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FILED
January 13, 2016
Court of Appeals
Division I
State of Washington

NO. 73756-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

PHUONG VAN NGUYEN,

Appellant.

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

The Honorable David R. Needy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to jury unanimity on the charged offense.

Issue Pertaining to Assignment of Error

Appellant was charged with one count of Unlawful Trafficking in Fish, Shellfish, or Wildlife in the First Degree based on alleged purchases of black market crab on three different dates. Jurors were not instructed that they must unanimously agree that the State had proved one of these purchases, and the prosecutor urged conviction based on all three purchases. Was appellant denied his right to a unanimous jury verdict?

B. STATEMENT OF THE CASE

The Skagit County Prosecutor's Office charged Phuong Nguyen with one count of Unlawful Trafficking in Fish, Shellfish, or Wildlife in the First Degree. CP 6; RCW 77.15.260(2).

The State's primary witness at trial was Washington Department of Fish & Wildlife Detective Julie Cook. RP 67. According to Cook, the commercial sale of Dungeness crab is heavily regulated. The crabs must be of sufficient size and they must be in season. RP 71-72. Moreover, for the sale of commercial quantities, licensed commercial fisherman must sell the crabs, and

the purchaser must be a licensed wholesale dealer. RP 72.

The charge against Nguyen involved three alleged purchases of black market Dungeness crab. Nguyen does not have a wholesale dealer's license, and he was not authorized to buy crab commercially. RP 73-74.

The first purchase allegedly occurred on January 4, 2013. RP 68, 77. On that date, another undercover officer from the Department of Fish & Wildlife – Detective Chris Clemenson – arranged to sell crab to Nguyen at his place of business, Diamond Nails in Sedro Woolley. RP 68-69. Cook accompanied Clemenson and posed as his girlfriend or wife. RP 69, 77. By the time of trial, Clemenson was unavailable to testify. RP 71. Therefore, the trial court limited the State to eliciting what Cook actually witnessed on January 4 and prohibited her from suggesting what may have happened between Clemenson and Nguyen outside her presence. RP 51-54.

Detective Cook testified that, on January 4, she and Clemenson arrived by truck in an alley behind Nguyen's nail salon. RP 69-70. Clemenson called Nguyen on his cell phone and Nguyen met them in the alley. RP 70. The two undercover detectives unloaded a garbage can containing 88 crabs (57 of which were

undersized), and Clemenson and Nguyen carried the can inside the salon. RP 70-71. Because some crabs had died and others were very small, the officers treated the batch as containing 70 crabs. RP 78. Cook did not go with the other two inside the shop and instead stayed in the alley with the truck, which contained additional crab destined for a different buyer. RP 71, 77. When Clemenson and Nguyen returned to the alley, Nguyen started to take the additional crab, but Clemenson said it was not for him. RP 78. According to Cook, Nguyen indicated to Clemenson that he was interested in getting more crab. RP 78. Cook never saw money change hands and she was unable to hear all of the conversations between Nguyen and Clemenson, but Clemenson handed her \$140.00. RP 78, 104. Assuming that was what Nguyen had paid, this was about \$2.00 per crab, which is well under its value – perhaps 1/4 of the wholesale price and 1/8 of the retail price. RP 78-79.

By the time of the second purchase, on March 29, 2013, Detective Cook had taken over the investigation from Clemenson. RP 79. Cook called Nguyen, reminded him that she had been with Clemenson when they met in January, and asked if he wanted to buy more crab. RP 80. Nguyen told her to bring the crab to his salon, and she brought about 70 of them, some of which were again

undersized. RP 80-81. The two carried the crabs into a back room, which appeared to be a laundry room with a crab cooker inside. RP 81. Nguyen asked where Clemenson was, and Cook said he was not there because he had gotten in trouble for selling crab. RP 81. According to Cook, she told Nguyen the sale was illegal and that he should not tell anyone. RP 81. Nguyen responded that he did not know it was illegal, but he did not care. He also said he buys from Indians regularly, and Clemenson is Native American. RP 82. Cook only charged Nguyen for 60 crabs, for which he paid her \$120.00, which again comes to \$2.00 per crab. RP 82-83, 96.

The third purchase occurred on August 3, 2013. RP 83. Cook contacted Nguyen by phone to ask if he wanted more crab, which he did. RP 83. Cook met him at the nail salon and sold him 84 crabs for \$160.00. RP 83-84, 87. Cook secretly videotaped this transaction. RP 84-85. According to Cook, after this August 3 sale, Nguyen called and left messages on three separate occasions expressing his desire to buy crab. But she never spoke to him and she did not sell him more crab. RP 88.

The only prosecution witness at trial other than Cook was Department of Fish & Wildlife Officer John Ludwig. RP 121. Ludwig testified that, on January 7, 2014, he and a second officer visited

Nguyen at Diamond Nails to discuss the crab purchases. RP 122. According to Ludwig, Nguyen wanted to speak with them and admitted to past purchases of crab from Clemenson and from Cook, indicating he first started buying crab in 2012. RP 130-132. Nguyen denied knowing the sales were illegal. He told the officers that Clemenson had said the sales were legal because Clemenson was Native American. RP 132-133. Ludwig explained that Nguyen had not met the legal requirements for purchase from a tribal member. RP 133. Nguyen asserted that he had paid \$3.00 per crab, some of which he gave to customers and some of which he served at parties he threw with other salon owners. RP 132-133.

