

No. 71416-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CLAYTON GERLACH,

Appellant.

2014 DEC -5 11:11:55
COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S REPLY BRIEF AND
SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Mr. Gerlach is prejudiced by the late entry of findings of fact and conclusions of law because there is a strong indication that the belated findings have been tailored to address the issues raised on appeal.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

Reversal is appropriate where findings of fact and conclusions of law required under CrR 6.1(d) are entered belatedly and the defendant can demonstrate actual prejudice. Actual prejudice may be shown where there is a strong indication that the written findings and conclusions have been “tailored” to meet the issues raised on appeal. Did the late entry of findings prejudice Mr. Gerlach, where the written factual findings directly address the sufficiency challenge raised on appeal and were never articulated in the court’s oral ruling?

C. ARGUMENT

Mr. Gerlach was prejudiced by the late entry of findings because there is a strong indication that they were tailored.

Although the practice of submitting late findings and conclusions is disfavored, they may be “submitted and entered even while an appeal is pending” if the defendant is not prejudiced by the

belated entry of findings. *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996) (citing *State v. McGary*, 37 Wn. App. 856, 861, 683 P.2d 1125 (1984)).

While prejudice will not be inferred from the delay in entry of written findings and conclusions, reversal is appropriate where a defendant can show actual prejudice. *State v. Head*, 136 Wn.2d 619, 624, 625, 964 P.2d 1187 (1998). A defendant can show actual prejudice “where there is a strong indication that findings ultimately entered have been ‘tailored’ to meet issues raised on appeal.” *Id.* at 624.

The entirety of the trial court’s oral ruling following Mr. Gerlach’s bench trial on the charge of residential burglary was as follows:

I have had a chance to review my notes as well as all the exhibits that were admitted in this case, and I am ready to make my decision. So, in this matter I find Mr. Gerlach guilty of the charge. I’ve already found him guilty of the bail jumping charge, but I find him guilty of the charge of residential burglary. What is the plan for sentencing?

11/26/13 RP 2. The trial court did not enter any written findings of fact or conclusions of law to support the guilty finding as required by CrR 6.1(d). Mr. Gerlach assigned error to this absence of written findings in

his opening brief, which was filed July 3, 2014. Appellant's Opening Br. at 4. Mr. Gerlach also assigned error to the sufficiency of the evidence, arguing that no rational trier of fact could find him guilty of residential burglary as either the principal actor or as an accomplice. *Id.* at 6-11.

After the filing of Mr. Gerlach's opening brief, the State made efforts to secure the entry of written findings and conclusions. *See* CP 95-98. First, the trial court entered "Bench Trial Findings" on September 3, 2014, more than nine months after the court's oral ruling.¹ CP 97-98. Included in these findings was the assertion that "the defendant acted as an accomplice by assisting and aiding another party in the commission of this crime." CP 98 (Finding of Fact 4). This factual finding was never articulated during the court's oral ruling the previous year. *See* 11/26/13 RP 2.

The State later submitted "Supplemental Findings." CP 95-96. Mr. Gerlach's trial counsel filed a written objection opposing the entry

¹ The court heard evidence on November 18, 2013. 11/18/13 RP 14-121. The court issued its oral ruling declaring Mr. Gerlach guilty on November 26, 2013. 11/26/13 RP 2-3. The Bench Trial Findings were entered on September 3, 2014, more than nine months after the court's oral ruling. CP 97-98. The Supplemental Findings were entered on October 7, 2014, more than 10 months after the court's oral ruling. CP 95-96.

of these findings and attached a copy of Mr. Gerlach's opening brief on appeal. Supp. CP ___, sub. no. 88 (Defendant's Brief Opposing Entry of Findings of Fact & Conclusions of Law).² The attorney representing the State on appeal, as opposed to trial prosecutor, filed a response to Mr. Gerlach's arguments against entering these findings. Supp. CP ___, sub. no. 92 (Response to Defendant's Objection to Entry of Supplemental Findings).

