

FILED
December 23, 2015
Court of Appeals
Division I
State of Washington

No. 73539-0-I

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

STATE OF WASHINGTON, Respondent,

v.

A.W., Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
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By Evan P. Jones
Deputy Prosecutor
Attorney for Respondent
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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- 1. Whether the trial court erred in failing to enter a written finding regarding the essential element of entry into a 'building.'**
- 2. Whether the proper remedy of an omitted finding is remand.**

C. STATEMENT OF THE CASE

1. Procedural History

The State agrees with and adopts the procedural history as presented by the Appellant. Brief of Appellant at 1.

2. Substantive Facts

The State agrees with and adopts the substantive facts as presented by the Appellant. Brief of Appellant at 1-3.

D. ARGUMENT

- 1. The case should be remanded for entry of findings and conclusions consistent with the evidence presented at trial.**

The State concedes that the findings of fact and conclusions of law do not state in exact words the necessary elements of the Burglary in the Second for which the Appellant was convicted. Such omission requires a remand for entry of findings and conclusions consistent with the evidence

presented at trial. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995) (holding an error by the court in entering judgment without findings of fact and conclusions of law is remedied by subsequent entry of findings, conclusions, and judgment).

A remand does not relieve the State of its burden of proving each element of the charged offense beyond a reasonable doubt. *Alvarez*, 128 Wn.2d 1, 19. Given the clear findings of the trial court that the Appellant “unlawfully entered” a “shed,” “property,” and “shop,” and “removed several items,” see Findings of Fact 2.1, 2.3, and the subsequent conclusion that, “The State has proven beyond a reasonable doubt the elements of Burglary in the Second Degree,” see Conclusion 3.1, the trial court's failure to enter more complete findings is more likely a matter of trial error, than insufficiency of the evidence. As stated in *Alvarez*, when the defect is based entirely on the trial court's failure to enter formal findings, the burden is intact and the proper remedy is remand. See *Id.* at 16, citing *State v. Souza*, 60 Wn.App. 534, 537, 805 P.2d 237 (1991).

The Appellant quotes language from *State v. Souza*, stating, “the proper remedy is *vacation* and remand to permit entry of further findings if appropriate.”(*emphasis added*) See Appellant Brief at 6, citing Souza, 60 Wn.App.. at 540-41. While this language is used in the *Souza* decision, 60 Wn.App. at 541, it is done in the context of recognizing that reversal of

the conviction was *not* necessary and that remand was instead the appropriate remedy. It was clearly the intention of the *Souza* court, (and the *Alvarez* court which followed) that matters such as these are handled through a remand without vacating the conviction. See *Alvarez*, 128 Wn.2d 1, 19 (holding if findings of fact and conclusions of law do not state “ultimate” facts, that error can be cured by remand.)

E. CONCLUSION

In this case, the State was still required to prove each element of the charged offense beyond a reasonable doubt. It is apparent from the record that the omission in the 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. The proper remedy is remand for entry of findings and conclusions.

Respectfully submitted this 23 December 2015

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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Tassi Schussman
Legal Assistant

12-23-15
Date