3/22/17; 263; 3/21/17; 53.

Deputy Nogle did not remember if Mr. Myers told him the keys to the Suburban were missing when the report was made. RP 3/21/17; 136. He did no further follow-up. RP 3/21/17; 136.

3. The prosecutor's failed effort to establish that Cliff's Auto did not sell Mr. Dunbar the Suburban.

There were two trials, the first ending when the jury deadlocked. RP 2/27/17; 352-353. At the first trial, Mr. Myers was the only witness to testify about Click It RV's ownership claim to the Suburban and to explain how it disappeared from the lot. RP 2/23/17; 199-256. The prosecution learned about the weaknesses in its case from polling the jury and retried Mr. Dunbar one month later. RP 3/20/17; 13-14.

In preparation for retrial, the prosecutor had Detective Steven White investigate what the employees at Cliff's Auto knew about the Suburban. RP 3/22/17; 236. The detective sent a subpoena with the Suburban's VIN number to Cliff's Auto to confirm that the car dealer did not sell Mr. Dunbar a vehicle with that VIN number. RP 3/21/17; 108-109; 3/22/17; 241-242.

But the VIN number provided to Cliff's Auto was incorrect.³ RP 3/21/17; 109, 122; 5/317; 355. The employee who ran the search for the Suburban, Christopher Dunn, relied on this incorrect VIN number in searching its inventory. RP 3/21/17; 109. Cliff's Auto uses the VIN number to track its inventory of over 3500 vehicles, and Mr. Dunn used this to determine whether it had sold the vehicle to Mr. Dunbar.⁴ RP 3/21/17; 81, 108, 128-129. Based on this erroneous information provided to Cliff's Auto, Mr. Dunn testified that Cliff's Auto never had the Suburban in its inventory, which the court erred in entering as a finding of fact. RP 3/21/17; 84, 115; CP 28, Finding of Fact 22 ("Cliff's records indicated that it never had the Suburban under its possession, control, or in its inventory.").

Mr. Dunbar proceeded to a bench trial without the court discussing the constitutional right he was waiving or obtaining a personal written or oral waiver prior to trial. RP 3/17/17; 5-7; CP 20. Mr. Dunbar was

³ The VIN Number for the Suburban provided to Cliff's Auto was 1GNFK16Z0J150636. RP 3/21/17;109. This is missing one digit of the Suburban's actual VIN number, which is 1GNFK16Z06J150636. RP 3/31/17; 201. Ex. S-2.

⁴ The Suburban's license plate holder bore the name of Cliff's Auto, its license plate belonged to a 2001 Yukon that was purchased by Cliff's Auto at an auction. Finding of fact #19, 20. Cliff's Auto was supplied with the correct VIN number for a 2001 Yukon, and was thus able to track this sale, which was made to a private party. RP 3/21/17; 77.

convicted as charged. CP 31; 35. The court entered written findings of fact and conclusions of law. CP 26-31. The trial court failed to enter any findings of fact or conclusions of law that addressed whether Mr. Dunbar knew the Suburban was stolen, the central issue in the case. CP 26-31.

E. ARGUMENT

A. Mr. Dunbar did not validly waive his jury trial right when he provided neither oral nor written waiver of his jury trial right prior to trial.

The accused's jury trial right is inviolate in Washington. Const. art. I, § 21. The right to a jury trial under Washington's constitution is broader than the federal constitutional jury trial right. *State v. Pierce*, 134 Wn. App. 763, 770, 142 P.3d 610 (2006). U.S. Const. amend.VI.

1. Mr. Dunbar's jury trial waiver was constitutionally infirm.

The record must adequately establish that the accused waived his jury trial right knowingly, intelligently, and voluntarily. *State v. Benitez*, 175 Wn. App. 116, 128, 302 P.3d 877 (2013) (citing *Pierce*, 134 Wn. App. at 771). This requires a personal expression of waiver. *Pierce*, 134 Wn. App. at 771(citing *State v. Stegall*, 124 Wn.2d 719,725, 881 P.2d 979 (1994)).

A constitutionally sufficient waiver may be established where the "the record includes either a written waiver signed by the defendant, a personal expression by the defendant of an intent to waive, or an informed

acquiescence.” *State v. Trebilcock*, 184 Wn App. 619, 632, 341 P.3d 1004 (2014)(citing *State v. Cham*, 165 Wn. App. 438, 448, 267 P.3d 528 (2011)); *Pierce*, 134 Wn. App. at 771(citing *State v. Woo Won Choi*, 55 Wn. App. 895, 904, 781 P.2d 505 (1989)).

