

63538-7

63538-7

NO. 63538-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,
Respondent,

v.

JASON ROBERTS,
Appellant.

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

The Honorable Michael Heavey

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

In his appeal from convictions for possessing stolen property in the first degree and trafficking in stolen property in the first degree, Jason Roberts contends that (1) the trial court erred in denying his motion to suppress evidence obtained from a search of his vehicle, (2) the two convictions violate the prohibition against double jeopardy, and (3) the trial court erred in failing to provide a unanimity instruction on the trafficking charge. These errors require reversal of his convictions.

B. ASSIGNMENTS OF ERROR.

1. The trial court erred in denying Mr. Roberts' motion to suppress evidence obtained from a search of his vehicle.

2. The convictions for possessing stolen property in the first degree and trafficking in stolen property in the first degree violate the prohibition against double jeopardy.

3. The trial court erred in failing to provide a unanimity instruction on the charge of trafficking in stolen property.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Under the "search incident to arrest" exception to the warrant requirement, a vehicle search is lawful only if the arrestee is within reaching distance of the passenger compartment at the

time of the search, or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Where Mr. Roberts was arrested on a warrant, handcuffed and placed in the back of a patrol car at the time his vehicle was searched, was the search of his vehicle unlawful?

2. Do the two convictions violate the prohibition against double jeopardy where the crimes are based on the same stolen property, took place on the same dates, and where, as charged and prosecuted, proof of the trafficking in stolen property in the first degree charge also proved possession of stolen property in the first degree?

3. Criminal defendants have a constitutional right to a unanimous jury verdict. Where evidence is presented of multiple distinct acts, any of which could be the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proven beyond a reasonable doubt. Where the State did not elect which act of trafficking in stolen property it was relying on as the basis for conviction, did the trial court's failure to provide a unanimity instruction require reversal of the conviction in count II?

D. STATEMENT OF THE CASE.

Susan McCullough breeds Miniature Australian Shepherds part-time. 2/5/09RP 5-6. On Friday, August 22, 2008, two men came to her home in response to an advertisement she had placed regarding a litter of puppies for sale. 2/5/09RP 25-26. The men left without purchasing a puppy. 2/5/09RP 30-31. The next morning when Ms. McCullough went to the kennel, she discovered that all five of the puppies were gone. 2/5/09RP 32-33.¹ She reported the loss to the police. 2/5/09RP 33.

King 5 News aired a story about the puppies. 2/5/09RP 35. Ms. McCullough received a tip, and forwarded the information to the police. 2/5/09RP 36. Based on this information, Officer John Crane of the Kent Police Department responded to a home in Kent on the evening of Monday, August 25, 2008. 2/10/09RP 61-62.

Tammy Jackson Orduno, along with her teenage children, Tamia and Mario Jackson, lived at the home in Kent. Jason Roberts was a friend of the Jackson family. 2/9/09RP 89; 2/10/09RP 14. According to the Jacksons, Mr. Roberts came to their home with five puppies around 4:00 in the morning on

¹ The litter contained a total of seven puppies. Two of them were sold prior to August 22, 2008. 2/5/09RP 15-16.

Saturday, August 23, 2008. 2/9/09RP 90, 98, 123, 129, 165, 169; 2/10/09 30, 32. Tamia said she overheard another person with Mr. Roberts say he grabbed the last puppy and did not want to get caught so he jumped in the car, and Mr. Roberts responded, "I know." 2/9/09RP 91-93, 97, 132-33. Tamia claimed that later that same day Mr. Roberts told her he sold one of the puppies. 2/9/09RP 102-04, 138-39. She also said that he placed an on-line advertisement to sell the others. 2/9/09RP 106-07.

