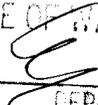


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STATE OF WASHINGTON

BY  DEPUTY

40547-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

JASON A. STOKEN

Appellant

40547-4-II

On Appeal from the Superior Court of Grays Harbor County

Cause No. 09-1-00177-4

The Honorable F. Mark McCauley

BRIEF OF APPELLANT

Law Office Of Jordan McCabe
P.O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

CONTENTS

Authorities Cited ii

I. Assignments of Error and Issues 1

A. Assignments of Error 1

B. Issues 1

II. Statement of the Case 2

III. Argument 6

1. The jury instructions on Count 3
are constitutionally defective 7

2. The evidence was insufficient to prove Count 3 11

3. The instructions omitted an essential element
of both counts 12

4. The evidence was insufficient to prove the
essential elements of Count 113

5. The court failed to ensure juror unanimity
on Count 1 17

IV. Conclusion 19

AUTHORITIES CITED

Washington Cases

State v. Alvarez, 128 Wn.2d 1
904 P.2d 754 (1995) 11

State v. Barnes, 153 Wn.2d 378
103 P.3d 1219 (2005) 9

State v. Bland, 71 Wn. App. 345
860 P.2d 1046 (1993) 18

State v. Bobenhouse, 166 Wn.2d 881
214 P.3d 907, 914 (2009) 18

State v. Brett, 126 Wn.2d 136
892 P.2d 29 (1995) 8

State v. Clausing, 147 Wn.2d 620
56 P.3d 550 (2002) 15

State v. Coleman, 159 Wn.2d 509
150 P.3d 1126 (2007) 18

State v. Demery, 144 Wn.2d 753
30 P.3d 1278 (2001) 16

State v. Goble, 131 Wn. App. 194
126 P.3d 821 (2005) 8

State v. Gooden, 51 Wn. App. 615,
754 P.2d 1000 (1988) 17

State v. Hickman, 135 Wn.2d 97
954 P.2d 900 (1998) 12, 13, 17

State v. Jones, 71 Wn. App. 798
863 P.2d 85 (1993) 18

State v. Kirkman, 159 Wn. 2d 918 155 P.3d 125 (2007)	16
State v. Kitchen, 110 Wn.2d 403 756 P.2d 105 (1988)	18, 19
State v. Kylo, 166 Wn.2d 856 215 P.3d 177 (2009)	8, 9
State v. Nguyen, 165 Wn.2d 428 197 P.3d 673 (2008)	18
State v. Ortega-Martinez, 124 Wn.2d 702 881 P.2d 231 (1994)	17
State v. Petrich, 101 Wn.2d 566 683 P.2d 173 (1984)	18
State v. Pirtle, 127 Wn.2d 628 904 P.2d 245 (1995)	9
State v. Smith, 159 Wn.2d 778 154 P.3d 873 (2007)	18
State v. Stanton, 68 Wn. App. 855 845 P.2d 1365 (1993)	12, 13, 17
State v. Thomas, 150 Wn.2d 821 83 P.3d 970 (2004)	11
State v. Williams, 158 Wn.2d 904 148 P.3d 993 (2006)	11

Federal Cases

In re Winship, 397 U.S. 358
90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 8

Washington Statutes & Court Rules

RCW 77.15.410 3
RCW 77.15.6703, 9, 10
RCW 77.08.010 14
RCW 77.15.010 12

Constitutional Provisions

Const. Art. I, § 3 17
Const. Art 1, § 2115, 17
Const. Art 1, § 22 8, 15, 17
U.S. Const. Amend. XIV8

I. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignments of Error**

1. The court failed to instruct the jury on the essential elements of first degree hunting with a suspended license as alleged in Count 3, contrary to Wash. Const. art. 1, §§ 21 & 22, and the Fifth Amendment.
2. The evidence was insufficient to prove first degree hunting with a suspended license, contrary to Wash. Const. art. 1, § 22, and the Fifth Amendment.
3. The court failed to allege or prove the essential element that Appellant was not exempt under RCW 77.15. 010.
4. The evidence was insufficient to prove hunting out of season as alleged in Count 1, contrary to Wash. Const. art. 1, § 22, and the Fifth Amendment.
5. The court failed to ensure juror unanimity on Count 1, contrary to Wash. Const. art. 1, §§ 21 & 22, and the Fifth Amendment.

