

No. 28970-2-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

TROY HAMILTON TRUSLEY,

Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT  
HONORABLE CRAIG J. MATHESON

---

BRIEF OF APPELLANT

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SUSAN MARIE GASCH  
WSBA No. 16485  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....2

C. ARGUMENT.....6

    1. A conviction for vehicular assault pursuant to an information that fails to allege all of the elements of the offense must be reversed and dismissed.....6

    2. The trial court violated the defendant’s right to a jury trial under Washington Constitution, Ar. 1, § 21 and U.S. Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently and voluntarily enter.....9

    3. The trial court erred in admitting results of the blood test, absent evidence that the test conformed to the controlling regulations...12

        a. The State was required to prove the blood analysis complied with methods approved by the State toxicologist.....12

        b. The State failed to prove the blood sample was preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration.....14

        c. The blood test results should have been excluded.....16

    4. The failure to enter written findings of fact and conclusions of law following a bench trial requires remand.....16

D. CONCLUSION.....18

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Cheff v. Schnackenberg</u> , 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966).....	9
<u>Auburn v. Brooke</u> , 119 Wn.2d 623, 836 P.2d 212 (1992).....	7
<u>Mairs v. Dep't of Licensing</u> , 70 Wn. App. 541, 954 P.2d 665 (1993).....	16
<u>Pasco v. Mace</u> , 98 Wn.2d 87, 653 P.2d 618 (1982).....	10
<u>State v. Bosio</u> , 107 Wn. App. 462, 27 P.3d 636 (2001).....	13, 14, 15, 16
<u>State v. Clark-Munoz</u> , 152 Wn.2d 39, 93 P.3d 141 (2004).....	12, 13, 16
<u>State v. Donahue</u> , 76 Wn. App. 695, 887 P.2d 485 (1995).....	10
<u>State v. Garrett</u> , 80 Wn. App. 65 1, 654,910 P.2d 552 (1996).....	13, 16
<u>State v. Gimarelli</u> , 105 Wn. App. 370, 20 P.3d 430 (2001).....	12
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998).....	16, 17
<u>State v. Hopper</u> , 118 Wn.2d 15 1, 822 P.2d 775 (1992).....	6
<u>State v. Klimes</u> , 117 Wn. App. 758, 73 P.3d 416 (2003).....	12
<u>State v. Kitchen</u> , 61 Wn. App. 91 1, 812 P.2d 888 (1991).....	9
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	6, 7, 9
<u>State v. Leach</u> , 113 Wn.2d 679, 782 P.2d 552 (1989).....	7
<u>State v. Neher</u> , 112 Wn.2d 347, 771 P.2d 330 (1989).....	8
<u>State v. Pierce</u> , 134 Wn. App. 763, 142 P.3d 610 (2006).....	10, 11

<u>State v. Ramirez-Dominguez</u> , 140 Wn. App. 233, 165 P.3d 391 (2007).....	10
<u>State v. Reynolds</u> , 80 Wn. App. 851, 912 P.2d 494 (1996).....	17
<u>State v. Royse</u> , 66 Wn.2d 552, 557, 403 P.2d 838 (1965).....	7
<u>State v. Schulze</u> , 116 Wn.2d 154, 804 P.2d 566 (1991).....	13
<u>State v. Smith</u> , 68 Wn. App. 201, 842 P.2d 494 (1992).....	18
<u>State v. Stegall</u> , 124 Wn.2d 719, 881 P.2d 979 (1994).....	10, 11
<u>State v. Vasquez</u> , 109 Wn. App. 310, 34 P.3d 1255, <i>aff'd</i> , 148 Wn.2d 303, 59 P.3d 648 (2001).....	11
<u>State v. Wicke</u> , 91 Wn.2d 638, 591 P.2d 452 (1979).....	10

**Statutes and Codes**

U.S. Const. amend. 6.....6, 9

Wash. Const. art. 1 § 21.....9, 10, 12

Wash. Const. art.1, § 22 (amend. 10).....6

RCW 46.61.506(3).....12, 13

RCW 46.61.522.....9

RCW 46.61.522(1).....7

RCW 46.61.522(1)(a).....8

RCW 46.61.522(1)(b).....8, 9, 12

RCW 46.61.522(1)(c).....8

WAC 448-14 *et seq*.....13

WAC 448-14-020(3)(b).....14

**Court Rules**

CrR 2.1(b).....6

CrR 6.1(a).....10

CrR 6.1(d).....16, 17, 18

ER 901.....16

**Other Resources**

2 C Torcia, WHARTON ON CRIMINAL PROCEDURE 238, p. 69 (13  
3d. 1990).....6

**A. ASSIGNMENTS OF ERROR**

1. The information fails to allege all elements of the offense.

2. The trial court violated the defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter.

3. The trial court erred in admitting the results of a blood test that did not meet the technical requirements of chapter 46.61 RCW and State toxicology requirements.