Mr. and Ms. McCullough met the police at the Jackson home, where they identified and recovered three of the puppies. 2/5/09RP 38; 2/9/09RP 10. Based on the information provided by the Jacksons, Officer Crane obtained a photograph of Jason Roberts and showed it to Ms. McCullough. 2/10/09RP 64-65, 68. Both Mr. and Ms. McCullough identified the photograph as that of one of the two men who had been at their home three days earlier. 2/9/09RP 12, 48.

Mr. Roberts was stopped in his SUV the following morning, August 26, 2008, not far from the Kent home. 2/10/09RP 99-101. He was arrested, and a puppy later identified as another of the puppies stolen from Ms. McCullough was seized from his vehicle. 2/9/09RP 19; 2/10/09RP 102, 122, 130. The four recovered

puppies were all sold for amounts between \$400 - \$600. 2/9/09RP 21-22; 2/10/09RP 109. A fifth puppy was never recovered. 2/9/09RP 19-20.

The original information charged one count of possessing stolen property in the first degree and alleged that Mr. Roberts “did knowingly receive, retain, possess, conceal, and dispose of stolen property, to-wit: canines, of a value in excess of \$1500” belonging to Ms. McCullough. CP 1. The information was later amended, over objection, to add the charge of trafficking in stolen property in the first degree. Count II, which encompassed the same time period as in count I, alleged that Mr. Roberts:

did knowingly sell, transfer, distribute, dispense or otherwise dispose of stolen property belonging to Susan McCullough, to another person, or did knowingly buy, receive, possess or obtain control of such stolen property, with intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person.

CP 133-34. The jury found Mr. Roberts guilty of both charges. CP 167-68; 2/12/09RP 61. Mr. Roberts filed a timely notice of appeal. CP 499.

E. ARGUMENT.

1. THE SEARCH OF MR. ROBERTS' VEHICLE WAS NOT A LAWFUL SEARCH INCIDENT TO ARREST.

a. Evidence presented at the CrR 3.6 hearing and the trial court's ruling. Pursuant to CrR 3.6, the defense made a motion to suppress evidence obtained in the search of Mr. Roberts' vehicle (specifically a puppy) after his arrest on August 26, 2008. CP 7-24. A pre-trial hearing was held on February 3-4, 2009.

On August 26, 2008 at the beginning of his shift, Kent Police Officer Scott McQuilkin was told about three stolen puppies that had been found in a home in Kent the night before. 2/3/09RP 70, 72. He spoke with Ms. McCullough and learned that the same vehicle associated with the puppies was back at the Kent home. 2/3/09RP 56. Ms. McCullough gave the officer a description of the car, including its license plate number, and he determined that the vehicle was registered to Mr. Roberts. 2/3/09RP 57-58. A computer check revealed a "warrant hit" from the Kirkland Police Department. 2/3/09RP 57-58. As the officer was on his way to the Jackson home, he confirmed the warrant and requested assistance. 2/3/09RP 58.

Officer David Ghaderi spotted the vehicle and stopped it as instructed by Officer McQuilkin. 2/3/09RP 30-31. Officer Ghaderi took Mr. Roberts' identification and waited for Officer McQuilkin to arrive at the scene. 2/3/09RP 31-32. Officer McQuilkin immediately told Mr. Roberts that he was under arrest for the warrant. 2/3/09RP 33.

The police took Mr. Roberts out of his vehicle, handcuffed him, and placed him in the backseat of Officer Ghaderi's patrol car, which was located 20-30 feet behind Mr. Roberts' vehicle. 2/3/09RP 33-34, 39, 62, 69. After securing Mr. Roberts in the police car, Officer Ghaderi searched Mr. Roberts' vehicle incident to the arrest. 2/3/09RP 33, 62-63, 68, 71. Officer Ghaderi motioned for Officer McQuilkin to come see what he had found. 2/3/09RP 68, 71-72. Officer McQuilkin walked over and saw a small brown and white puppy in the back seat on the floorboard. 2/3/09RP 63. The front seat was reclined over the puppy. 2/3/09RP 67-68. The puppy was seized and identified in the trial as one of the stolen puppies belonging to Ms. McCullough. 2/3/09RP 33; 2/9/09RP 19; 2/10/09RP 102, 122, 130.