B. Issues Pertaining to Assignments of Error

1. The instructions contain the elements of second degree hunting while suspended, not a first degree offense.
2. The evidence was insufficient to prove a first degree hunting while suspended violation.
3. The State neglected to allege or prove that Appellant was not exempt from prosecution under the act.
4. The State failed to establish that the animal charged in Count 1 was killed out of season.
5. The State's failure to elect which of multiple facts established hunting out of season and the court's failure to instruct the jury on the need for unanimity on that element casts doubt on the verdict.

II. STATEMENT OF THE CASE

Procedural Facts: Appellant, Jason A. Stoken, was charged under the Fish and Wildlife Act with second degree unlawful hunting big game in violation of RCW 77.15.410 (Count 1) and first degree hunting while license suspended or revoked contrary to RCW 77.15.670 (Counts 2 and 3). CP 15-16. A jury convicted him of Counts 1 and 3 and acquitted him of Count 2. CP 28-30.

The sentencing court classified Count 1 as a gross misdemeanor and Count 3 as a Class C felony. CP 34. Stoken received 365 days with 185 suspended on Count 1, and six months on Count 3 to be served concurrently. CP 36-37.

Mr. Stoken filed this timely appeal. CP 43.

Substantive Facts: The men in the Stoken family are life-long hunters. RP 223. Stoken's brother Russell and Russell's son, Garrett, were licensed at all relevant times. RP 69, Ex. 13, 16. Although Stoken usually also was licensed, his license was suspended on April 22, 2006. Stipulation, CP 17. But Washington State Department of Fish and Wildlife (F&W) licensing officer Evan Yett testified that the 2006 restrictions on Stoken's license were released in January, 2008. RP 69.

Count 1 of the Information charged that on April 22, 2008, Stoken shot a black-tailed deer. CP 15. Kimberly Brigden, Stoken's on-again-

off-again girlfriend (RP 20, 48), called F&W to report a violation. F&W enforcement officer Brian Alexander met Brigden at her campsite and she led him to a partially-butchered carcass. RP 134-35. Alexander testified to his opinion that the dead animal was a black-tail yearling doe. He provided no basis or explanation for this opinion. Alexander also expressed the legal opinion that it was unlawful to kill yearlings at that time of year and that deer hunting season started in September that year and ran through December. The State offered no documentation for this opinion either. RP 135.

Ms. Brigden testified unequivocally that she never saw Stoken shoot anything. RP 24, 33, 36. She claimed loss of memory as to her prior statements. RP 28. Accordingly, the court permitted Alexander to testify about out-of-court statements Brigden had dictated to him and signed. Portions of the statement were read into the record under ER 801(a)(3), the exception for recorded recollections of later-forgotten facts. RP 154.

F&W obtained a warrant to search a home belonging to Stoken's mother, Muriel Stoken, where Stoken was living. RP 20, 4-45, 55-56. A freezer on the back porch contained a large amount of packaged game meat. RP 33, 61. F&W officer Matt Nixon testified that Stoken told him the meat was mostly old, some as old as 2003, and that it came from

several relatives, including from a 2007 elk killed by Russell Stoken. RP 61.

F&W officers also found numerous elk “racks” or antlers, and specialized teeth known as whistlers or elk ivory. RP 120.