4. The trial court failed to comply with CrR 6.1(d) when it failed to enter written findings of fact and conclusions of law after the bench trial.

*Issues Pertaining to Assignments of Error*

1. Whether a conviction for vehicular assault based upon an information that fails to allege all of the elements of the offense must be reversed and dismissed? Assignment of Error No. 1.

2. Does a trial court violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it accepts a jury waiver that the defendant did not

knowingly, intelligently, and voluntarily enter? Assignment of Error No.

2.

3. The results of a blood test are admissible only where performed in compliance with the methods approved by the State toxicologist and where the State has met its burden of establishing that foundation. Where the State failed to prove that the blood sample was preserved with sufficient amounts of anticoagulant and enzyme poison to prevent clotting and stabilize the blood alcohol concentration, as required by the Washington Administrative Code, did the trial court err in admitting evidence of the blood test? Assignment of Error No. 3.

4. Where the trial court failed to comply with CrR 6.1(d) when it failed to enter written findings of fact and conclusions of law, must the case be remanded for entry of findings and conclusions? Assignment of Error No. 4.

## **B. STATEMENT OF THE CASE**

The defendant, Troy Hamilton Trusley, was charged with vehicular assault based on causing injury to another when driving a car recklessly or while under the influence of intoxicating drugs. CP 1-2; RCW 46.61.522(1)(a) and (b). The charge arose from a May 2009 collision between Trusley's car and a bicycle being ridden by Cindy Goulet, as they

were travelling in the same direction on a roadway with an adjacent bike path in Benton County, Washington. CP 3; RP<sup>1</sup> 9–10, 40–41, 44–45, 48, 81.

On January 14, 2010, Trusley appeared before the court with his counsel, who filed a jury waiver on the defendant's behalf. 1/14/2010 RP

3. The body of this waiver states as follows:

I, Troy Trusley, have been fully advised of my right to a jury trial. I am electing to waive my right to a jury trial and am requesting a bench trial in this matter. I have been fully informed that this is solely my decision to make and have weighed the facts of my case with my attorney. I have not made this decision under any duress or threats. I make this decision freely and voluntarily.

CP 12. The document was signed only by Trusley. Id. The court had the following colloquy with Trusley concerning his understanding of his constitutional right to a jury trial:

THE COURT: Let me make a couple quick inquiries, Mr. Trusley. You've discussed waiving this right, your right to a jury trial, you've discussed waiving it with your attorney, Miss Ajax?

THE DEFENDANT: Yes, sir.

THE COURT: And you understand that's a very substantial and important right to have 12 people decide whether you've committed a crime, rather than just a judge, but you're willing to give that right up?

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<sup>1</sup> The transcript of the trial, sentencing and a few hearings is found in Volumes 1 and 2, and will be referred to as "RP \_\_\_\_". Reference to any other hearings will be by date, e.g. "1/14/2010 RP \_\_\_\_".

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And you've signed this document, so we'll go to trial without a jury, and it's set for ...

1/14/2010 RP 3.

The following pertinent evidence was presented during the bench trial. On the morning of the incident, Trusley drove onto a roadway going through Columbia Park. RP 29, 259–61. Four bicyclists in staggered positions were riding ahead of him in the adjacent bike path. RP 9–10, 18–21, 33, 40, 261–62. With a posted speed limit of 25 or 30 miles per hour, the bicyclists were going 12 to 15 miles per hour while Trusley was driving somewhere between 20 to 37 miles per hour. RP 21, 47, 67–68, 89, 108, 214, 262, 276.

At some point Trusley's car hit Cindy Goulet's bike from the back, causing her to hit the car windshield and land on the far side of the bike path. RP 10, 21, 34, 41, 107, 261–63. Investigation showed that the collision occurred in the middle of the road lane. RP 103, 105. There was conflicting evidence whether Goulet gradually entered the road lane or instead popped out suddenly into the roadway. RP 12, 25–26, 31, 220–22, 227–29, 261–63, 268–69. Goulet suffered injuries to her ribs. RP 10–11.