Counsel for Mr. Roberts argued that the warrantless search of the vehicle fell outside the scope of a valid search incident to

arrest under both the United States and Washington Constitutions, since Mr. Roberts was already removed from his vehicle and securely detained in a police car at the time his vehicle was searched. 2/3/09RP 77-78; CP 10-12. The trial court denied the motion to suppress, finding that the search was justified as incident to Mr. Roberts' arrest for the warrant. 2/4/09RP 6; CP 201 (Finding of Fact 1). Consistent with the testimony of the officers, the court found that Mr. Roberts' vehicle was searched after he was arrested, removed from his vehicle, handcuffed, and placed in the back of Officer Ghaderi's patrol car. CP 201(Findings of Fact 5-7).² The trial court went on to rule that under State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008) and State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986), the search constituted a valid search incident to Mr. Roberts' arrest. CP 201 (Conclusions of Law 11-13).

b. The search of Mr. Roberts' vehicle falls outside the "search incident to arrest" exception to the warrant requirement.

The Fourth Amendment to the United States Constitution provides

² Officer Ghaderi testified he initially saw the dog right after stopping Mr. Roberts, but this was contradicted by his report and by Officer McQuilkin's testimony and report. 2/3/09RP 31, 68, 71-72; Pretrial Ex. 6, 7. In his ruling, Judge Heavey expressly held that the State did not establish that the plain view exception applied, since "the State did not meet its burden to show that the puppy was seen by Ghaderi prior to the arrest." CP 201 (Conclusion of Law 10).

in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” Article I, section 7 of the Washington State Constitution provides: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

Warrantless searches are per se unreasonable. Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed. 2d 639 (1980); State v. Williams, 102 Wn.2d 733, 736, 698 P.2d 1065 (1984). Exceptions to the warrant requirement are limited and narrowly drawn. State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). The State bears the heavy burden of proving that a warrantless search falls within one of the “jealously and carefully drawn” exceptions to the warrant requirement. Jones v. United States, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958); State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

In the recent case of Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), the United States Supreme Court clarified the allowable scope of a search incident to arrest under the United States Constitution. The Court first noted that the search incident to arrest exception is justified by interests in officer

safety and evidence preservation, and if there is no possibility that an arrestee can reach into the area sought to be searched, the justifications for the exception are absent. Id. at 1716. The Court concluded:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.

Id. at 1723.

The Washington Supreme Court recently reached the same conclusion under article 1, section 7 of the Washington Constitution. State v. Patton, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3384578 at *15 (No. 80518-1, October 22, 2009). The Court acknowledged the existence of previous cases upholding searches incident to arrest "conducted after the arrestee has been secured and the attendant risk to officers in the field has passed." Id. The Court then clarified that "[t]oday, we expressly disapprove of this expansive application of the narrow search incident to arrest exception." Id. Consistent with the ruling in Gant, the Court articulated when the search incident to arrest exception applies:

We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of

the search, and the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

Id. at *2.

Here, Mr. Roberts was not within reach of the passenger compartment of his vehicle at the time of the search. In addition, there was no reason to believe that the vehicle contained evidence of the offense of arrest, since the arrest was based on the warrant, not on the theft of the puppies. The officers did not believe they had probable cause to arrest Mr. Roberts regarding the theft of the puppies, and the trial court's findings justify the arrest solely based on the existence of the warrant. 2/3/09RP 65-66; CP 200-02.