F&W forensic lab tech Cheryl Dean ran DNA tests on samples of tissue, teeth, and antler. RP 76, 80, 83. This testing could not provide any information about the age of an animal, the year it died, or how it died. RP 90. Chief analyst Kenneth Warheit corroborated this. RP 100-01. Officer Alexander also testified that he could not date the antlers he saw at the Stoken home and conceded that they could have been from a legal kill. RP 181. Ms. Dean also tested a blood spot from a backpack Brigden said Stoken used on April 22, 2008. RP 177-78. That blood turned out not to be from a deer, but from an elk. RP 89. Over repeated defense objections, the State’s witnesses speculated that the numbers “06” and “07” on meat labels and teeth referred to 2006 and 2007 and signified the year the animal was hunted. RP 121. But Warheit testified that teeth labeled 06 and 07 were from the same animal, not different animals. RP 101-03.

F&W officer Greg Haw testified that Stoken made a statement to him at the time of his arrest to the effect that, if the officers took his meat, he would have to poach more to feed his family.¹ RP 58.

Stoken's brother Russell and Russell's son Garrett both testified that they each legally harvested an elk during the relevant time. Russell said he shot a 5x5² elk in 2006. RP 226. Officer Yett testified that F&W's system for self-reporting kills did not show a reported kill for Russell Stoken in 2006. But Yett said reporting was optional, so that Russell might very well have lawfully harvested an elk that year. RP 70-71. Garrett Stoken said he killed a 6x7 elk in 2007. RP 212.

Both Russell and Garrett testified that they frequently stored meat in Muriel Stoken's freezer. RP 210, 224. Russell said he stores meat mostly at his mom's because he just has an upright freezer which he used to store shrimp received from his mother-in-law. RP 223. Muriel Stoken's testimony was consistent with this and also with Stoken's out-of-court statements (see RP 61.) She testified that Russell and Garrett frequently stored meat in her freezer. RP 198-99. Ms. Stoken testified

¹ Defense counsel had stipulated to the admissibility of Stoken's statements because he was not in custody. RP 9.

² These numbers refer to the number of points on the right and left antler. RP 213. Using a slightly different system, Russell called this same elk a 5x6. RP 225-26.

that friends called the Frickles also gave her game meat that went in the freezer, and her ex-husband, Dwight, put game meat in there too. RP 204.

The State made sure to introduce evidence supporting the essential element that the alleged offenses occurred in Washington, in Grays Harbor County and the Mount St. Helens area. RP 187.

The Court denied a defense motion to dismiss Counts 2 and 3 at the close of the State's case. RP 189-91. Defense counsel approved the jury instructions. RP 238.

The jury acquitted Stoken on Count 2 and convicted him on Counts 1 and 3.

III. ARGUMENT

1. THE JURY INSTRUCTIONS DO NOT INCLUDE ALL THE ELEMENTS OF COUNT 3, FIRST DEGREE HUNTING WITH LICENSE SUSPENDED.

The court erroneously instructed the jury in Instructions No. 2 and No. 6 that Stoken was guilty of first degree hunting while license revoked or suspended if he hunted while his license was revoked or suspended. CP 20, 21. This is an incorrect statement of the law. Merely hunting with a suspended license is a second degree violation, not first degree.

(a) ***This is an error of constitutional magnitude that may be raised for the first time on appeal.*** Due process requires the State to

prove every element of the charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A jury instruction that relieves the State of its burden to prove all the elements beyond a reasonable doubt is an error of constitutional magnitude that can be raised for the first time on appeal regardless of trial counsel's failure to challenge the instruction. RAP 2.5(a)(3); *Kylo*, 166 Wn.2d at 862.

An instruction that relieves the State of its burden of proof concerns a manifest error of constitutional magnitude and will be reviewed, even if trial counsel did not object. *State v. Goble*, 131 Wn. App. 194, 203-04, 126 P.3d 821 (2005). A challenge to a jury instruction on the grounds that it "relieved the State of its burden of proof" may be raised for the first time on appeal. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

Moreover, here, defense counsel approved the State's proposed jury instructions as accurate and offered no objection or exception. RP 238. Failing to read the statute and check that the instructions included the essential elements of the offense was per se defective performance which prejudiced Stoken by (1) relieving the State of its burden to prove the elements of the charged offense of hunting with a suspended license; and

(2) potentially depriving Stoken of the right to raise the constitutional violation on appeal. *See, Kyлло*, 166 Wn.2d at 862.