Kennewick Police Department Officer Bennett arrested Trusley at the scene for driving under the influence, and later conducted a DRE<sup>2</sup> evaluation at the station. RP 132–48. The officer felt that Trusley was under the influence of a CNS<sup>3</sup> stimulant and was unable to operate a car safely. RP 149. The officer took Trusley to the hospital for a blood test. RP 149.

Officer Bennett brought a blood draw kit from the Kennewick Police Department with him to the hospital, and observed the blood draw. RP 150–51. He testified the vials contained an anti-coagulant powder and/or a white powder, and that the expiration date had not yet expired. RP 151, 160. When shown a photograph of the vials, he noted that the label indicated the vials contained sodium fluoride. RP 160–61. Brittany Ball, from the Washington State Toxicology Lab, testified that the blood kits that are sent by the lab to agencies to use, contain an enzyme poison and an anti-coagulant. RP 175, 183, 185. The blood test results showed the presence of methamphetamine. RP 185–87.

The trial court found Trusley guilty of vehicular assault. RP 302. This appeal followed. CP 28.

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<sup>2</sup> “DRE” means drug recognition expert. RP 121.

<sup>3</sup> “CNS” means central nervous system. RP 178.

## C. ARGUMENT

### 1. A conviction for vehicular assault pursuant to an information that fails to allege all of the elements of the offense must be reversed and dismissed.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C Torcia, WHARTON ON CRIMINAL PROCEDURE 238, p. 69 (13 3d. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charge in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, § 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged until after the verdict, the information "will be more liberally construed in favor of validity. . . ." Kjorsvik, 117 Wn.2d at 102.

The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient "to use words conveying the same meaning and import as the statutory language." State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, "state the acts constituting the offense in ordinary and concise language . . ." State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question "is whether the words would reasonably appraise an accused of the elements of the crime charged." Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 46.61.522(1) provides that a person is guilty of vehicular assault if he or she operates or drives any vehicle:

- (a) In a reckless manner and causes substantial bodily harm to another; or
- (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or
- (c) With disregard for the safety of others and causes substantial bodily harm to another.

To constitute vehicular assault, there must be a causal connection between the injury to a person and the criminal conduct of the defendant so that the act done was a cause of the resulting substantial bodily harm.

*See State v. Neher*, 112 Wn.2d 347, 352, 771 P.2d 330 (1989).

Trusley was charged in the information as follows:

That the said Troy Hamilton Trusley, in the County of Benton, State of Washington, on or about the 9<sup>th</sup> day of May, 2009, in violation of RCW 46.61.622(1)(a) and/or (b), did operate or drive a vehicle in a reckless manner and/or did operate or drive a vehicle while under the influence of central nervous system stimulant and caused substantial bodily harm to another, to-wit: broken ribs inflicted on Cindy Goulet . . . .

CP 1.

This information is insufficient because it does not allege the causal connection between the alleged criminal conduct on the part of Trusley and the injury to another person, as set forth in RCW 46.61.522. ("In a reckless manner *and* causes substantial bodily harm to another;" RCW 46.61.522(1)(a) (emphasis added); "While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, *and* causes

substantial bodily harm to another;" RCW 46.61.522(1)(b) (emphasis added). The language in the charging document does not reflect the conduct-and-caused-substantial bodily-harm structure of the verbiage of RCW 46.61.522. Instead, the information alleges only that Trusley operated or drove a vehicle in the proscribed prohibited manner, not that he drove in the prohibited manner and thereby caused the bodily injury.

The information is therefore defective, and the conviction obtained on the charge of vehicular assault must be reversed and the charge dismissed. State v. Kitchen, 61 Wn. App. 91 1, 812 P.2d 888 (1991). Trusley need not show prejudice, since Kjorsvik calls for a review of prejudice only if the "liberal interpretation" upholds the validity of the information. *See Kjorsvik*, 117 Wn.2d at 105–06.

**2. The trial court violated the defendant's right to a jury trial under Washington Constitution, Art. 1, § 21 and U.S. Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently and voluntarily enter.**

Under the United States Constitution, Sixth Amendment every person charged with an offense that could result in over six months imprisonment is entitled to a trial by jury. Cheffv. Schnackenberg, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). By contrast, Washington

Constitution, Art. 1, § 21, affords the citizens of this state the right to trial by jury for any offense that is defined as a "crime," the conviction of which could result in any imprisonment. Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may only be sustained if a defendant acts knowingly, intelligently, voluntarily and free from improper influences. State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994).

The waiver of the right to jury trial must either be made in writing or made orally on the record. State v. Wicke, 91 Wn.2d 638, 591 P.2d 452 (1979). If the defendant challenges the validity of the jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. State v. Donahue, 76 Wn. App. 695, 697, 887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews a trial court's decision to accept the defendant's jury trial waiver *de novo*. State v. Ramirez-Dominguez, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). A reviewing court may not presume that a defendant waived his jury trial right unless the record establishes a valid waiver. State v. Pierce, 134 Wn. App. 763, 771, 142 P.3d 610 (2006); CrR 6.1(a) ("cases required to be

tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court”).

While a written waiver is evidence that a defendant validly waived a jury trial, it is not determinative. Pierce, 134 Wn. App.at 771. The record must reflect a personal expression of waiver by the defendant. Stegall, 124 Wn.2d at 725.

In the case at bar, Trusley was at least aware that he did have the right to trial by jury, since the written waiver so states. However, both the shortness of the colloquy and the failure of the trial court to adequately inform the defendant of the essential nature of the jury waiver show that the waiver in this case was not made knowingly, intelligently and voluntarily. The court briefly mentioned that waiver included the right to have 12 people, rather than a single judge, decide whether a crime had been committed. 1/14/2010 RP 3. However, the record contains no evidence that Trusley understood that under the Washington constitution, there must be complete jury unanimity in order to enter a guilty verdict. See State v. Pierce, 134 Wn. App. 763, 142 P.3d 610 (2006) and State v. Vasquez, 109 Wn. App. 310, 34 P.3d 1255, *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2001) (waivers found valid where, among other things, defendant was expressly informed of right to unanimous verdict). This state

constitutional right varies significantly from the United States Constitution and many other state constitutions, which do not require complete jury unanimity in order to sustain a guilty verdict. *See* State v. Gimarelli, 105 Wn. App. 370, 379, 20 P.3d 430 (2001); State v. Klimes, 117 Wn. App. 758, 770, 73 P.3d 416 (2003).

Absent advice on this important component of the right to jury trial under Washington Constitution, Article 1, § 21, the State in this case cannot meet its burden of proving that the jury waiver was knowingly, intelligently, and voluntarily made. As a result, this Court should reverse the conviction and remand for a new trial before a jury.

**3. The trial court erred in admitting results of the blood test, absent evidence that the test conformed to the controlling regulations.**

a. The State was required to prove the blood analysis complied with methods approved by the State toxicologist. In order to prove Trusley committed vehicular assault as charged, the State was required to prove he was under the influence of an intoxicating drug. RCW 46.61.522(1)(b). Blood tests are admissible as evidence of intoxication only if they meet the requirements of chapter 46.61 RCW. RCW 46.61.506(3); State v. Clark-Munoz, 152 Wn.2d 39, 48–49, 93 P.3d 141 (2004) (holding blood and breath evidence inadmissible where State fails

to prove strict compliance with administrative code). "Analysis of the person's blood or breath to be considered valid under the provisions of this section or RCW 46.61.502 or 46.61.504 shall have been performed according to methods approved by the state toxicologist." RCW 46.61.506(3) (emphasis added); *see also* Clark-Munoz, 152 Wn.2d at 48-50.

The state toxicologist promulgated WAC 448-14 *et seq.* to implement the dictates of RCW 46.61.506(3) with regard to blood tests. State v. Schulze, 116 Wn.2d 154, 167, 804 P.2d 566 (1991).

The regulations approve the tests only if they meet strict standards for precision, accuracy, and specificity. WAC 448-14-010. The regulations also specify the general manner in which tests must be conducted. WAC 448-14-010. WAC 448-14-020 sets forth analytical and reporting procedures for blood tests, and standards for sample containers and preservation. WAC 448-14-030 sets forth qualifications for blood analysis.

Schulze, 116 Wn.2d at 167.

Compliance with the provisions of WAC 448-14 *et seq.* is mandatory, and the State must demonstrate compliance before any evidence of blood tests can be admitted. State v. Garrett, 80 Wn. App. 65, 1,654,910 P.2d 552 (1996); State v. Bosio, 107 Wn. App. 462, 467, 27 P.3d 636 (2001).

b. The State failed to prove the blood sample was preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. The Washington Administrative Code requires, among other things, that:

Blood samples for alcohol analysis shall be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize the alcohol concentration. Suitable preservatives and anticoagulants include the combination of sodium fluoride and potassium oxalate.