The trial court's conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Conclusions of Law 11-13 pursuant to the CrR 3.6 hearing maintain that the search of Mr. Roberts' vehicle was valid as a search incident to his arrest. CP 201. However, in light of Gant and Patton, the search of the vehicle violated Mr. Roberts' constitutional protection against unreasonable searches.

c. The evidence obtained in the unlawful search must be suppressed. Evidence obtained in violation of the Fourth

Amendment or article I, section 7 must be suppressed. State v. White, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982); State v. Young, 123 Wn.2d 173, 196, 720 P.2d 808 (1994); State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990). This Court should reverse the conviction and remand with direction that the unconstitutionally-obtained evidence be suppressed.

2. THE TWO CONVICTIONS VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY.

a. The prohibition against double jeopardy prohibits multiple convictions for the same offense. The double jeopardy clauses of the Fifth Amendment to the United States Constitution³ and Article I, section 9 of the Washington Constitution protect a criminal defendant from multiple convictions and punishments for the same offense. Ball v. United States, 470 U.S. 856, 861, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000). The Washington State double jeopardy clause provides the same scope of protection as does the federal double jeopardy clause. Bobic, 140 Wn.2d at 260. A violation of the prohibition against double jeopardy is a manifest constitutional

³ The Fifth Amendment double jeopardy clause applies to the states through the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969).

error that may be raised for the first time on appeal. Id. at 257; RAP 2.5(a). A double jeopardy violation is reviewed de novo. State v. Knutson, 88 Wn. App. 677, 680, 946 P.2d 789 (1997).

Where a defendant is charged with violating two separate statutory provisions for a single act, courts must determine whether, in light of legislative intent, the charged crimes constitute the same offense. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932). To determine this, courts should ask if the crimes are the same in law and fact. Offenses are the same in fact “when they arise from the same act or transaction.” State v. Martin, 149 Wn. App. 689, 699, 205 P.3d 931 (2009). Offenses are the same in law “when proof of one would also prove the other.” Id.

The inquiry must focus on the offenses as they were charged and prosecuted in a given case, rather than a mere abstract comparison of statutory elements. Whalen v. United States, 445 U.S. 684, 694, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (defendant’s conviction for both rape and felony murder in the commission of a rape violated the prohibition against double jeopardy, even though one could be guilty under the felony murder statute without committing a rape); In re Pers. Restraint of Orange,

152 Wn.2d 795, 818-19, 100 P.3d 291 (2004). If there is doubt as to the legislative intent, the rule of lenity requires the interpretation most favorable to the defendant. Whalen, 445 U.S. at 694.

b. Mr. Roberts' convictions, as charged and prosecuted, violated double jeopardy. The Court of Appeals has at least implicitly held that possessing stolen property in the first degree is a lesser offense of trafficking in stolen property. State v. Knight, 54 Wn. App. 143, 154-56, 772 P.2d 1042, rev. denied, 113 Wn.2d 1014 (1989) (conviction for attempted trafficking in stolen property in the first degree reversed where trial court failed to instruct the jury on the lesser crimes of first and second degree possession of stolen property). This ruling makes sense, because the crime of trafficking involves either the sale of stolen property, or possession of stolen property with the intent to sell. Since one must possess something in order to sell it, either by actual or constructive possession, inherent in the trafficking charge is the requirement that the defendant be in possession of the property. Convictions for both offenses violate the prohibition against double jeopardy since "the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser

included offense.” Brown v. Ohio, 432 U.S. 161, 169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

Prior to trial, Mr. Roberts requested that the court order the prosecution to provide a bill of particulars, arguing that the broad charging language in the information “does not furnish a reasonable notice to the defendant as to the conduct he must defend against,” specifically which charges corresponded with which puppies and on which dates. 2/3/09RP 91, 101-02; CP 44-45. In addition, counsel noted his belief that conviction on both offenses would violate the prohibition against double jeopardy, and stated that a bill of particulars was necessary in order to advance this position. CP 45-46; 2/3/09RP 97-98; 2/4/09RP 10. The trial court, however, denied the request. 2/4/09RP 14-17.

