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Supreme Court No. 99008-5
(COA No. 79835-9-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GONZALES,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Gonzales asks this Court to review the opinion of the Court of Appeals in *State v. Gonzales*, 79835-9-I (issued on August 10, 2020). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Whether unanimity was violated by a general verdict on the charge of trafficking in stolen property when the evidence was insufficient to prove all the alternative means of committing the offense.

C. STATEMENT OF THE CASE

Mr. Gonzales was working for Wolfe Plumbing in December 2016. Struggling with substance abuse, he took several tools from a job site and pawned the items. 3/25/19 VRP 96-97. After he was arrested, Mr. Gonzales was cooperative, admitted his actions to police, and worked with Detective Robert DeGabriele to identify the items he had pawned at various pawnshops. *Id.* at 162-63, 166.

The State charge Mr. Gonzales with theft in the second degree and trafficking in stolen property in the first degree.¹ CP 154-56.

Specifically, the State alleged Mr. Gonzales:

did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property . . . for sale to others, and did knowingly traffic in stolen property.

CP 154.

At trial, employees from two pawnshops testified. Kandice Detherage, the former assistant manager at Cash America in Everett, identified pawn tickets from her store for tools. 3/26/19 VRP 197, 198. The tickets corresponded to tools collected by Detective DeGabriele as part of his investigation. *Id.* at 200-01; 3/25/19 VRP 169.

Ms. Detherage described the pawning process and indicated customers can either pawn an item or sell it outright to the pawnshop. 3/26/19 VRP 214. She stated that a pawn is a loan to a customer, with the pawned item pledged as collateral. *Id.* at 215. The item is held for 90 days plus a 30-day grace period pending repayment of the loan, after which ownership of the item passes to the pawnshop. *Id.* at 215-16.

¹ Mr. Gonzales was charged with one count of theft in the second degree and three counts of trafficking in stolen property in the first degree. CP 154-56. At his first trial, two counts of trafficking were dismissed following a *Green* motion. CP 148-49; 2/5/19 VRP 192. The jury hung on the remaining counts, and a mistrial was declared. 2/6/19 VRP 242. Mr. Gonzales was retried on the remaining counts.

Ms. Detherage confirmed Mr. Gonzales pawned, rather than sold, three items at Cash America during December 2016. *Id.* at 217, 219-22. The loans for the items did not mature until late March, but Detective DeGabriele seized the items during his investigation in January 2017. *Id.* at 220-22, 224. Ms. Detherage stated the pawnshop could not have sold the items until after the loan maturity dates and the corresponding 30-day grace periods had elapsed. *Id.* at 227.

Alyshia Pfeiffer, a manager at Pawn Fathers in Everett, testified similarly to Ms. Detherage. Ms. Pfeiffer identified two pawn tickets for tools associated with Mr. Gonzales. *Id.* at 238. She stated that customers can either sell an item to Pawn Fathers, or they can pawn the item as collateral for a short-term loan. *Id.* at 239-40. Ms. Pfeiffer confirmed Mr. Gonzales's loans would not have matured until March 2017, although the items were seized by police before then. *Id.* at 240-241. Before the loan maturity dates, ownership of the tools would not have transferred to Pawn Fathers, and the store could not have sold the tools. *Id.* at 241-42. Ms. Pfeiffer stated the pawnshop does not notify customers when their items have been seized by police. *Id.* at 244.

During closing arguments, the State argued two alternative means of first degree trafficking in stolen property. 3/26/19 VRP 303.

The court also instructed the jury on both means. CP 134. The jury convicted Mr. Gonzales of theft in the second degree and trafficking in the first degree without specifying on which alternative means they relied. CP 113, 115.

On review, the Court of Appeals found both means were supported by the evidence. Slip Op. at 4. The court also found pawning was sufficient to prove trafficking in stolen property. *Id.*

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Mr. Gonzales’s conviction for trafficking in stolen property in the first degree must be reversed because the evidence is insufficient to prove both alternative means of committing the offense.

a. Criminal defendants in Washington are guaranteed a right to a unanimous jury verdict.

Article I, section 21 guarantees criminal defendants in Washington the right to a unanimous jury verdict. *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). When a crime charged may be committed by any one of several alternative means, however, express unanimity as to the particular means by which the offense was committed may be required. *State v. Woodlyn*, 188 Wn.2d 157, 164, 392 P.3d 1062 (2017).

Specifically, when a general verdict implicates a due process violation -- that is, “when at least one means lacks sufficient evidentiary support” -- a particularized expression of jury unanimity is required. *Woodlyn*, 188 Wn.2d at 164. A general verdict satisfies due process so long as each alternative means is supported by sufficient evidence. *Id.* at 165. If the evidence is insufficient to support *any* of the means, and there is no particularized expression of jury unanimity, the conviction must be reversed. *Id.*

b. Trafficking in stolen property is an alternative means crime.

