

NO. 71416-3-I

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

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STATE OF WASHINGTON

Respondent

v.

CLAYTON D. GERLACH,

Appellant

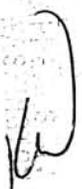
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BRIEF OF RESPONDENT

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2015 OCT 16 7:11:23  
COURT OF APPEALS  
STATE OF WASHINGTON  


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**TABLE OF CONTENTS**

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT ..... 5

A. THE COURT HAS ENTERED FINDINGS AND CONCLUSIONS.  
..... 5

B. THE EVIDENCE WAS SUFFICIENT TO FIND THE  
DEFENDANT GUILTY OF RESIDENTIAL BURGLARY..... 7

IV. CONCLUSION ..... 13

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Collins</u> , 76 Wn. App. 496, 886 P.2d 243 (1995) .....	9
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996) .....	7
<u>State v. Garbaccio</u> , 151 Wn. App. 716, 214 P.3d 168 (2009), <u>review denied</u> , 168 Wn.2d 1027, 230 P.3d 1060 (2010).....	7
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	7
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <u>cert denied</u> , 745 U.S. 1020 (1986) .....	12
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998).....	6
<u>State v. Lubers</u> , 81 Wn. App. 614, 915 P.2d 1157, <u>review denied</u> , 130 Wn.2d 1008, 928 P.2d 413 (1996).....	8
<u>State v. McDonald</u> , 138 Wn.2d 680, 981 P.2d 443 (1999) .....	11
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	8
<u>State v. Scott</u> , 46 Wn. App. 561, 739 P.2d 742 (1987).....	9
<u>State v. Thomas</u> , 166 Wn.2d 380, 208 P.3d 1107 (2009) .....	4, 12
<u>State v. Toomey</u> , 38 Wn. App. 831, 690 P.2d 1175 (1984), <u>review denied</u> , 103 Wn.2d 1012, <u>cert. denied</u> , 471 U.S. 1067 (1985)....	11
<u>State v. Truong</u> , 168 Wn. App. 529, 277 P.3d 74 (2012).....	9, 12
<u>State v. Vailencour</u> , 81 Wn. App. 372, 914 P.2d 767 (1996) .....	6

### WASHINGTON STATUTES

RCW 9A.04.110(7) .....	8
RCW 9A.08.020(2)(c).....	9
RCW 9A.08.020(3)(a)(ii).....	9
RCW 9A.52.010(5) .....	8
RCW 9A.52.024 .....	8

### COURT RULES

CrR 6.1(d).....	1, 5, 6
-----------------	---------

### OTHER AUTHORITIES

WPIC 10.51 .....	9
WPIC 60.02.02 .....	8

## **I. ISSUES**

1. When the trial court has now complied with CrR 6.1(d) is it necessary to remand the case to the trial court to enter findings and conclusions?

2. Was the evidence sufficient to support the defendant's conviction for residential burglary?

## **II. STATEMENT OF THE CASE**

Mark Conner lived on 95<sup>th</sup> Ave. N.E. in Arlington, Washington on October 27, 2011. On that date he left his home at 9:00 a.m. Mr. Conner saw a white Ford Explorer pulling in his driveway when he returned home about one hour later. The vehicle parked about half way between the road and the house. 11/18/13 RP 15-17.

Mr. Conner went up to the driver to see if he needed any help. The defendant, Clayton Gerlach was driving the car. He honked the horn when Mr. Conner approached. He then tapped on the engine light and said something about engine trouble. Mr. Conner became suspicious and decided to call the police. 11/18/13 RP 21-22, 27, 30.

When Mr. Conner left his home the lights were out and the screen door was shut. The door had been locked but the dead bolt

had not been turned. When Mr. Conner returned to his house to retrieve his cell phone he saw that the lights were on. The screen door was open and the locks were reversed; the door lock was unlocked but the deadbolt was turned. 11/18/13 RP 23-24.

