IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

State of Washington
Appellant

v.

DAVID W. MAXWELL
Respondent

42877-6-II

On Appeal from the Kitsap County Superior Court

Cause No. 11-1-00250-9

The Honorable Russell W. Harman

REPLY BRIEF

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II. ARGUMENT IN REPLY

Summary: Viewing the evidence in the light most favorable to the prosecution, a single sale of scrap metal worth less than $750 to a legitimate dealer is insufficient to prove trafficking in stolen property under the criminal profiteering act which requires proof of a predicate felony, not a misdemeanor.

III. STATEMENT OF THE CASE:

For a full account of the alleged conduct giving rise to the prosecution, please refer to the Appellant's Opening Brief, pp. 1-3.

Appellant David W. Maxwell was convicted by jury of a single count of trafficking in stolen property as defined in section RCW 9A.82.050(1) of the criminal profiteering act. CP 17-20. The charge was based on a single sale to a legitimate dealer of scrap metal Maxwell collected in the course of his established salvaging business.[1] The jury acquitted Maxwell of six additional counts for insufficient evidence. CP 55-56. The value of the scrap metal was $616.00. CP 54-55; RP 162.

[1] RCW 9A.82.050(1) A person 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, is guilty of trafficking in stolen property in the first degree.

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Maxwell received a standard range sentence of 22 months. He appealed. CP 68. Mr. Maxwell maintains the assignments of error in the opening brief, but replies only to the State's sufficiency argument .

IV. ARGUMENT

THE CRIMINAL PROFITEERING STATUTE REQUIRES THAT MAXWELL'S PROSECUTION FOR TRAFFICKING BE BASED ON A PREDICATE FELONY, NOT A MISDEMEANOR.

Construction of a statute is reviewed de novo. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). The evidence supporting Mr. Maxwell's trafficking conviction is insufficient as a matter of law.

The State claims a prosecution for trafficking under the criminal profiteering act is not governed by the criminal profiteering act. Accordingly, the State argues that David Maxwell was lawfully convicted based solely on evidence that he committed third degree theft of some scrap metal and sold the scrap to a dealer. Brief of Respondent (BR 13-14). This is wrong.

Maxwell was charged and convicted under Chapter 9A.82 RCW. CP 17. Chapter 9A.82 RCW is the criminal profiteering act.[2] By definition, "criminal profiteering" is limited to acts that are chargeable as

[2] The difference between first degree and second degree traficking is not the value of the property but the actor's state of mind. To traffick knowingly is first degree. To do so recklessly is second degree. RCW 9A.82.055(1).

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one of the predicate felonies enumerated in the statute. RCW 9A.82.010(4); *State v. Munson*, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004).

Munson was convicted of criminal profiteering based on the predicate offense of forgery, RCW 9A.82.010(4)(d). *Munson*, 120 Wn. App. at 105. Maxwell was prosecuted for first degree trafficking in stolen property in violation of RCW 9A.82.050(1).[3] CP 17, 56. Contrary to the State's contention, trafficking in stolen property in violation of RCW 9A.82.050(1) is an act of criminal profiteering. That is so (a) because the Legislature included trafficking as a violation of the criminal profiteering act, RCW 9A.82.050(1); and (b) because the Legislature listed trafficking in violation of RCW 9A.82.050(1) as an act of criminal profiteering in RCW 9A.82.010(4)(r).

Therefore, to convict Maxwell of trafficking in violation of the criminal profiteering act, the State was required to allege and prove a predicate felony under RCW 9A.82.010(4).

The statute lists various theft offenses as predicate offenses sufficient to support a charge of criminal profiteering, but these are limited to felony thefts as defined in RCW 9A.56.030, 9A.56.040, 9A.56.060,

[3] A person 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, is guilty of trafficking in stolen property in the first degree. RCW 9A.82.050(1).