The sufficiency of the record that fails to satisfy the constitutional requirements for waiver of this fundamental right may be raised for the first time on appeal. *Cham*, 165 Wn. App. at 447 (citing *State v. Wicke*, 91 Wn.2d 638, 644, 591 P.2d 452 (1979)). This Court reviews a jury trial waiver de novo. *Benitez*, 175 Wn. App. at 128. The State bears the burden of establishing a valid waiver, and absent a record to the contrary, courts “indulge every reasonable presumption against waiver.” *Trebilcock*, 184 Wn. App. at 632(citing *Cham*, 165 Wn. App. at 447); *Wicke*, 91 Wn.2d at 645.

In *Wicke*, counsel waived his client’s jury trial right by oral stipulation as Mr. Wicke stood beside him in open court. *Wicke*, 91 Wn.2d at 641. The trial judge did not question Mr. Wicke to determine whether he discussed the matter sufficiently and agreed with his counsel. *Id.* Nor did Mr. Wicke file a written waiver of his jury trial right. *Id.* The *Wicke* court held this silent record failed to meet the constitutional requirements of a valid jury trial waiver. *Id.* at 645.

Mr. Dunbar's record is similarly silent and thus insufficient to establish a valid waiver of his jury trial right. On retrial, the issue of waiving a jury trial came up the Friday before the trial scheduled on Monday. RP 3/17/17; 4-5. Defense counsel informed the court Mr. Dunbar was unable to proceed to trial on Monday because they still needed to interview one of the prosecutor's additional witnesses. RP 3/17/17; 5. Mr. Dunbar's counsel stated, "I don't know how to address that necessarily at this time," before proposing jury trial waiver to the court. RP 3/17/17; 5. In addition to requesting a continuance in order to speak with this witness, Mr. Dunbar's attorney informed the court that she had talked to Mr. Dunbar about waiving his jury trial right:

The other piece, Your Honor, is I think Mr. Dunbar and I have discussed his options, and we'd be ready to proceed to a bench trial on Monday. I think we'd waive jury this time and hopefully that is substantive notice for the court. I believe there's a form I fill out, and I can do that as soon as I get back to the office, but Mr. Dunbar and I just spoke about it for the first time yesterday, and I just wanted to double check with him this morning before I made any commitments to the court.

RP 3/17/17; 5.

In response to the motion to continue trial, the prosecutor offered to proceed without the witness Mr. Dunbar's attorney sought to interview. 3/17/17 RP 6. In regard to waiving jury trial, the prosecutor responded:

So if we are waiving a jury, again, there's a whole bunch of ifs. If we -- if Mr. Dunbar does in fact waive the jury and we set it up to where we proceed to trial on even Tuesday, still believe we can get the trial done, but I don't want to place the court or Ms. Foley in the position where we're up against a time line that we can't actually set right now, because we don't know about Mr. Grout's schedule. So the state is prepared to go without Mr. Grout if necessary.

THE COURT: All right. And with regard to the jury, would you have any objection to the waiver of the jury if Mr. Dunbar decides to waive a jury?

MR. LINDSEY: No, Your Honor.

THE COURT: All right. And, Ms. Foley, are you prepared at this point to commit to waiving the jury?

MS. FOLEY: Yes, Your Honor.

THE COURT: All right. Then that addresses the issue... [s]o I'm going to leave us set for Monday, and we'll proceed without the need of a jury.

RP 3/17/17; 7.

Like in *Wicke*, Mr. Dunbar's counsel indicated he would waive a bench trial. RP 3/17/17; 7. And like in *Wicke*, the court did not personally inquire whether Mr. Dunbar understood the right he was waiving and fully agreed with counsel. And though Mr. Dunbar's counsel discussed obtaining a written waiver from him, no waiver was signed or filed with the court until March 31, 10 days after his two day bench trial began. CP 20; RP 3/17/17; 5. This is not evidence of knowing, intelligent, and

voluntary waiver because the court failed to establish voluntariness of the waiver prior to trial. Either a colloquy with Mr. Dunbar or a written waiver prior to proceeding to bench trial was necessary to ensure Mr. Dunbar was not proceeding to bench trial for purposes of scheduling or expediency, or foregoing his constitutional right to a jury trial in favor of his constitutional right to prepare a defense.