When Mr. Conner opened the door he discovered a number of items had been moved from where he and his wife normally kept them. He found his penny collection, which he kept in his bedroom, strewn around the front room. A computer that had been in an office and a jewelry box that had been in a bedroom were also moved to the front room. Mr. Conner's wife's jewelry that was kept in her closet was placed on the bed. Numerous drawers throughout the house that had been closed when Mr. Conner left home were open and appeared to have been rifled through. Mr. Conner's CPAP machine had been tampered with. Mr. Conner also noticed that the back door was open. It had been closed when he left the home earlier. Mr. Conner had not given anyone permission to enter his home. 11/18/13 RP 26, 31-39.

Mr. Conner grabbed his phone and called 911. He went outside to try to stop the defendant from leaving. The defendant spun out and drove quickly down Mr. Conner's driveway. When he got to the end of the driveway the defendant honked his horn.

Once he got out on the street he honked the horn twice more. Mr. Conner saw a man running from the north side of his house and through some bushes. Mr. Conner saw the person get into the defendant's car and they sped off. 11/13/13 RP 26-28.

Dispatch radioed a description of the vehicle. Deputy Morris went to the area and saw the defendant walking on the side of the road, about one to two miles from Mr. Conner's home. It was unusual to see anyone walking in that area; there were no sidewalks or shoulders, and it was dangerous for pedestrians to walk there. The defendant's face was red, as if he had been exerting himself. The defendant was wearing a back pack but no coat, even though it was a cold day. Deputy Morris did not stop the defendant but drove on where he located the vehicle that Mr. Conner had described. The vehicle was stopped about 200 yards from where he had seen the defendant. It was parked at an angle off the road and there were skid marks in the grass. In the deputies' experience the vehicle looked as if hastily abandoned. Deputy Morris checked the engine and found it was still warm. Given the climate the engine would have cooled down within about 30 minutes. Deputy Morris called dispatch and advised other

officers to stop the defendant who was still in the area. 11/18/13 RP 29, 62-66, 69-70, 84.

Officer Thomas stopped the defendant. He noticed that the defendant was sweating and breathing hard. The defendant appeared anxious and continually looked around. The defendant told Officer Thomas that he was from Everett. The defendant could not tell Officer Thomas where he was coming from or why he was in that neighborhood. 11/18/13 RP 89-93.

Sergeant Bowman met Mr. Conner at his home and began taking an initial statement. Sergeant Bowman drove Mr. Conner to the defendant's location. There Mr. Conner identified the defendant's vehicle by its color and style, from an item that was hanging from the rearview mirror, and from the distinctive pink trailer hitch on the back. Mr. Conner then identified the defendant as the person that he encountered in his driveway. 11/18/13 RP 30-31, 80-82.

A K-9 officer came to the scene and conducted a track beginning at the defendant's car. The dog tracked from the car to the defendant. The officer then brought the dog back to the car to attempt to track the second suspect. The dog tracked through woods and into the backyard of a residence. The K-9 officer

observed several footprints along the way. Ultimately they were not able to locate the second suspect. 11/18/13 RP 97-107.

The defendant was charged with one count of residential burglary and one count of bail jumping. 1 CP 54-55, 93-94. He stipulated to a bench trial on agreed documentary evidence on the bail jumping charge. 1 CP 25-50. He waived jury on the residential burglary charge. 1 CP 51.

The State presented evidence as outlined above. At trial the defendant testified that he was going to Arlington to apply for jobs. He was driving in Mr. Conner's neighborhood because when he was younger he knew someone that lived in that neighborhood. He was experiencing car trouble so he pulled into Mr. Conner's driveway. The defendant left when he thought Mr. Conner was acting suspicious. 11/18/13 RP 113-118.

At the conclusion of the evidence the judge found the defendant guilty of both charges. 11/18/13 RP 139; 11/26/13 RP 2.

### **III. ARGUMENT**

#### **A. THE COURT HAS ENTERED FINDINGS AND CONCLUSIONS.**

The defendant first argues that the trial court failed to enter findings of fact and conclusions of law as required by CrR 6.1(d).