(b) ***Instructions 2 and 6 relieved the State of its burden to prove the statutory elements of hunting while license revoked or suspended in the first degree.*** This Court reviews alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Jury instructions are not sufficient unless they permit the parties to argue their theories of the case, do not mislead the jury, and “properly inform the jury of the applicable law.” *Barnes*, 153 Wn.2d at 382. It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every essential element of a criminal offense beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Instruction No. 2 states:

A person commits the crime of Hunting while License Revoked in the First Degree when he knowingly hunts, takes or possesses big game at a time when his privilege to engage in that activity was revoked or suspended.

CP 20. This is wrong. The legislature has defined simply hunting with a suspended license as a second degree violation of RCW 77.15.670, not first degree:

A person is guilty of violating a suspension of department privileges in the second degree if the person engages in any activity that is

licensed by the department and the person's privileges to engage in that activity were revoked or suspended by any court or the department.

RCW 77.15.670(1) (emphasis added).

The essential elements of a first degree violation are set forth in RCW 77.15.670(2). To find a first degree violation, the jury must find one or more additional statutory elements besides a revoked or suspended license. A person is guilty of violating a suspension of department privileges in the first degree if the person commits the act described by RCW 77.15.670(1) and:

- (a) The suspension of privileges that was violated was a permanent suspension;
- (b) The person takes or possesses more than two hundred fifty dollars' worth of unlawfully taken food fish, wildlife, game fish, seaweed, or shellfish; or
- (c) The violation involves the hunting, taking, or possession of fish or wildlife classified as endangered or threatened or big game.

RCW 77.15.670(2).

Thus, the jury was instructed that the elements of second degree hunting while license suspended constitute the offense in the first degree. This gave the State a first degree conviction without the burden of proving the elements of a first degree offense.

The to-convict instruction for Count 3 contains the same error. Instr. No. 6, CP 21. If the to-convict instruction does not include all the

essential elements of the offense, the conviction must be reversed. *State v. Williams*, 158 Wn.2d 904, 917, 148 P.3d 993 (2006).

The conviction for Count 3 must be reversed.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE COUNT 3, FIRST DEGREE HUNTING WITH A SUSPENDED LICENSE.

By the same reasoning, the evidence also was insufficient to support the conviction on Count 3.

The evidence is sufficient to support a conviction only if a rational fact finder could find the essential elements of the crime beyond a reasonable doubt from the evidence as viewed in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874. Sufficiency of the evidence is a question of constitutional magnitude that can be raised for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

Not only did Mr. Stoken's jury receive an erroneous statement of the law as to the elements of Count 3, but the facts alleged by the State proved no more than second degree hunting with license suspended. The State offered no evidence that Stoken's suspension was permanent. There

was no evidence of a dollar value of wildlife taken or possessed; and there was no evidence that wildlife taken was endangered or threatened.

Reversal is required with instructions to dismiss because retrial following reversal for sufficient evidence is strictly prohibited. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Court should dismiss Count 3 with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

3. THE STATE FAILED TO ALLEGE OR PROVE THE ESSENTIAL STATUTORY ELEMENT THAT STOKEN WAS NOT PERFORMING AUTHORIZED FISH AND WILDLIFE DUTIES.

The State neglected to allege or offer any evidence that Stoken was not exempt from the provisions of Chapter 77.15 RCW in 2008.

RCW 77.15.010 provides that a person is exempt from the provisions of Chapter 77.15 RCW if he or she is an officer, employee, or agent of the department lawfully acting in the course of authorized duties. Accordingly, this is an additional element the State must prove beyond a reasonable doubt.

Just as with the element that the offense occurred in the State of Washington, the State is not excused from proving an essential element just because it is easily proved. Stoken's not guilty plea put every element at issue. Instr. 3, CP 20.