Because this waiver was not obtained before Mr. Dunbar gave up his jury trial right and had his case heard by the court, the presumption must be against waiver. *See Trebilcock*, 184 Wn. App. at 632.

2. Remand for a new trial is required.

Because there is no valid pre-trial waiver of Mr. Dunbar's right to a jury trial, reversal and remand for a new trial is the appropriate remedy. *See Wicke*, 91 Wn.2d at 645 (In an uncomplicated DUI trial, remand for a new trial is warranted).

B. The trial court’s factual findings did not support its conclusion that Mr. Dunbar knowingly possessed a stolen vehicle, rendering the findings insufficient as to the disputed element of knowledge.

1. *The trial court failed to enter findings of fact and conclusions of law that separately addressed the element of knowledge.*

In criminal cases tried without a jury, the court must enter written findings of fact that address each element of the crime separately. CrR 6.1(d); *State v. Heffner*, 126 Wn. App. 803, 810–11, 110 P.3d 219 (2005) (citing *State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003)). Each conclusion of law must be supported by a factual basis and must expressly indicate that each element has been met. *Id.* at 811.

In *Heffner*, the trial court’s failure to support the elements of the crime with a factual basis and the failure to state the elements were met was error. *Heffner*, 126 Wn. App. at 811. Likewise, in *Banks*, the trial court did not specifically address knowledge in its findings of fact and conclusions of law, which was error. *Banks*, 149 Wn.2d 38 at 43.

In Mr. Dunbar’s case, the trial court entered numerous findings of fact, but did not specify which facts supported the court’s conclusion of law regarding the essential element of knowledge. Rather, the facts are simply statements of the evidence presented at trial, with no finding as to what element they support, including no credibility determinations that

would even allow this Court to infer which facts were relied on to support the court's ultimate finding Mr. Dunbar "possessed the Suburban with knowledge that it had been stolen." CP 31, Conclusion of Law B; CP 26-31, Findings of Fact 1-51. This makes the court's findings insufficient.

Heffner, 126 Wn. App. at 810–11.

2. *The court's failure to specify facts in support of the legal conclusion that Mr. Dunbar knowingly possessed the stolen vehicle was not harmless error, because this factual insufficiency vitiates the court's conclusion of law that Mr. Dunbar knowingly possessed the Suburban with knowledge that it was stolen.*

The court's insufficient findings are not harmless error, because they vitiate the court's conclusion that the prosecutor proved the element of knowledge beyond a reasonable doubt.

A court's insufficient findings of fact and conclusions of law are subject to harmless error analysis. *Heffner*, 126 Wn. App. at 811. If there is a reasonable probability that the outcome of the trial would have been different had the error not occurred, the outcome of the trial is undermined. *Id.* Here the State had the burden of proving beyond a reasonable doubt every element of possession of a stolen motor vehicle, including the element of knowledge. RCW 9A.56.068; CP 6; *State v. Porter*, 186 Wn.2d 85, 93, 375 P.3d 664 (2016) (citing *State v.*

Moavenzadeh, 135 Wn.2d 359, 363-364, 956 P.2d 1097 (1998))

(knowledge is an essential element of possession of stolen property).

The court's findings of fact should establish that the prosecutor met its burden of proof. *State v. Rose*, 175 Wn.2d 10, 21, 282 P.3d 1087 (2012). In the absence of a finding on a factual issue, courts must "indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Here, there was evidence that Mr. Dunbar did not knowingly possess the stolen Suburban. The court's findings do not state the factual basis for this material element. The absence of a finding on this material, disputed element of knowledge must be presumed to show that the State failed to meet its burden as to this element.

The issue of knowledge was central to Mr. Dunbar's defense, as he claimed throughout that he had a right to the vehicle. RP 2/21/17; 18; RP 3/21/17; 175; CP 29-30, Finding of Fact 27, 41. The jury was hung after the first trial, and when polled, jurors informed counsel they needed evidence about Cliff's Auto. RP 2/27/17; 353; 3/20/17; 13.

Before the second trial, the government tried to bolster its case by contacting Cliff's Auto. But the information the government provided to Cliff's Auto was incorrect. RP 3/21/17; 19; 83-84, 86-87, 324, 326; CP 28, Finding of Fact 22. Cliff's Auto searches vehicles by VIN numbers, and

this was the only search it conducted in regards to the Suburban that was introduced to refute Mr. Dunbar's claim of innocence. RP 3/21/17; 81-82, 108, 128-129. With no way to show Mr. Dunbar did not legally purchase the vehicle from Cliff's Auto, the prosecution failed in its attempt to discredit Mr. Dunbar's claim that he knew the Suburban was stolen. The trial court's finding of fact that Cliff's Auto's records indicated it never had the Suburban in its possession was error. CP 28, Finding of Fact 22.

