

No. 39371-9

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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PM 1/26/10

STATE OF WASHINGTON,

Respondent,

Vs.

MICHAEL DRAPER,

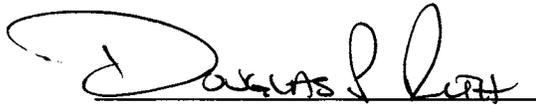
Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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By:



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STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

I. The Record Contains Sufficient Evidence To Support The Trial Court's Verdict Of Guilty.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201. Credibility determinations are for the trier of fact and will not be reviewed. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the evidence's overall persuasiveness. State v. Lubers, 81 Wn.App. 614, 619, 915

P.2d 1157, *review denied*, 130 Wn.2d 1008 (1996). Circumstantial evidence is treated equally with direct evidence. *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

The evidence in the present case, if presumed true and viewed in the light most favorable to the State, was sufficient to prove beyond a reasonable doubt that Mr. Draper committed the crimes of first degree Possession of Stolen Property and Possession of a Stolen Vehicle. Mr. Draper argues that the state's evidence did not rise to this standard, generally because the state failed to establish that he possessed the stolen property at any time. The state concedes that Mr. Draper accurately cites the law in support of his argument, but it cannot agree with the conclusion Mr. Draper draws from it.

As Mr. Draper observed in his brief, this court may view the "totality of the circumstances" when determining whether the trial court had sufficient evidence of possession to establish guilt. Appl. Br. at 9 (*quoting State v. Enlow*, 143 Wn.App. 463, 469, 178 P.3d 366 (2008)). *See also, State v. Lakotiy*, 151 Wn.App. 699, 714, 214 P.3d 181 (2009) ("We examine the totality of the circumstances, including the proximity of the property and ownership of the premises where the contraband was found, to determine whether

there is substantial evidence of dominion and control."). He proceeds, however, to view various categories of evidence in isolation – his proximity to the Toyota, his fingerprint on the Toyota, the proximity of the Chevrolet truck and the Toyota, and his fingerprint on the Search and Rescue (SAR) trailer door – rather than as corroborative evidence. It is true that mere proximity and evidence of momentary handling is not sufficient to show constructive possession of contraband, but when this evidence is combined with other corroborating evidence linking the defendant to the stolen property it can be sufficient to prove constructive possession. See State v. Sanders, 7 Wn.App. 891, 893, 503 P.2d 467 (1972). This is the case here. Each fact and circumstance in the record, standing alone, might not have supported a guilty verdict, but the trial judge properly found that when viewed together they provide sufficient grounds for such a verdict. The court did not rely only on "guilt by association," as Mr. Draper suggests; it had other corroborating evidence.

First, the presence of the stolen pickup on the Gish Road property indicates Mr. Drapers' guilty possession of other stolen items. On appeal, Mr. Draper does not challenge the court's oral ruling that the stolen truck was in his possession. But this evidence

does more than merely substantiate his guilt on count one. Its presence on the same property where the deputies found the trailer and the Toyota also establishes his possession of these items. The three items were found on a remote piece of fenced property, up a 1,500 foot driveway. 2/26/09 RP at 9. Clearly, these items of different ownership were not placed there by coincidence or chance. This property is not public or open. The testimony of the officers and of the owner established that it is the type of property that someone might hide items he didn't want anyone to find. *Id.*; 2/25/09 RP at 31. Mr. Draper was also associated with this property. Deputy Snaza testified that he entered the property in response to a report he received from two individuals that Mr. Draper had been on the property. 2/25/09 RP at 83. Thus, a rational trier of fact could infer that whoever possessed the pickup truck also possessed the trailer and the Toyota vehicle. In short, Mr. Drapers' use of the otherwise vacant, remote piece of property to hide the pickup truck ties him to the other stolen property on the land. It also establishes that his use of these items was not "only a momentary handling." *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Storing items on property indicates more than temporary use.

These conclusions are not based upon Mr. Draper's proximity to the stolen items, as was the case in *Callahan, Enlow*, and *State v. McCaughey*, 14 Wn.App. 326, 541 P.2d 998 (1975). A person's proximity or access to an item says little about the person's possession of the item. But this logical fallacy does not exist when a trier of fact considers the proximity of one item of known ownership or possession to all other items at an inaccessible and remote location. A trier of fact can logically infer from the proximity between items on this type of property that the person who possesses the one item possesses the others as well.