The failure to instruct the jury on this element requires reversal of both convictions. And the failure to provide any evidence on this element precludes retrial and requires dismissal with prejudice. *Hickman*, 135 Wn.2d at 103. The Court will, therefore, dismiss Count 1 with prejudice. *Stanton*, 68 Wn. App. at 867.

4. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR UNLAWFUL HUNTING AS CHARGED IN COUNT 1.

Stoken was charged with unlawfully killing a black-tail deer on April 22, 2008. CP 15, 20. The State did not allege that Stoken did not have a hunting license in April, 2008; his license was restored in January of 2008. RP 69. Rather, the jury was instructed that the elements of the crime were that Stoken hunted big game out of season. CP 15. The court instructed the jury:

To convict the defendant, Jason A. Stoken of the crime of Unlawful Hunting of Big Game in the Second Degree, as charged in Count I of the Information, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about April 22, 2008, the defendant knowingly hunted or took big game,
- (2) At the time of the defendant's hunting or taking the season was closed to such activity, and
- (3) That these events occurred in the State of Washington.

CP 20.

In addition to failure of the non-exempt element, the State also failed to provide the jury with the facts needed in order to conclude that the animal killed on April 22, 2008, was out-of-season. CP 20. The jury was left to guess based solely on the unsupported opinion testimony of F&W enforcement officer Brian Alexander that Stoken killed a yearling black-tail doe and that doing so was out of season.

First, Alexander did not provide any factual basis for his opinion testimony as to the species, age and gender of the animal. He offered no supporting evidence for his opinion that the animal he saw on April 22, 2008, was (i) a deer, (ii) a black-tail; (iii) a doe; or (iv) a yearling.³

Second, Alexander also testified that (v) it was not legal to kill yearlings at that time of year and (vi) deer hunting season starts in September and runs through December. But, as regards the time of an alleged offense, “closed season” means at times other than those established by rule of the state fish and wildlife commission as an open season. RCW 77.08.010(6), (9). The State presented no evidence of what open season times the fish and wildlife commission had established in this case.

³ The witness did provide circumstantial evidence from which the jury could have inferred the animal was dead. RP 136.

Further, what constituted the hunting season was a legal opinion. Whether or not it was legal to kill a deer on a particular date was a matter of law to which no fact witness, even an expert, may testify. *State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) (testifying to the jury on the law usurps the role of the judge.) The jury should not have to obtain its instruction on the law from the prosecutor's arguments. "Rather, it is the judge's province alone to instruct the jury on relevant legal standards." *State v. Berg*, 147 Wn. App. 923, 935-36, 198 P.3d 529 (2008). Here, neither a witness nor the court offered any guidance as to the meaning of "out of season." Therefore, the jury had take its instruction from Alexander's bald assertion.

This invaded the province of the jury and infringed upon Stoken's right to have his guilt determined solely by his jury.

"The right of a trial by jury shall remain inviolate." Const. art. 1, § 21. Also Const. art 1, § 22: "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

Whether the animal killed on April 22, 2008, was out of season is the sole disputed question the jury must answer in reaching a verdict on Count 1. Stoken had the right to have this determined by jury.

Opinion testimony may reach questions of ultimate fact, but only if a proper foundation is laid. *City of Seattle v. Heatley*, 70 Wn. App. 573,

579, 854 P.2d 658 (1993). In determining whether a proper foundation was laid for testimony that constitutes an opinion of ultimate fact, the Court considers: “(1) the type of witness; (2) the nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence. *State v. Kirkman*, 159 Wn. 2d 918, 927, 155 P.3d 125 (2007); *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

That did not happen here. Alexander may have been able to provide information that would help the jury to understand the concept of in- and out-of-season hunting and to apply the rules to a particular animal. But simply announcing the ultimate fact with no foundation invaded the province of the jury and requires reversal. *See, e.g., Heatley*, 70 Wn. App. at 580.

Alexander’s testimony did not provide the facts the jury needed to determine the out-of-season element. The jurors could have speculated that what was out of season was the killing of any deer. Or maybe killing a deer was fine so long as it was not a black-tail. Or possibly black-tail bucks were legal but does were out of season. Or maybe it was killing a yearling that was bad. Or was it only a black-tail yearling, a doe yearling or specifically a black-tail doe yearling? CP 20; RP 135.