Trafficking in stolen property in the first degree is an alternative means offense. RCW 9A.82.050(1); *Owens*, 180 Wn.2d at 99. RCW 9A.82.050 provides that person is guilty of first degree trafficking:

Who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property.

RCW 9A.82.050(1) (emphasis added).

As the Court stated in *Owens*, this statute establishes two means of first degree trafficking: (1) knowingly “stealing” for sale to others, and (2) knowingly trafficking in stolen property. 180 Wn.2d at 99.

Where a jury is not instructed that it must be unanimous as to the means by which the defendant committed this offense, a reviewing

court must determine whether sufficient evidence supports each of the alternative means. *Id.* at 99. Evidence is only sufficient if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

c. The evidence was insufficient to prove one of the alternative means of trafficking in stolen property in the first degree; Mr. Gonzales's conviction must be reversed.

The court instructed the jury that to prove Mr. Gonzales trafficked in stolen property in the first degree, the State was required to prove beyond a reasonable doubt he: (1) knowingly stole for sale to others, or (2) knowingly trafficked in stolen property. *See Owens*, 180 Wn.2d at 99; CP 134. The evidence is insufficient to prove the first alternative means, that Mr. Gonzales knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others. RCW 9A.82.050(1).

It is undisputed that Mr. Gonzales pawned, rather than sold, the tools he took from his employer. Both Ms. Detherage and Ms. Pfeiffer explained that a pawned item acts as collateral for a short-term loan, and ownership of the item does not transfer to the pawnshop unless and until the loan is not repaid. 3/26/19 VRP 215-16; 239-40, 241-42. Both witnesses also confirmed the pawnshops could not have sold the tools

Mr. Gonzales pawned unless and until the loans matured without repayment and the 30-day grace period had elapsed. *Id.* at 227, 241-42.

The Court of Appeals relied on *State v. Hermann*, 138 Wn. App. 596, 158 P.3d 96 (2007) for the proposition that pawning is a means of trafficking because it entails transferring possession of stolen property. The court found that because Mr. Gonzales admitted to pawning stolen tools, the evidence is sufficient to prove the first alternative means of trafficking in stolen property: that he knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others. RCW 9A.82.050(1); Slip Op. at 4.

The court's reliance on *Hermann* is misplaced. In *Hermann*, the court did not consider whether pawning is sufficient to prove the first alternative means of trafficking in stolen property. Indeed, the court only addressed whether pawning is sufficient under the second alternative means, that is, whether Hermann knowingly trafficked in stolen property. RCW 9A.82.050(1); *Hermann*, 138 Wn. App. at 603.04. The court noted the statutory definition of "traffic" includes the transfer of stolen property to another person, and thus pawning, which involves the transfer of possession of stolen property to a pawnshop, is sufficient to prove trafficking under the second alternative means. *Id.*

The *Hermann* court did not discuss whether pawning is sufficient evidence of an intent to sell the stolen property to others as required under the first alternative means.

Accordingly, the court's opinion here is incorrect because the evidence fails to prove Mr. Gonzales initiated, organized, planned, financed, directed, managed, or supervised the theft of property "for sale to others." RCW 9A.82.050(1). Without such evidence, the lack of jury unanimity persists. There is no indication Mr. Gonzales intended to sell the tools to anyone, including the pawnshops. Rather, the evidence clearly establishes Mr. Gonzales could have sold the items to the pawnshop, but instead chose to use them as collateral for a loan.

The State failed to prove the first alternative means of committing trafficking because there is no evidence Mr. Gonzales took the tools "for sale to others." RCW 9A.82.050(1). Therefore, because the jury was instructed on both alternative means, and because there was no particularized expression of jury unanimity as to which means Mr. Gonzales may have employed committed the offense, the conviction must be reversed. *Woodlyn*, 188 Wn.2d at 165.

E. CONCLUSION

Based on the foregoing, Mr. Gonzales respectfully requests that review be granted. RAP 13.4(b).

DATED this 9th day of September 2020.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ALEXANDER GONZALES,

Appellant.

No. 79835-9-I

DIVISION ONE

UNPUBLISHED OPINION

LEACH, J. — Michael Gonzales appeals his conviction for trafficking in stolen property in the first degree. He claims the trial court violated his right to a unanimous jury verdict because the record does not include sufficient evidence to support the first of two alternative means charged. Because sufficient evidence supports the first alternative means, we affirm.