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9A.56.080, and 9A.56.083. RCW 9A.82.010(4)(e). Third degree theft, by contrast, cannot serve as a predicate offense of an act of criminal profiteering, because it is defined in a non-listed section of chapter 9A.56 RCW and is a gross misdemeanor. RCW 9A.56.050(1) & (2). Since the State proved no more than third degree theft of scrap worth less than $750, the evidence was insufficient as a matter of law to sustain a conviction under Chapter 9A.82 RCW.

In *Munson*, the defendant was lawfully convicted of leading organized crime under RCW 9A.82.060, because RCW 9A.82.060 prohibits organizing a pattern of criminal profiteering[4] and Munson engaged in an enterprise of forgery that constituted a pattern of criminal conduct. *Munson*, 120 Wn. App. at 105. The State urges the Court to apply the reasoning of *Munson* to the entire criminal profiteering act and to restrict use of the term "criminal profiteering" solely to the offense of leading organized crime. BR 13. This is backwards, however. Leading organized crime is a category of criminal profiteering, not vice versa:

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[4] RCW 9A.82.060:
(1) A person commits the offense of leading organized crime by:
(a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity; or (b) Intentionally inciting or inducing others to engage in violence or intimidation with the intent to further or promote the accomplishment of a pattern of criminal profiteering activity.
(2)(a) Leading organized crime as defined in subsection (1)(a) of this section is a class A felony. (b) Leading organized crime as defined in subsection (1)(b) of this section is a class B felony.

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organized crime involves a pattern of acts of criminal profiteering. RCW 9A.82.060. But criminal profiteering is not necessarily a pattern of conduct. It can also be a single act, provided it comprises a felony defined as a predicate of criminal profiteering in RCW 9A.82.010(4) §§ (a) – (ss). That list includes theft as defined by RCW 9A.56.030, 040, 060, 080, and 083. It does not include third degree theft. RCW 9A.82.010(4)(e).

The State appears to argue that the predicate crimes element of RCW 9A.82.010(4) does not apply to Maxwell because, unlike Munson, he was charged with a single act of trafficking under 9A.82.050 and not a pattern of conduct under 9A.82.060. But the State offers no authority that charging a single act of criminal profiteering rather than an ongoing enterprise eliminates the predicate crime element or suspends the operation of the criminal profiteering act. By the plain language of the statute the definitions apply throughout the chapter. RCW 9A.82.010.

The State is correct that "criminal profiteering" is a category of offenses rather than a single discrete crime. BR 13. But this does not mean the State need not establish the elements of a crime charged under the criminal profiteering act. The plain language of RCW 9A.82.010(4) unambiguously defines criminal profiteering as including trafficking in stolen property as defined in RCW 9A.82.050 (the provision Maxwell was charged with violating). RCW 9A.82.010(4)(r).

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Without citation to authority, the State asks the Court to ignore the fact that Maxwell was prosecuted under an act entitled "the criminal profiteering act" Chapter 9A.82 RCW and review the conviction in a vacuum. This is unprecedented, and the Court should decline.

The Legislature states the intent of chapter 9A.82 in a preamble. That is to reenact a predecessor law "relating to criminal profiteering[.]" Preamble to Chapter 9A.82 RCW, citing Laws, 2001, c 222 § 1. The purpose of the current law, like that of its predecessor, the racketeering act[5] is to impose additional punishment "separate and distinct from any underlying predicate crimes." *State v. Harris*, 167 Wn. App. 340, 357, 272 P.3d 299 (2012). Here, that would be to punish the "fencing" of stolen property in addition to the theft itself. By the plain terms of the act, that can only be accomplished by prosecuting the transaction as an act of criminal profiteering.

This is consistent with the practice of Washington courts to address the true nature of the charged criminal conduct, rather than simply the language employed by the State in the Information. In *State v. Greathouse*, 113 Wn. App. 889, 56 P.3d 569 (2002), for example, the Information charged that the accused "did exert unauthorized control over such property belonging to another,... contrary to RCW 9A.56.040(1)(a),

[5] Former Ch. 9A.82 RCW, Laws of 1985, ch. 455, § 1. *See Harris*, 272 P.3d at 309, n. 20.

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9A.56.020(1)(a) and 9A.08.020." The Court redefined the charged offense and called it by its right name: "Thus, the information charged [the defendants] with theft by means of embezzlement [as defined by] RCW 9A.56.010(19)(b)." *Greathouse*, 113 Wn. App. at 901. Likewise, trafficking in stolen property for financial gain constitutes criminal profiteering. *State v. Strohm*, 75 Wn. App. 301, 305, 879 P.2d 962 (1994); RCW 9A.82.010(4)(r).

It is well settled that trafficking in stolen property is an act of criminal profiteering. In *Strohm*, for example, the jury could have considered two counts of trafficking as part of a pattern of criminal profiteering activity. *Strohm*, 75 Wn. App. at 304, 307; *State v. Michielli*, 81 Wn. App. 773, 778, 916 P.2d 458 (1996).

The Legislature included the crime of trafficking in the criminal profiteering act for a reason. "By including the crime of trafficking in the criminal profiteering act, the Legislature intended to punish those who knowingly deal in property stolen by others. The statute "targets a person who steals and then sells to a middleman (fence) who, in turn, buys the stolen property with the intent to resell it to a third person. … There is no indication the Legislature intended to convert [third]-degree thefts into first-degree felonies when the accused sells or pawns the items taken. *Michielli*, 81 Wn. App. at 778, citing *Florida v. Camp*, 579 So.2d 763

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(Fla. Dist. Ct. App.1991) (Florida anti-fencing statute intended to punish those who knowingly deal in property stolen by others; not intended to convert a third-degree felony into a second-degree felony merely because the thief sells the property rather than consumes it.).

In other words, the Legislature did not intend to extend trafficking prosecutions to include a single sale to a good faith buyer for value, which is the sum total of the State's evidence here. The State did not suggest that Navy City Metals was a "fence" that bought from Maxwell as part of a course of dealing in stolen property. Or that Maxwell sold to Navy City Metals in that capacity.

This interpretation is supported by both legislative history and case law. When the Legislature amended the criminal profiteering act in 1985, it noted: Generally a single commission of any one of the identified crimes constituting [criminal profiteering] is sufficient to invoke all the criminal and civil penalties and remedies of the law. Final Legislative Report, 49th Legislature, at 140 (1985). And, in *Strohm*, convictions for several counts of trafficking were upheld as criminal profiteering. 75 Wn. App. at 305.

Moreover, if the statute is deemed ambiguous, it must be construed strictly against the State and in favor of the accused. *Michielli*, 81 Wn.

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App. at 778, citing *State v. Jackson*, 61 Wn. App. 86, 93, 809 P.2d 221 (1991).

If the State had elected to charge Maxwell with theft, the applicable statutes are found in chapter 9A.56 RCW. Trafficking, by contrast, is criminalized solely in Chapter 9A.82. It is an act of criminal profiteering, and as such must be based on a predicate felony, not a misdemeanor. RCW 9A.82.010(4). The prosecutor elected to charge Maxwell with criminal profiteering under RCW 9A.82.050. Perhaps this was inadvertent, but Maxwell's prosecution for trafficking nevertheless was for criminal profiteering by statutory definition, and as such it must rest upon a predicate felony, not a misdemeanor.

The State claims that RCW 9A.82.050(1) and the definitions of 9A.82.010 are not susceptible to judicial construction because their plain meaning is not ambiguous. BR 14. But the Court does not determine the plain meaning of statutory language in isolation. Rather, the Court must consider the general context, related provisions, and the statutory scheme as a whole. *Engel*, 166 Wn.2d at 578, citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). The meaning of words may be indicated or controlled by those with which they are associated. *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005).

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Read in context, chapter 9A.82 RCW unambiguously includes trafficking as a criminal profiteering offense for which proof of an underlying felony is required.

V. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the opening brief, the Court should reverse Mr. Maxwell's conviction and dismiss the prosecution with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Respectfully submitted, this 17th day of September, 2012.

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CERTIFICATE OF SERVICE

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