Mr. Draper relies on *Callahan* to support his argument. In that case, police found on a houseboat a cigar box of illegal drugs sitting between the defendant and another man, both of who were temporarily staying on the boat. *Callahan*, 77 Wn.2d at 28. Although the defendant admitted handling the drugs, a different visitor to the houseboat testified that the drugs belonged to him, not the defendant, and that he had sole control over them. *Callahan*, 77 Wn.2d at 31. Others corroborated this person's account. *Callahan*, 77 Wn.2d at 31. Further, the defendant was just one of several people on the boat. *Callahan*, 77 Wn.2d at 28, 31. This is not our case. No other person claimed possession of the trailer

and the Toyota, and there was no evidence that other individuals frequented the Gish Road property while these items were stored there. Thus, *Callahan* is distinguishable.

Mr. Draper's reliance on *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990) is equally misplaced. In *Spruell*, several individuals had access to a residence containing drugs and more than one person was near the drugs when police entered the residence. The defendant's only connection with the house was that he was present on the day police seized the illegal drugs. *Spruell*, 57 Wn.App. at 388. His only connection to the drugs was his fingerprint on the plate that held the drugs when the police entered the residence.

In contrast, here there was limited access to the Gish Road property and it is undisputed that Mr. Draper possessed the stolen truck found at the property. He was clearly not a mere visitor to the property, as *Spruell* was. And there is nothing in the record suggesting the presence of any person other than Mr. Draper on the unused property near the time the deputies discovered the stolen items.

The other cases Mr. Draper cites regard a defendant's presence in a stolen vehicle or a vehicle containing contraband.

These are similarly distinguishable from the facts before this court. It is commonplace to be a passenger in a car and not come in contact with or even to be aware of the contents of the car, or know if the vehicle is stolen. And many passengers may pass in and out of a vehicle on any given day. But this cannot be said of Mr. Draper's use of the Gish Road property. The property was not an open, well used piece of property. It had limited, gated access and was in a remote location. Moreover, the record contains a basis to conclude that Mr. Draper didn't simply visit a property containing contraband, but that he placed that contraband there – he was seen driving one of the items on the property.

In addition to the presence of the stolen truck at Gish Road, the most telling evidence of course is the three fingerprints found on each of the stolen items. 2/25/09 RP at 91, 113-14, 93, 99. In some cases, the existence of fingerprints isn't enough to establish possession. Certainly, fingerprints that result from a mere touching of an object do not show possession. But when the existence of Mr. Draper's fingerprints on each item is added to the undisputed evidence of Mr. Draper's possession of the stolen truck, the condition of the stolen items, their remote location, their proximity to each other, the report of Mr. Draper being on the property, and the

presence of a torch in the back of the stolen truck, the fingerprints are probative of possession. The three fingerprints were found on three unrelated vehicles, all with different owners, all reported stolen, and all found hidden in the same location. Fingerprints on objects connected to stolen property provide a strong inference of possession of that stolen property by the person with those fingerprints. State v. Mace, 97 Wn.2d 840, 845, 650 P.2d 217, 220 (1982).

Looked at from the opposite view, all other explanations for the fingerprints are unpersuasive. If the fingerprints resulted from Mr. Draper's mere innocent or passing contact with each item, then someone else must have placed the items on the Gish Road property. The record establishes that the owners, or someone authorized by the owners, did not place the items there; both owners did not know that the items were on the property. 2/26/09 RP at 17-18, 52. Further, it is unreasonable to believe that both owners chose to store their property on this remote piece of land, which belongs to another, at the same time Mr. Draper also happened to be using the land for storage of the stolen truck.

Thus, the defense must be suggesting that Mr. Draper happened to have touched the items before someone else placed

them on the property, or that he placed the truck in a location that happened to be where others had deposited stolen property and he casually touched these other stolen items. The first possibility is sufficiently unlikely to be unreasonable. Mr. Draper was not given permission to use either of the items and it would be extremely unusual that two items he happened to come in contact with were stolen and placed in the same location where he deposited a stolen truck. 2/26/09 RP at 19, 54.