Despite Mr. Gerlach's objection, the trial court adopted the Supplemental Findings on October 7, 2014. CP 95-96. None of these factual findings were pronounced during the trial court's oral ruling the previous year. *See* 11/26/13 RP 2. The findings included that "[t]he defendant intended to aid and facilitate the unknown person's commission of the crime of residential burglary." CP 96 (Finding of Fact g).

These findings precisely address the sufficiency challenge that Mr. Gerlach raised in his opening brief. Mr. Gerlach argued that his mere presence was insufficient to establish accomplice liability and that

² A supplemental designation of clerk's papers has been filed with the superior court for all documents referred to herein by subfolder number.

the State failed to prove that he had knowledge his actions would promote or facilitate any crime. Appellant's Opening Br. at 10-11. A supplemental finding, announced for the very first time, then asserted that "[t]he defendant knew that the unknown person had entered the residence without permission to steal property inside the residence." CP 96 (Finding of Fact f).

When determining whether belatedly entered findings have been tailored, reviewing courts look to the trial court's oral ruling. *E.g.*, *Cannon*, 130 Wn.2d at 330 (late entry of findings did not prejudice the defendant because "a comparison of the late-filed findings and conclusions with the trial court's oral ruling shows that the State did not tailor or alter the findings"); *State v. Ritter*, 149 Wn. App. 105, 109, 201 P.3d 1086 (2009) (because written finding almost identical to the court's oral ruling, defendant failed to show court tailored written findings to assignments of error); *State v. Portomene*, 79 Wn. App. 863, 865, 905 P.2d 1234 (1995) (defendant was not prejudiced by the late findings because "the written findings ultimately entered closely mirror the oral ruling" so there was "no indication that findings were 'tailored' to meet issues raised in this appeal").

Here, a comparison of the written findings, entered more than nine and ten months later, and the trial court's oral ruling the previous year establishes a convincing inference of tailoring. The trial court made absolutely no factual findings when it orally declared Mr. Gerlach guilty. The court never articulated the crucial facts that supported its legal conclusion that the State had proved each element of residential burglary beyond a reasonable doubt. The court neglected to indicate whether it was relying on accomplice liability to find Mr. Gerlach guilty.

The State made multiple attempts to enter appropriate findings that would resolve the factual issues that the court simply did not undertake at the time of trial. The need to submit supplemental findings specifically addressing Mr. Gerlach's knowledge indicates tailoring to fill in the cataclysmic gaps in the trial court's oral ruling. This situation illuminates the reason for the requirement in CrR 6.1(d) to enter findings and conclusions at the time of trial.

The record does not establish that the prosecution of Mr. Gerlach was fully adjudicated at trial by the finder of fact. Rather, critical factual issues were left unresolved until multiple written findings were entered more than nine and 10 months later specifically

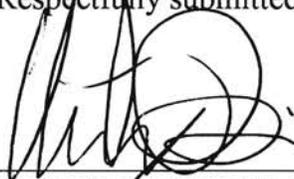
addressing the assignments of error raised on appeal. Therefore, Mr. Gerlach is prejudiced by the late entry of findings. This Court should reverse and remand for dismissal with prejudice.

D. CONCLUSION

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Gerlach respectfully requests this Court reverse his conviction.

DATED this 4th day of December, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Whitney Rivera', written over a horizontal line.

WHITNEY RIVERA, WSBA No. 38139
Washington Appellate Project
Attorneys for Appellant

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DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71416-3-I
)	
CLAYTON GERLACH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-------------------------------------|--------------------------------------|-------------------------------------|---------------|
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| | 3000 ROCKEFELLER | <input type="checkbox"/> | _____ |
| | EVERETT, WA 98201 | | |

SIGNED IN SEATTLE, WASHINGTON, THIS 4TH DAY OF DECEMBER, 2014.

X _____ 