In pretrial discussions, the State took the position that possession of stolen property in the first degree was not a lesser included offense of trafficking in stolen property, since the possession charge requires proof that the property was valued at over \$1500, and value is not an element of the trafficking charge. RCW 9A.56.150; RCW 9A.82.010(19). Even if true, conviction for both offenses still violates the prohibition against double jeopardy. The appropriate inquiry focuses on whether the evidence to prove

count II (trafficking in stolen property), as charged and prosecuted, also proved the crime of possessing stolen property, as charged and prosecuted. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005); Orange, 152 Wn.2d at 818. It is irrelevant whether, in another scenario, the charge of trafficking in stolen property could theoretically be established without also proving possession of stolen property in the first degree. Whalen, 445 U.S. at 694.

In United States v. Dixon, 509 U.S. 688, 712, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), a conviction for criminal contempt was held to bar a subsequent prosecution for possession of drugs. Since the contempt charge was based on a violation of a court order not to commit any criminal offenses, and possession of drugs was the criminal offense, proof of the contempt charge also proved the drug charge, and the offenses were held to be the same. Id. at 699-700. This was so even though the crimes of criminal contempt and drug possession clearly have completely different elements. See also Brown, 432 U.S. at 164 (“separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition”); State v. Hughes, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009) (convictions for rape and child rape based on the same

act of intercourse violated the prohibition against double jeopardy even though one element of child rape required proof of age and one element of rape required proof of non-consent).

The “property” in both charges was the same; that is, the puppies. 2/3/09RP 96; 2/4/09RP 13. The charging period for both offenses was the same. CP 133-34. In addition, the applicable statutes, as well as the information and the jury instructions, contain the words “possess” and “dispose” in defining both charges. RCW 9A.56.140; RCW 9A.82.010(19); CP 133-34, 144, 151, 155, 157-58.

The very same evidence that the State offered to prove count II also proved the crime in count I. The two offenses, as charged and prosecuted, constituted the same offense and Mr. Roberts’ convictions on both Counts I and II violate the prohibition against double jeopardy. See Orange, 152 Wn.2d at 820 (two convictions violated prohibition against double jeopardy where “the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault”).

c. The proper remedy is vacation of the conviction in Count I. Where, as here, two convictions violate the prohibition

against double jeopardy, the remedy is to vacate the conviction for the offense that formed part of the proof of the other offense. State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006), cert. denied, 127 S.Ct. 2986, 168 L.Ed.2d 714, 2007 U.S. LEXIS 7828 (2007); State v. Read, 100 Wn.App. 776, 792-93, 998 P.2d 897 (2000), aff'd. on other grounds, 147 Wn.2d 238, 53 P.3d 26 (2002).

Accordingly, the conviction for possessing stolen property in the first degree in count I must be vacated.

3. THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION WHERE THE STATE PRESENTED EVIDENCE OF TWO DISTINCT ACTS OF TRAFFICKING IN STOLEN PROPERTY, EITHER OF WHICH COULD BE THE BASIS OF A CRIMINAL CONVICTION.

a. In a criminal case, the jury must be unanimous on all essential elements of the crime. The federal constitutional right to trial by jury and the state constitutional right to conviction only upon a unanimous jury verdict require jury unanimity on all essential elements of the crime charged. State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); U.S. Const. amend. 6; Wash. Const. art. I, § 21.

When the evidence indicates multiple distinct acts, any one of which could form the basis for a conviction, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jury that it must unanimously agree that the same act has been proven beyond a reasonable doubt. Camarillo, 115 Wn.2d at 64; Kitchen, 110 Wn.2d at 411; State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Where neither alternative is followed, constitutional error “stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all elements necessary for a conviction.” Kitchen, 110 Wn.2d at 411. Such an error is a manifest error affecting a constitutional right that can be raised for the first time on appeal. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991); RAP 2.5(a).

b. The State failed to elect which distinct act it relied on as the basis for the charge, and the court failed to instruct the jury they must unanimously agree that the same act was proven beyond a reasonable doubt. The evidence presented at trial established two distinct acts, either of which could form a basis for the trafficking charge. One distinct act was the alleged sale of the puppy that was never returned to Ms. McCullough. This was based

on Tamia Jackson's testimony that on Saturday, August 23, 2008, Mr. Roberts left her home with a puppy, returned alone, and then told her he had sold the puppy to a friend in West Seattle.