The defense was a combination of denial and entrapment. Nguyen testified in his own defense. RP 154. He explained that he emigrated from Vietnam about 16 years ago and understands only very basic English.¹ RP 154-155. In Vietnam, there are no regulations regarding the purchase and sale of crab. RP 158-159. Similar to what he told Officer Ludwig, he testified that he believed his purchases were legal because he buys from Native Americans,

¹ Fish & Wildlife Officer Ludwig and Detective Cook testified that Nguyen's English language skills were good enough that he understood an explanation of his legal rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and was able to engage in conversations regarding the sale of crab. RP 123-127, 141-142, 165.

and Clemenson had reassured him that purchases from him were legal. RP 159-160. Nguyen testified he never would have purchased had he known he was breaking the law and believed he had been entrapped. RP 160. Nguyen admitted buying crab from Cook on two occasions, although he could not recall the dates. He denied buying crab from Cook and Clemenson on January 4, 2013. RP 162.

Jurors were instructed on entrapment and the defense burden to establish it by a preponderance of the evidence. CP 20. Jurors nonetheless convicted Nguyen, he received a standard range sentence of 20 days, and he timely filed his Notice of Appeal. RP 208, 217; CP 36, 50-61, 63.

C. ARGUMENT

NGUYEN WAS DENIED HIS RIGHT TO JURY UNANIMITY.

Criminal defendants have a right to unanimous jury verdicts. Const. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). In State v. Crane, 116 Wn.2d 315, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991), the Washington Supreme Court succinctly explained Washington law on jury unanimity:

In Washington, a defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). When the prosecutor presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)(citing Petrich, [101 Wn.2d] at 570; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)). In multiple act cases, when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed 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 405-06 (modifying the harmless error standard enunciated in Petrich). Since the error is of constitutional magnitude, it may be raised for the first time on appeal. Kitchen, [110 Wn.2d] at 411.

Crane, 116 Wn.2d at 324-25.

At Nguyen's trial, to obtain a conviction the State had to prove each of the following elements beyond a reasonable doubt:

- (1) That on or between January 4, 2013 and August 3, 2013, the defendant trafficked in shellfish; and
- (2) The fish is classified as shellfish; and
- (3) The trafficking is not authorized by statute or rule of the department; and
- (4) The shellfish had a value of two hundred fifty dollars or more; and

- (5) That any of these acts occurred in the State of Washington.

CP 19.

Despite there being three separate trafficking incidents at issue, jurors were never instructed they had to be unanimous as to any particular one. See CP 7-22. Nor did the prosecutor elect a single incident for consideration. Quite the opposite. During closing arguments, she urged jurors to consider all three incidents when assessing Nguyen's guilt. See RP 190-192. This violated Nguyen's right to jury unanimity.

The only remaining issue is whether this violation can be deemed harmless, i.e., whether the State can demonstrate no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. The State cannot make this showing.

There was substantial reason for doubt regarding the January 4, 2013 purchase. First, this was the only purchase where the seller – Detective Chris Clemenson – did not testify. There was no evidence of what was said between Nguyen and Clemenson leading up to the alleged sale. See RP 68-69 (evidence of conversation in which sale arranged not admitted for truth of the

matter). And Detective Cook, who remained in the alley at all times, did not see cash change hands. RP 78, 104. Second, although Nguyen admitted to purchasing crab from Cook on two occasions, he denied that he purchased crab from Clemenson on this January date. RP 162. Thus, jurors were more likely to find reasonable doubt a sale occurred on this occasion.

Moreover, even if jurors were inclined to find that Nguyen purchased crab from Clemenson on January 4, 2013, they were more likely to find entrapment established for this particular sale. Nguyen claimed that Clemenson – who is Native American – falsely assured him that any sale between the two was legal. RP 82, 132-133, 159-160. Nguyen also testified that he never would have broken the law had he known a purchase from Clemenson was illegal. RP 160. If jurors believed Nguyen was telling the truth about Clemenson's false representations, they may have found entrapment established for the January 4 purchase, which was the only purchase involving Clemenson. See CP 20 (entrapment requires that the criminal design originate in the mind of law enforcement and defendant was induced to commit a crime he otherwise did not intend to commit).

Because one or more jurors could have entertained

reasonable doubt whether Nguyen unlawfully trafficked in shellfish on January 4, 2013, reversal is required. Kitchen, 110 Wn.2d at 405-406.

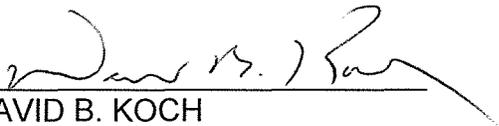
D. CONCLUSION

Nguyen was denied his constitutional right to a unanimous jury verdict. His conviction must be reversed.

DATED this 13th day of January, 2016.

Respectfully submitted,-

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Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 73756-2-I
)	
PHUONG VAN NGUYEN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PHUONG VAN NGUYEN
7101 MLK WAY S. #116-152
SEATTLE, WA 98118

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JANUARY 2016.

X *Patrick Mayovsky*