The court's erroneous finding of fact on this issue is even more problematic in light of the unexplained fact that the Suburban had a license plate holder bearing the name of Cliff's Auto, yet the owner of Cliff's Auto denied having any such license plate holders in the recent past. RP 3/21/17; 128. Cliff's Auto's credibility was further undermined by Trooper Douglas Thoet's testimony that he knew of previous police investigations into Cliff's Auto. RP 3/22/17; 300.

The prosecutor argued in closing that the evidence Mr. Dunbar sold the chrome tires and grill showed he was attempting to hide the identity of the vehicle. RP 3/22/17; 313. But this argument was countered by evidence that Mr. Dunbar registered his name through the "On Star" system that openly connected his identity to the vehicle. CP 30, Finding of Fact 47; RP 3/22/17; 325. And Ms. Snow testified she and Mr. Dunbar had police contact, without incident, in the Suburban about a month prior

while it still had the chrome tires and bumpers. RP 3/22/17; 288, 290. Her testimony also establishes that the distinctive chrome was not removed immediately after it disappeared from Click It RV's lot, which undermines the prosecutor's contention that the removed the chrome grill and tires shows an effort to disguise a stolen vehicle. Though Mr. Myers found the Craigslist ad placed by Ms. Snow to sell the tires, there was no date attached to when these were posted. RP 3/21/17; 45. This again undermines the inference that Mr. Dunbar removed the wheels to hide the vehicle, because they were openly posted for sale, and there is was not evidence that they had been immediately removed. The eventual sale of the tires to Mr. Dunbar's brother, which would be very easily traced to Mr. Dunbar, supports the inference that he needed the money for the tires as opposed to showing he was attempting to hide the vehicle's identity. RP 3/22/17; 294.

The court's finding that Mr. Dunbar told police the chrome wheels were stolen when he in fact sold them was not cited as a factual basis to the element of knowledge. The court found simply that, "despite selling the wheels, Dunbar told Bart the wheels had been stolen." CP 31, Finding of Fact 51.

Because the court did not specifically find this fact was evidence that Mr. Dunbar knowingly possessed the stolen Suburban, it cannot be

presumed to be evidence establishing that the State met its burden of proof. *See Armenta*, 134 Wn.2d at 14 (Where the trial court made no such factual finding the reviewing court “must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue.”)

The court’s failure to enter findings that meet the requirements of *Banks* and *Heffner* renders them insufficient. The insufficiency of these findings must be presumed to show that the State failed to meet its burden of proof that Mr. Dunbar knowingly possessed a stolen motor vehicle, especially in light of the evidence undermining the prosecutor’s efforts to show Mr. Dunbar knowingly possessed the stolen vehicle. *Armenta*, 134 Wn.2d at 14.

The court’s findings that did not specifically support its conclusion of law was not harmless error, because the insufficient findings failed to establish beyond a reasonable doubt that Mr. Dunbar knowingly possessed a stolen vehicle. Absent sufficient findings of this essential element, he should not have been convicted. Reversal of Mr. Dunbar’s conviction is required. *See State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009) (reversal for insufficient evidence is deemed equivalent to an acquittal, for double jeopardy purposes).

F. CONCLUSION

Absent a personal affirmation or written waiver of his jury trial right, this silent record is insufficient to establish a valid constitutional waiver of Mr. Dunbar's jury trial right, requiring reversal. And the trial court's factual findings are insufficient because they failed to address each element of the crime separately, and failed to support each conclusion of law with the factual basis. These insufficient findings of fact failed to establish that the prosecutor proved the element of knowledge beyond a reasonable doubt, which provides a separate basis for reversal of Mr. Dunbar's conviction.

DATED this 26th day of June 2018.

Respectfully submitted,

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

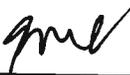
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35352-4-III
)	
DANIEL DUNBAR,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JUNE, 2018, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] BRIAN O'BRIEN [SCPAappeals@spokanecounty.org] SPOKANE COUNTY PROSECUTOR'S OFFICE 1100 W. MALLON AVENUE SPOKANE, WA 99260	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
[X] DANIEL DUNBAR 813308 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JUNE, 2018.

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