

No. 69813-3-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FREDERICK GARRETT,

Appellant.

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

BRIEF OF APPELLANT

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2013 JUL 5 1 57 PM '13

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
KING COUNTY  
CLERK

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A. ASSIGNMENT OF ERROR

The trial erred in failing to enter findings of fact on each element of the offense of conviction as required by CrR 6.1.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Following a bench trial the court must enter written findings of fact and conclusions of law. The court must separately find each element of the offense and set forth the facts that support that finding. Where the trial court did not separately find each element of the offense of second degree burglary, must this Court reverse Frederick Garrett's conviction?

C. STATEMENT OF CASE

David and Lieyzi Smith's home was heavily damaged by a fire. Supp. CP \_\_, Sub No. 108. Although the couple and their family could not live in the home while repairs were being made, many of their personal belongings were still there. *Id.*

The family returned to their house one day to discover Mr. Garrett inside. *Id.* Mr. Garrett fled with several of the Smith's possessions, including two inoperable rifles. *Id.* Police arrested Mr. Garrett a short distance from the house. *Id.*

The State originally charged Mr. Garrett with one count each of residential burglary and theft of a firearm. CP 1-6. Prior to trial the State amended the burglary charge to second degree burglary. CP 100-01. Following a bench trial the court found Mr. Garrett guilty of second degree burglary and attempted theft of a firearm. Supp. CP \_\_, Sub No. 108.

D. ARGUMENT

**The State did not prove each essential element of the crime beyond a reasonable doubt.**

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process “indisputably entitle[s] a criminal defendant to ‘a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77. Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560

(1979). “The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an “element” or “ingredient” of the charged offense. *Alleyne v. United States*, \_\_ U.S. \_\_, 133 S. Ct. 2151, 2158 (2013).

RCW 9A.52.030(1) provides:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building **other than a vehicle or a dwelling**.

(Emphasis added.) The emphasized language is an element of second degree burglary. If the building is dwelling, the person is guilty of a different offense: residential burglary. A fact which differentiates one offense from another is certainly an ingredient of the offense.

CrR 6.1 requires that a court enter written findings of fact and conclusions of law following a bench trial. Those findings are the record which may be reviewed on appeal. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

Each element must be addressed separately, setting out the factual basis for each conclusion of law. [*Head*, 136 Wn.2d at 623]. In addition, the findings must specifically state that an element has been met. *State v. Alvarez*, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

*State v. Banks*, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003).

The trial court entered written findings of fact and conclusions of law as required by CrR 6.1. Supp. CP \_\_, Sub No. 108. The court found Mr. Garrett entered a house which was uninhabitable. The court's conclusion of law provide Mr. Garrett "entered and remained unlawfully in a building." The findings do not separately address, nor even mention, the element that the building is not a dwelling. Thus, the findings are insufficient. *Banks*, 149 Wn.2d at 43.

The failure to enter a finding on an element requires reversal unless the State can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Applying this analysis *Banks* concluded the absence of a finding of knowledge in a drug possession case because the defendant had litigated the question of knowledge at trial, and there was thus sufficient evidence to permit the reviewing court to determine the absence of a finding on the element was not prejudicial. 149 Wn.2d at 46. Here, however, the parties did not litigate the question of whether the building was "other than a dwelling." Thus, the absence of a finding on that element cannot be deemed harmless.

E. CONCLUSION

For the reasons set forth above, this Court should reverse Mr. Garrett's burglary conviction.

Respectfully submitted this 31<sup>st</sup> day of July, 2013.



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FREDERICK GARRETT,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING 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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KING COUNTY COURTHOUSE	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

[X] FREDERICK GARRETT	(X)	U.S. MAIL
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**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF JULY, 2013.

X \_\_\_\_\_  
*grd*

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