2/9/09RP 102-04, 138-39. The other act concerned possession of the remaining four puppies with the intent to sell them, based on evidence that over the next several days Mr. Roberts placed an advertisement offering the four puppies for sale and discussed selling them with neighbors. 2/9/09RP 99-101, 106-07; 2/10/09RP 43-44, 89.

In closing argument, the prosecutor told the jury that they need not be unanimous regarding the two potential means of committing trafficking in stolen property. 2/12/09RP 21. He explained that some jurors could be convinced Mr. Roberts possessed the dogs with intent to sell them but not be convinced that he sold the one puppy never recovered, and other jurors could be convinced he sold the one puppy not recovered but not be convinced he intended to sell the others. "You don't have to be unanimous." 2/12/09RP 21.

The prosecutor was correct that, in general, where a statute contains alternate means of committing a crime, the jury need not be unanimous as to the means. Petrich, 101 Wn.2d at 569.

However, in this case, the alternate means also involved alternate acts. The act of selling the one dog not recovered was separate and distinct from the act of possessing the remaining dogs with the intent to sell them. Either act could form the basis for conviction. Yet the prosecutor failed to elect which act it was relying on as the basis for the charge.

In addition, the jury was not instructed that it had to unanimously agree that the same act had been proven beyond a reasonable doubt. Rather, they were told just the opposite. Court's Instruction 19, the "to-convict" instruction for the trafficking charge, states as follows:

To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree as charged in count two, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during a period of time intervening between August 22, 2008 and August 26, 2008,
 - (a) the defendant
 - (i) knowingly received or possessed or retained control over property, knowing that the property was stolen; and
 - (ii) intended to sell or transfer or distribute or dispense that property to another person;
 - Or
 - (b) the defendant knowingly sold or transferred or distributed or dispensed or disposed of property to another person, knowing that the property was stolen;
- (2) That the property was stolen property; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count two.

If you find from the evidence that Elements (2) and (3) and either Elements (1)(a) or (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count two. Elements (1)(a) and (1)(b) are alternatives and only one need be proved. You need not unanimously agree as to which of elements (1)(a) and (1)(b) has been proved.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count two.

CP 157-58 (emphasis added).

Thus, the evidence, State's closing argument, and jury instructions all invited the jury to base a conviction on either of the alleged acts of trafficking in stolen property without unanimously agreeing as to which act of trafficking had been proven beyond a reasonable doubt.

c. The error requires reversal of the trafficking conviction in Count II. The failure to require a unanimous verdict is an error of constitutional magnitude, and as such, is reversible unless it is "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1975);

State v. King, 75 Wn. App. 899, 903, 872 P.2d 1115 (1994), rev. denied, 125 Wn.2d 1021 (1995). Prejudice is presumed, and the error is harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 406; State v. Jones, 71 Wn. App. 798, 822, 863 P.2d 85 (1993), rev. denied, 124 Wn.2d 1018 (1994). Here, the error was not harmless beyond a reasonable doubt, and the conviction must be reversed.

F. CONCLUSION.

Reversal of Mr. Roberts’ convictions is required where (1) the trial court erred in denying his motion to suppress evidence obtained from a search of his vehicle, (2) the two convictions violate the prohibition against double jeopardy, and (3) the trial court erred in failing to provide a unanimity instruction on the trafficking charge.

DATED this 23rd day of October, 2009.

Respectfully submitted,


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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 63538-7-I
)	
JASON ROBERTS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF OCTOBER, 2009, 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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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF OCTOBER, 2009.

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