He argues the remedy is to vacate the judgment and remand for entry of findings and conclusions. BOA at 6.

Where the court has not complied with the requirements set out in CrR 6.1(d), remand for entry of finding and conclusion is the appropriate remedy. State v. Head, 136 Wn.2d 619, 626, 964 P.2d 1187 (1998). However this Court has accepted delayed findings and conclusions when the failure to do so was a clerical error. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996). Here the trial court entered findings and conclusions, and supplemental findings, albeit late. 2 CP 95-98. The purpose of CrR 6.1(d) has been met. Remand for entry of findings is therefore unnecessary.

Generally if the court fails to comply with CrR 6.1(d) and no findings have been entered by the time the appellate court reviews the case the remedy is to remand for entry of written findings and conclusions. Head, 136 Wn.2d at 624. The Court has noted that a defendant may be entitled to reversal if he can show actual prejudice resulting from the absence of written findings and conclusions or following remand for entry of the same. Id. at 625. The burden of proving prejudice is on the defendant. Id. No claim of prejudice has been raised at this point.

**B. THE EVIDENCE WAS SUFFICIENT TO FIND THE DEFENDANT GUILTY OF RESIDENTIAL BURGLARY.**

The defendant challenges his conviction for residential burglary on the basis that the evidence was insufficient to find that he was an accomplice to another who committed the crime. Because there was sufficient evidence from which a rational trier of fact could have found the defendant guilty, the challenge should be rejected.

The State bears the burden to prove every essential element of the crime beyond a reasonable doubt. State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). Evidence is sufficient to support the charge if after viewing the evidence in the light most favorable to the State any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and most strongly against the defendant. State v. Garbaccio, 151 Wn. App. 716, 742, 214 P.3d 168 (2009), review denied, 168 Wn.2d 1027 (2010). When evaluating the sufficiency of the evidence a reviewing court will treat circumstantial evidence as probative as direct evidence. Id. When a defendant challenges the sufficiency of

the evidence he admits the truth of the State's evidence and all reasonable inferences that could be drawn from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court gives deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of the witnesses, and weighs the persuasiveness of the evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157, review denied, 130 Wn.2d 1008 (1996).

In order to find the defendant guilty of residential burglary the State was required to prove that the defendant or a person to whom he was an accomplice entered or remained unlawfully in a dwelling, and that the entering or remaining was done with intent to commit a crime against person or property therein. RCW 9A.52.024, WPIC 60.02.02. A person "enters or remains unlawfully" when he is not licensed, invited, or otherwise privileged to so enter or remain. RCW 9A.52.010(5). A dwelling is any building or structure which is used or ordinarily used by a person for lodging. RCW 9A.04.110(7).

A person is an accomplice to a crime if, with knowledge that it will promote or facilitate the commission of the crime he aids or agrees to aid another person in planning or committing the crime.

RCW 9A.08.020(2)(c),(3)(a)(ii). "Aid" means all assistance, including words, acts, encouragement, support, or presence. WPIIC 10.51. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. State v. Collins, 76 Wn. App. 496, 501-502, 886 P.2d 243 (1995). A person is not acting as an accomplice if he is merely present without aiding the principal, despite knowledge of the principal's criminal activity. State v. Truong, 168 Wn. App. 529, 540, 277 P.3d 74 (2012).

While presence at the scene of a burglary alone is not enough to find a defendant acted as an accomplice, there is sufficient evidence to convict a defendant of that offense when other circumstantial evidence ties the defendant to the crime scene. State v. Scott, 46 Wn. App. 561, 571-572, 739 P.2d 742 (1987). In Scott the defendant was seen next to a car and an apartment that was later found to have been burglarized. A short time later the defendant was found in the car sitting next to property that had been stolen from the apartment. Id. at 562-563. Considering the totality of this evidence the Court concluded there was sufficient evidence to find the defendant was present and ready to assist in

the burglary when he was seen standing outside the apartment. Id. at 571.