WAC 448-14-020(3)(b).

In State v. Bosio, this Court considered the appeal of a woman convicted of vehicular assault. 107 Wn. App. at 463. Following an automobile accident, Ms. Bosio submitted to a blood test, and the results showed she had a blood alcohol level of .23. *Id.* at 464. On appeal, Ms. Bosio contended the trial court should not have admitted the results of her blood test because there was no evidence establishing, *inter alia*, the use of an enzyme poison or an anticoagulant. *Id.* at 466.

The court found there was sufficient evidence establishing the presence of the anticoagulant. Both the nurse who conducted the blood draw and the trooper who observed the draw testified about powder in the vials, and the blood was not coagulated. *Id.* at 467-68. But the court agreed with Ms. Bosio with regard to the enzyme poison, finding no

evidence that the enzyme poison was added to the blood sample. Id. at 468. Accordingly, the court reversed the conviction and remanded the case for a new trial. Id.

In the case at hand, Officer Bennett, brought a blood draw kit from the Kennewick Police Department with him to the hospital, and observed the blood draw. RP 150–51. He testified the vials contained an anti-coagulant powder and/or a white powder, and that the expiration date had not yet expired.. RP 151, 160. When shown a photograph of the vials, he noted that the label indicated the vials contained sodium fluoride. RP 160–61. Brittany Ball, from the Washington State Toxicology Lab, testified that the lab sends out blood kits to agencies to use, and that vials in the kit contain an enzyme poison and an anti-coagulant. RP 175, 183, 185.

The State offered no proof of compliance with the regulations or even a proclamation of compliance from the manufacturer. The State offered no testimony to establish that the vials contained an amount of anticoagulant and enzyme poison sufficient to prevent clotting and stabilize the alcohol concentration. Moreover, unlike in Bosio, there was no corroborating testimony that the blood samples in fact were not coagulated or contaminated.

In the absence of such evidence, the State failed to make a *prima facie* case that Trusley's blood sample was properly preserved. Bosio, 107 Wn. App. at 467; *see also* ER 901 (addressing foundation requirements of evidence).

c. The blood test results should have been excluded. Where the State fails to show compliance with the regulations, the evidence of the blood test must be excluded. *See* Garrett, 80 Wn. App. at 653; Bosio, 107 Wn. App. at 468; *cf.* Clark-Munoz, 152 Wn.2d at 48-50. Because the State could not show the blood test complied with the regulations promulgated by the State toxicologist, the blood test evidence should have been suppressed.

**4. The failure to enter written findings of fact and conclusions of law following a bench trial requires remand.**

CrR 6.1(d) requires that written findings of fact and conclusions of law be entered after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 964 P.2d 1187 (1998). The purpose of this rule is to enable effective appellate review. Id. at 662. Absent written findings of fact and conclusions of law, an appellant cannot properly assign error and this Court cannot review whether the findings of fact and conclusions of law are supported by the record. *See e.g.*, Mairs v. Dep't of Licensing, 70 Wn.

App. 541, 545, 954 P.2d 665 (1993) (appellant court only reviews whether findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

The court's oral findings are not binding and cannot replace written findings of fact and conclusions of law. Head, 136 Wn.2d at 622. The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to interpret oral rulings. Id. at 624.

The proper remedy for the failure to enter written findings of fact and conclusions of law under CrR 6.1(d) is remand to the trial court for entry of findings. Head, 136 Wn.2d at 622. Assuming written findings are ultimately entered herein, reversal will be required if the delay prejudices Trusley. Id. at 624–25. Trusley is entitled to the opportunity to offer

further argument depending on the content of any written findings and conclusions.<sup>4</sup>

**D. CONCLUSION**

For the reasons stated, this Court should reverse, and dismiss Trusley's conviction or order a new trial. Alternatively, the case should be remanded, directing the trial court to enter findings and conclusions.

Respectfully submitted on October 13, 2010.

  
Susan Marie Gasch, WSBA #16485  
Attorney for Appellant

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<sup>4</sup> Because a trial court's failure to enter written findings of fact and conclusions of law may prejudice an appellant, there is a "strong presumption that dismissal will be the appropriate remedy." State v. Smith, 68 Wn. App. 201, 209-11, 842 P.2d 494 (1992). Where prejudice to the defendant can be shown, the proper remedy for failure to comply with CrR 6.1(d) is not remand, but reversal. Head, 136 Wn.2d at 624.