The evidence in the record refutes the second possibility. One of Mr. Draper's fingerprints was found on a door that had been removed from the trailer, which generally showed signs of being stripped. The trial court could infer that this was not a random print. The print establishes that Mr. Draper was stripping the vehicle. As well, the presence of the torch in the stolen truck corroborates this evidence. Mr. Draper's possession of the torch on the property indicates he had more than casual contact with the trailer. Mr. Williams testified that the trailer had been cut by a torch after it was stolen. 2/26/09 RP at 59.

Similarly, the fact that Mr. Draper's fingerprint was found inside a vehicle that was covered when found by the sheriffs' deputies indicates Mr. Draper's involvement with that vehicle was

more than a mere touching. It is clear he uncovered and then entered the vehicle. 2/25/09 RP at 84, 87.

The holdings in *State v. Cote*, *Spruell*, and *Enlow*, cited by Mr. Draper, do not undermine this argument. In none of these cases were the defendant's fingerprints found on the contraband. In *Spruell*, the defendant's fingerprint was on a plate holding the drugs. In *Cote*, the defendant's fingerprints were on a jar containing drugs. And in *Enlow*, the defendant's fingerprints were found on completely unrelated items. Thus, in all three cases, the fingerprints might have been made before the drugs were in the defendants' proximity. In addition, in all three cases other individuals had access to the drugs and the property on which they were found, and in each the record lacked any evidence indicating that the defendant had anything but innocent contact with the drugs.

Here, in contrast, a trier of fact could conclude that Mr. Draper was the only individual using the property. Also, the presence of the truck, with the cutting torch in its bed, on the property in very close proximity to the trailer and the car established a logical probability that Mr. Draper did not have innocent contact with those items. If this same distinguishing characteristic had

existed in *Spruell, Cote, and Enlow* – for instance, evidence that next to the drugs lay a scale and baggies undisputedly possessed by the defendant during the same time frame – the outcomes certainly would have been different.

Thus, the fingerprints and the presence of the stolen truck on the Gish Road property refute any innocent explanations for Mr. Draper's contact with the trailer and the Toyota. The evidence is sufficient to establish that Mr. Draper had dominion and control of the vehicles when they were placed on the property or during the time they were stored there. Looking at the evidence in the light most favorable to the state and drawing all reasonable inferences from it, the trial court could conclude that the totality of the circumstances proved Mr. Draper possessed the trailer and the Toyota in addition to the Chevrolet truck. The evidence established more than mere proximity and momentary handling of the items. The evidence was sufficient to establish constructive possession beyond a reasonable doubt.

II. The Failure of The Trial Court to Enter Written Findings of Fact and Conclusions of Law Stating Its Basis For The Guilty Verdict Was Harmless.

Mr. Draper next claims that the trial court erred in failing to enter written findings of fact following the bench trial. CrR 6.1(d) requires entry of written findings of fact and conclusions of law articulating the facts and the law relied upon by a court when acting as the trier of fact. Although the record here is devoid of any findings and conclusions, the error does not warrant remand for entry of these statements, as Mr. Draper claims. The Supreme Court has recognized that the failure to enter written findings and conclusions is subject to harmless error analysis and does not automatically require remand. State v. Banks, 149 Wn.2d 38, 43-44, 65 P.3d 1198 (2003). In Banks, the Supreme Court reviewed a trial court's failure to enter findings and conclusions on the knowledge element of the crime of unlawful possession of a firearm. Banks, 149 Wn.2d at 43. The court determined that this error was subject to the harmless error analysis recognized in Neder v. United States, 527 U.S. 1, 7 119 S.Ct. 1827 (1999). That test is whether "there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of

the trial is undermined.' " Banks, 149 Wn.2d at 44 (quoting State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

In other circumstances, this court has found that the failure to enter findings of fact is harmless. In State v. Fry, 15 Wn.App. 499, 550 P.2d 697 (1976), the defendant argued that he was denied due process due to the absence of any written findings of fact entered after a revocation hearing. This court denied the defendant's claim based upon the existence of a sufficient oral opinion and record in the case. Fry, 15 Wn.App. at 501-02. This court quoted State v Myers, 86 Wn.2d 419, 429:

"...the absence of specific written findings did not hinder appellant in making his appeal since the oral opinion provided a record sufficient for review... A remand for the purpose of entering formal written findings would serve no useful purpose..."