Here the evidence showed that the defendant was ready to assist another in burglarizing Mr. Conner's home. Mr. Conner testified that no one had permission to enter his home when he left that morning. Evidence the doors to his home had been tampered with, and his property had been staged, established someone entered Mr. Conner's home unlawfully with intent to steal his property.

Mr. Conner saw the defendant's car drive into his driveway and park at an angle by the hedge so that he was obscured from the street. 11/18/13 RP 16-17. When Mr. Conner first approached the defendant, the defendant honked the horn. 11/18/13 RP 27. After Mr. Conner got his phone from his house, and returned to block the defendant from leaving, the defendant raced down the driveway and honked his horn again. 11/18/13 RP 27. At that point someone ran across the yard and jumped into the defendant's car before they sped off. 11/18/13 RP 27-28.

The reasonable inference from this evidence is that the defendant was acting as a lookout when the burglar was inside Mr. Conner's home preparing to steal Mr. Conner's property. The

defendant signaled the burglar that it was not safe to continue burglarizing the premises by honking his horn. The defendant signaled to the burglar that he was leaving, and drove the getaway car when Mr. Conner called the police. Taking this evidence in the light most favorable to the State, the evidence showed that the defendant was not merely standing by, but was actively assisting the burglar in committing the burglary.

The defendant first argues that there was insufficient evidence to prove the defendant was guilty as a principal actor in committing the residential burglary. BOA at 9. Accomplice and principal liability do not constitute separate crimes. State v. Toomey, 38 Wn. App. 831, 840, 690 P.2d 1175 (1984), review denied, 103 Wn.2d 1012, cert. denied, 471 U.S. 1067 (1985). If the defendant is guilty as an accomplice then he is guilty as a principal. Id. Thus since there is evidence the defendant participated in crime as an accomplice it is immaterial whether there was sufficient evidence to prove he acted as a principal. State v. McDonald, 138 Wn.2d 680, 686, 981 P.2d 443 (1999).

The defendant next contends that there was insufficient evidence that he acted as an accomplice to the residential burglary. He asserts that there was no evidence he shared the criminal intent

of another or that he had knowledge that his actions would promote or facilitate the commission of the crime. He claims that at best he was merely present. These arguments fail to take into account the standard for considering a sufficiency of the evidence claim.

The defendant cites this Court's decision in Truong for the proposition that the evidence must show that he shared the burglar's criminal intent. Truong, 168 Wn. App. at 540. This statement conflicts with Supreme Court authority that the accomplice need not share the principal's specific intent. State v. Guloy, 104 Wn.2d 412, 431, 705 P.2d 1182 (1985), cert denied, 745 U.S. 1020 (1986). The evidence need only prove that the defendant knew his actions would facilitate the crime for which he was charged. State v. Thomas, 166 Wn.2d 380, 387-388, 208 P.3d 1107 (2009). Here the evidence showed the defendant acted as lookout and getaway driver. Evidence the defendant signaled the burglar when Mr. Conner came home proved the defendant knew he was facilitating a burglary. The evidence did not need to show that the defendant shared the same intent to commit a specific crime upon entering Mr. Conner's home.

#### **IV. CONCLUSION**

The evidence was sufficient to find the defendant acted as an accomplice in a residential burglary. The State asks the Court to affirm the defendant's conviction.

Respectfully submitted on October 14, 2014.

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October 14, 2014

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**Re: STATE v. CLAYTON D. GERLACH  
COURT OF APPEALS NO. 71416-3-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

*Kathleen Webber*

KATHLEEN WEBBER, #16040  
Deputy Prosecuting Attorney

cc: Washington Appellate Project  
Appellant's attorney

15th  
OCT 14  
*[Handwritten signature]*

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

2014 OCT 16 10:11:22  
STATE OF WASHINGTON  
COURT OF APPEALS  
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*[Signature]*

THE STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
CLAYTON D. GERLACH,  
  
Appellant.

No. 71416-3-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 15<sup>th</sup> day of October, 2014, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT  
1511 THIRD AVENUE, SUITE 701  
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 15<sup>th</sup> day of October, 2014.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit