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State of Washington
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COA NO. 51284-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE HICKMAN,

Appellant.

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

The Honorable Anna Laurie, Judge
The Honorable Sally F. Olsen, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE WARRANTLESS SEIZURE VIOLATED HICKMAN'S CONSTITUTIONAL RIGHT TO PRIVACY BECAUSE IT WAS UNSUPPORTED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY.

The State contends police have reasonable suspicion to seize anyone traveling on a public road who happens to be in the general proximity of a non-violent crime committed on private property. The argument refuting this contention is set forth in the opening brief and need not be repeated here.

Two specific points, however, are made in reply. First, the State claims the vehicle was coming down a "dead-end" road, suggesting the vehicle could only have been coming from the woods where the trees were cut. Brief of Respondent (BOR) at 21. Clarification is needed. Apex Road ultimately dead ends at a private airstrip, but before it does so, multiple roads branch off and provide access to other areas. Pre-Trial Ex. 3; Trial Ex. 33. And Apex Road runs alongside a residential area. Id.; 2RP 13. A vehicle traveling along Apex Road that night need not have come from the woods.

Second, the State chides Hickman for parsing "each of the facts separately." BOR at 21. Hickman's analysis is appropriate: "While we evaluate the totality of the circumstances to determine whether a

reasonable suspicion of criminal activity exists, we do so, in part, by examining each fact identified by the officer as contributing to that suspicion." State v. Fuentes, 183 Wn.2d 149, 159, 352 P.3d 152 (2015). Hickman identified each fact identified as contributing to reasonable suspicion and then showed why the totality of circumstances do not amount to reasonable suspicion.

2. THE LACK OF UNANIMITY INSTRUCTION VIOLATED HICKMAN'S CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

The State argues a jury unanimity instruction was not required because the evidence shows a continuous course of conduct rather than multiple acts. BOR at 22-25. The State is mistaken.

"Multiple acts tend to be shown by evidence of acts that occur at different times, in different places, or against different victims." State v. Locke, 175 Wn. App. 779, 802, 307 P.3d 771 (2013), review denied, 179 Wn.2d 1021, 336 P.3d 1165 (2014). There are different victims here: McQueary and Delhaute. The presence of different victims precludes a determination that this is a continuous course of conduct case. Cases cited by the State in support of its argument all involve a charged offense committed against a single victim. See State v. Gooden, 51 Wn. App. 615, 616, 620, 754 P.2d 1000 (1988) (two counts of promoting prostitution, one count for each victim, were each a continuous course of conduct); State v.

Crane, 116 Wn.2d 315, 329-30, 804 P.2d 10 (1991) (multiple assaults against single victim were continuous course of conduct). The State does not cite a single case in which a continuous course of conduct was found despite there being two different victims for a single count. See City of Seattle v. Muldrew, 69 Wn.2d 877, 877, 420 P.2d 702 (1966) ("Where no authorities are cited in support of a proposition, the court is not required to search for authorities, but may assume that counsel, after diligent efforts, has found none.").

The State says it is notable that the elements for trafficking in stolen property do not include the identity of the victim. BOR at 24. The point fails. The elements of first degree burglary committed by means of assault do not include the identity of the victim either. RCW 9A.52.020(1). But unanimity error was still found in State v. Williams, 136 Wn. App. 486, 497-99, 150 P.3d 111 (2007).

The State makes no argument that it can overcome the presumption of prejudice by showing the unanimity error is harmless beyond a reasonable doubt. See State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014) ("The State makes no attempt in its briefing to this court to show harmless error, and accordingly the presumption of prejudice stands."). The conviction must be reversed.

B. CONCLUSION

For the reasons stated above and in the amended opening brief, Hickman requests reversal of the conviction, vacature of the forfeiture order, and vacature of the challenged legal financial obligations.

DATED this 16th day of November 2018

Respectfully Submitted,

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