Similarly, this court has held that the failure to enter written findings of fact and conclusions of law following a CrR 3.5 hearing is harmless if the oral opinion and the record are sufficiently comprehensive and clear to allow appellate review. State v. Miller, 92 Wn.App. 693, 703-04, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023, 980 P.2d 1282 (1999).

Here, the trial court provided a clear and extensive oral ruling delineating its reasons for the verdict on each count. 2/26/09

RP 92-102. The court provided references to the evidence in support of its reasons and addressed the arguments of each counsel. The ruling is essentially a verbal finding of fact and conclusion of law. Memorializing it in writing would add nothing to the efficacy of Mr. Draper's appeal or this court's ability to review the trial court's verdict.

The trial court's failure to enter written findings and conclusions particularly has no bearing on the alleged errors Mr. Draper appeals. The trial judge's oral ruling addresses the possession element in detail and the judge supports his verdict with facts in the record establishing Mr. Draper's possession of the three items. In fact, Mr. Draper quotes from this ruling to make his argument regarding the sufficiency of evidence to support the verdict. Appl. Br. at 5-6, 12. Where the record is sufficient to facilitate review on issues raised on appeal, a court will address those issues in the absence of written findings and conclusions. State v. Otis, 151 Wn.App. 572, 577, 213 P.3d 613 (2009); State v. Mitchell, 149 Wn.App. 716, 721 n. 1, 205 P.3d 920 (2009). Thus, Mr. Draper cannot argue that the absence of findings has compromised this court's ability to provide meaningful appellate review on the issue Mr. Draper raises. And he does not explain

how remand for entry of findings would be anything more than a formality. Considering the adequacy of the trial court's oral ruling and the record, this court should find the trial court's failure harmless.

In the alternative, this court should remand for entry of findings by the trial court. According to the Supreme Court in State v. Head, 136 Wn.2d 619,624,964 P.2d 1187, 1190 (1998), remand is an option when a trial court's oral findings are sufficiently comprehensive and complete to make drafting written findings a simple task. While reversal of a conviction is an available remedy where the defendant shows actual prejudice from the failure to enter written findings, Mr. Draper has not met that burden here. Head, 136 Wn.2d at 624-25. Delay in the entry of the findings alone does not establish prejudice. Id. In addition, the Supreme Court has held that "[t]his kind of prejudice could be shown only, of course, after remand and the entry of findings." Head, 136 Wn.2d at 625 at n. 3. Accordingly, remand is the appropriate response if this court does not find that the failure to enter findings of fact was harmless.

III. The Sentencing Court's Failure to Enter Findings of Fact and Conclusions of Law is Harmless.

Finally, Mr. Draper notes the absence of findings of fact and conclusions of law in support of the exceptional sentence imposed by the sentencing court. He argues that the remedy for the error is remand for entry of the findings and conclusions. Appl. Br. at 21. Again, this remedy is unnecessary where the trial court's oral ruling is adequate to allow extrapolation of the trial court's factual support and rationale for its ruling.

In general, a court must enter written findings of fact and conclusions of law after imposing an exception sentence. RCW 9.94A.535. Written findings “ensure that the reasons for exceptional sentences are articulated, thus informing the defendant, appellate courts, the Sentencing Guidelines Commission, and the public of the reasons for deviating from the standard range.” *In re Personal Restraint of Breedlove*, 138 Wn.2d 298, 311, 979 P.2d 417 (1999). More particularly, the importance of written findings for this court is to enable it to review the issues raised on appeal. *State v. Bynum*, 76 Wn.App. 262, 266, 884 P.2d 10, 13 (1994), *review denied*, 126 Wn.2d 1012, 892 P.2d 1089 (1995).

In this case, the court found that Mr. Draper's commission of multiple current offenses justified imposing a sentence outside the standard range. When a defendant's multiple current offenses produce an offender score that results in some of the offenses going unpunished, a trial court may impose an exceptional sentence. RCW 9.94A.535(2)(c). The trial court did not enter a written record of its finding. The court did, however, make an oral ruling stating the reasons it was imposing an exceptional sentence. As noted above, where a rule requires written findings, the appellate courts have overlooked that requirement if the oral record adequately presents the trial court's reasoning. See, e.g., *Banks*, 149 Wn.2d at 44, *State v. Ferguson*, 76 Wn.App. 560, 561 n. 1, 886 P.2d 1164 (1995) (absence of CrR 3.5 findings does not require reversal if oral ruling permits meaningful review of suppression decision); *Bynum*, 76 Wn.App. at 266, 884 P.2d at 13 (failure to enter findings as to each element as required by JuCR 7.11(d) was "inconsequential, making remand an unnecessary administrative detail" because the trial court's comprehensive oral ruling included findings on all elements). Moreover, this court has used oral rulings both to supplement written findings supporting an exceptional sentence and to evaluate the accuracy of belated written findings of

fact in support of an exceptional sentence. *State v. Teuber*, 109 Wn.App. 640, 646, 36 P.3d 1089 (2001); *State v. Smith*, 82 Wn.App. 153, 167, 916 P.2d 960 (1996).

In its oral ruling, the sentencing court clearly identified the facts that it was relying upon to support the finding of multiple current offenses. In fact, in response to clarifying questions by both the prosecuting and defense attorneys, the court exhaustively explained and then summarized its ruling for counsel. The court's statements were satisfactory to establish the exceptional sentence. By its nature, the "multiple current offenses" basis for an exceptional sentence does not require detailed factual inquiry. The only obligations upon the sentencing court are to identify that it is sentencing the defendant for the commission of multiple offenses, and that due to the defendant's resulting offender score the length of defendant's sentence is less than it would be if the court separately sentenced him for each offense. This is a mechanical calculation that is easily reviewed by an appellate court. The sentencing court's ruling shows that it made the calculation carefully. And the ruling thoroughly described the court's reasoning behind the calculation. 5/8/09 RP 20-25. It identified the cause numbers of the criminal actions it relied upon to impose the

exceptional sentence and identifies whether the sentence for each count is to be served consecutively or concurrently with other charges. *Id.* Thus, the oral ruling was sufficiently articulated to allow for appellate review and to inform this court, the defendant, and the public of the reasons why the sentencing court was deviating from the standard range.

In addition, while the judgment and sentence does not include separate findings of facts and conclusions of law in support of the exceptional sentence, it is still clear on its face as to the reasons for the exceptional sentence. Section 2.4 of the judgment and sentence establishes that "substantial and compelling reasons exist which justify an exceptional sentence." CP 14-16. It then states the specific justification: "The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." *Id.* When read in conjunction with the sections of the judgment and sentence delineating Mr. Draper's current offenses (sec. 2.1), criminal history (sec. 2.2), and sentencing data (sec. 2.3), the judgment and sentence provides the factual and legal basis for the exceptional sentence. Thus, remanding this case to the sentencing court for written findings of fact and conclusions of law would be "an

unnecessary administrative detail" and a formality. Bynum, 76 Wn.App. at 266. This is particularly true since Mr. Draper raises no issues regarding his exceptional sentence in his brief. Id. Under these circumstances, the sentencing court's oral findings and judgment and sentence are adequate to permit meaningful appellate review. And remand for entry of additional written findings of fact would serve no useful purpose. State v. Trout, 125 Wn.App. 403, 415, 105 P.3d 69, 76 (2005) (The absence of findings of fact in a 3.5 hearing is harmless if the trial court's oral opinion is clear and comprehensive and written findings would be just a formality). Accordingly, the state contends there is no need to remand this case for entry of findings and conclusions.

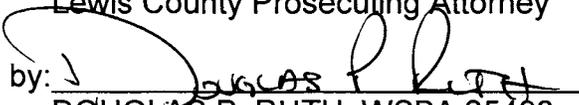
CONCLUSION

For the foregoing reasons, this court should affirm Mr. Draper's conviction.

RESPECTFULLY submitted this 26 day of January, 2010.

MICHAEL GOLDEN
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by: ↓


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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

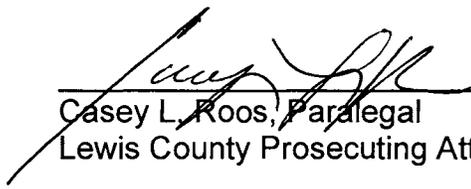
COURT OF APPEALS FOR THE STATE OF WASHINGTON
10 JAN 27 2010
BY _____

STATE OF WASHINGTON,) NO. 39371-9
Respondent,)
vs.)
MICHAEL DRAPER,) DECLARATION OF
Appellant.) MAILING
_____)

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 26, 2010 the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

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DATED this 24th day of January 2010, at Chehalis, Washington.



Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office

Declaration of
Mailing