BACKGROUND

Michael Gonzales worked for Wolfe Plumbing. On December 22, 2016, Gonzales left a job site and never returned to work. Robert Lacseul, a foreman for Wolfe Plumbing, visited the job site after returning from Christmas break on January 2, 2017 and noticed that someone broke into the job box. He contacted police after discovering tools were missing from the job box.

Detective Robert DeGabriele of the Lynnwood Police Department searched a pawn registry for the missing tools. The search led detectives to Gonzales. Gonzales told detectives, and testified at trial, he would “cut some locks off of some

of the job boxes” and “take the items and sell them right away to obtain money” to supply his drug problem. He admitted he would “take the tools and go pawn them in order to get drug money.”

Gonzales pawned three items to Kandice Detherage, an employee of Cash American pawn shop. She testified how a pawn transaction works. A customer would exchange the pawned item for a loan and the customer would then have 90 days, plus a 30-day grace period, to repay the amount borrowed plus a finance charge.

Alyshia Pfeiffer, a manager for Pawn Fathers pawn shop in Everett, Washington also testified that Gonzales pawned two items to her. Gonzales pawned items there for a short-term loan. Pawn Fathers would have held the pawned property for 90 days until he paid back the loan plus interest. At the time detectives seized the pawned items, none of the loans had matured.

The State charged Gonzales with theft in the second degree and trafficking in stolen property in the first degree. The jury convicted Gonzales as charged. Gonzales appeals the trafficking in stolen property conviction.

ANALYSIS

Gonzales claims the State violated his right to a unanimous jury verdict because the State failed to present sufficient evidence to support one of the two alternative means the jury was instructed to consider to convict him of trafficking in stolen property; that he knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others. He asserts that because detectives recovered the stolen tools before the time

Gonzales agreed to pay back the loan plus interest, the jury received insufficient evidence of his intent to sell the tools to others.

Criminal defendants have a right to a unanimous jury verdict.¹ When the State charges a defendant with an alternative means crime, the right to a unanimous jury verdict may also include the right to a unanimous jury determination as to the means by which the defendant committed the crime.² When sufficient evidence supports each of the charged alternative means of committing the crime, express jury unanimity is not required.³

When reviewing a defendant's challenge to the sufficiency of the evidence in a criminal case, Washington State appellate courts review the record viewing the evidence in the light most favorable to the State to determine whether any rational juror could find the essential elements of the crime beyond a reasonable doubt.⁴ We draw all reasonable inferences from the evidence in favor of the State and strongly against the defendant.⁵ A claim of insufficiency admits the truth of the State's evidence and all inferences reasonably drawn from it.⁶ We consider circumstantial evidence as reliable as direct evidence.⁷ We defer to the jury to resolve conflicting testimony, weigh the evidence, and draw reasonable inferences from the testimony.⁸

¹ WASH. CONST. art. I, § 21; Ramos v. Louisiana, 140 S.Ct. 1390, 206 L.Ed.2d 583 (2020).

² State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014).

³ State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

⁴ State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

⁵ Salinas, 119 Wn.2d at 201.

⁶ Salinas, 119 Wn.2d at 201.

⁷ State v. Johnson, 159 Wn. App. 766, 774, 247 P.3d 11 (2011).

⁸ State v. Lawson, 37 Wn. App. 539, 543, 681 P.2d 867 (1984).

The State presented two alternative means of trafficking in stolen property in the first degree. The first was that Gonzales knowingly initiated, organized, planned, or supervised the theft of property for sale to others. The second was that he trafficked in stolen property knowing the property was stolen. The trial court also instructed the jury that to find Gonzales guilty, the jury need not unanimously find him guilty of both alternatives, “as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.”

Gonzales asserts insufficient evidence supports the first alternative means because he only pawned the items, and since the loan was not past due and he could retrieve them, no evidence shows he intended to sell the tools. But, he admits that he pawned the stolen tools. In an earlier case we held that where a defendant pawns goods for a loan, rather than a sale, that is “sufficient to support a charge of trafficking in stolen property” because “[r]eading the trafficking statute to prohibit only the transfer of title in stolen property would render the statute a nullity.”⁹ So, the record includes sufficient evidence for a reasonable juror to conclude beyond a reasonable doubt that Gonzales knowingly initiated, organized, planned, or supervised the theft of property for sale to others. The State presented sufficient evidence to support each alternative means charged.

⁹ State v. Hermann, 138 Wn. App. 596, 603-04, 158 P.3d 96 (2007).

CONCLUSION

The record contains sufficient evidence for a reasonable juror to find either charged alternative means of trafficking in stolen property. We affirm.

WE CONCUR:

Leach, J.

Bunnam, J.

Lippelwick, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79835-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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