The evidence was simply insufficient to prove the essential element that the animal alleged in Count 1 was out of season.

Reversal is required. As a matter of law, retrial following reversal for sufficient evidence is strictly prohibited. *Hickman*, 135 Wn.2d at 103. The Court will, therefore, dismiss Count 1 with prejudice. *Stanton*, 68 Wn. App. at 867.

5. THE COURT FAILED TO ENSURE JURY UNANIMITY ON COUNT 1.

Our state constitution protects the due process right to a unanimous jury verdict in criminal cases. Const. art. I, §§ 3, 21, 22;⁴ *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This protection mirrors that of the United States Constitution.⁵ The right to a unanimous verdict derives from the fundamental constitutional right of trial by jury. *State v. Gooden*, 51 Wn. App. 615, 617, 754 P.2d 1000 (1988).

Where the State alleges a single charge that could be committed in multiple ways, either the State must elect which act it is relying on as the basis for the charge or the judge must instruct the jurors that they must unanimously agree that the prosecution has proved a single act beyond a

⁴ Wash. Const. art. 1, § 9: "No person shall be...twice put in jeopardy for the same offense." Const. art. 1, § 21: "The right of a trial by jury shall remain inviolate." Const. art. 1, § 22: "In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

⁵ U.S. Const. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State's election must be clear from the record. *See State v. Jones*, 71 Wn. App. 798, 821-22, 863 P.2d 85 (1993); *State v. Bland*, 71 Wn. App. 345, 351-52, 860 P.2d 1046 (1993), overruled on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007).

These fundamental constitutional protections assure that the verdict is based on the unanimous finding that same act has been proved beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007). Failure to follow these precautions gives rise to a constitutional error, because some jurors may have relied on one act while other jurors relied on another. It is sufficient that a rational trier of fact "could have found each means of committing the crime proved beyond a reasonable doubt." *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (emphasis in original). Lack of juror unanimity is a manifest constitutional error the defendant can assert for the first time on appeal. RAP 2.5(a)(3); *State v. Bobenhouse*, 166 Wn.2d 881, 897, n.4, 214 P.3d 907, 914 (2009), citing *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

As discussed in Issue 4 above, the jurors received a smorgasbord of evidence from which any one of them could reasonably have concluded that the animal Stoken allegedly killed on April 22, 2008, was out of

season. The State made no election and the Court limited its unanimity instruction to hunting with a suspended license as alleged in Counts 2 and 3. Instr. 7, CP 22. We know all the jurors did not agree on all the relevant facts, because they disclosed that they were hung on Count 2. CP 24.

The State's failure to provide sufficient information from which all the jurors could agree on what aspect of killing an animal on April 22, 2008, might have constituted hunting out of season, the failure to elect one or all of the possible scenarios, and the court's failure to instruct on the need for unanimity on this element introduces substantial doubt whether all the jurors agreed as to what the charged conduct unlawful on Count 1.

Failure to require unanimity cannot be harmless error where, as here, a rational juror could have entertained a reasonable doubt that the State proved the crime based on any of the potentially culpable scenarios. *Kitchen*, 110 Wn.2d at 405-06, 411. Reversal is required.

IV. **CONCLUSION**

For the foregoing reasons, Mr. Stoken asks this Court to reverse his convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

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Respectfully submitted this 7th day of September, 2010.

STATE OF WASHINGTON

BY  _____
DEPUTY



Jordan B. McCabe, WSBA No. 27211

Counsel for Jason A. Stoken

CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, copies of this Appellant's Brief to:

Kraig C. Newman, Prosecutor's Office
Grays Harbor Superior Court Building
102 West Broadway Avenue, Room 102
Montesano, WA 98563-3621

Jason A. Stoken,
Grays Harbor County Jail
P.O. BOX 630
Montesano, WA 98563



Date: September 7, 2010

Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington