

73756-2

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Court of Appeals
Division I
State of Washington

73756-2

NO. 73756-2-I

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

NGUYEN WAS DENIED HIS RIGHT TO JURY UNANIMITY

Nguyen was charged with one count of Unlawful Trafficking in Fish, Shellfish, or Wildlife in the First Degree based on three different transactions: January 4, 2013, March 29, 2013, and August 3, 2013. Jurors were not instructed they had to be unanimous as to a particular act, and the trial prosecutor did not elect a particular act for jurors to focus upon. And because one or more jurors could have entertained a reasonable doubt that the State had proved the January 4, 2013 incident, the violation of Nguyen's right to jury unanimity cannot be deemed harmless beyond a reasonable doubt.

In response, the State argues there was no violation because RCW 77.15.260(2)(b) allows aggregation of the value of stolen shellfish from each incident. The statute provides:

(1) A person is guilty of unlawful trafficking in fish, shellfish, or wildlife in the second degree if the person traffics in fish, shellfish, or wildlife with a wholesale value of less than two hundred fifty dollars and:

- (a) The fish, shellfish or wildlife is classified as game, food fish, shellfish, game fish, or protected wildlife and the trafficking is not authorized by statute or department rule; or

- (b) The fish, shellfish, or wildlife is unclassified and the trafficking violates any department rule.

(2)(a) A person is guilty of unlawful trafficking in fish, shellfish, or wildlife in the first degree if the person commits the act described by subsection (1) of this section and:

- (i) The fish, shellfish, or wildlife has a value of two hundred fifty dollars or more; or
- (ii) The fish, shellfish, or wildlife is designated as an endangered species or deleterious exotic wildlife and such trafficking is not authorized by any statute or department rule.

(b) For purposes of this subsection (2), whenever any series of transactions that constitute unlawful trafficking would, when considered separately, constitute unlawful trafficking in the second degree due to the value of the fish, shellfish, or wildlife, and the series of transactions are part of a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all transactions considered when determining the degree of unlawful trafficking involved.

(3)(a) Unlawful trafficking in fish, shellfish, or wildlife in the second degree is a class C felony.

(b) Unlawful trafficking in fish, shellfish, or wildlife in the first degree is a class B felony.

RCW 77.15.260 (emphasis added).

The State does not adequately explain how section 2(b), which merely permits aggregation of the values involved in a series of transactions to increase the offense from a class C felony to a class B felony, impacts the right to jury unanimity. Regardless of the ability to aggregate values, where a crime is based on multiple acts of trafficking, juror unanimity is required. The State cites no contrary authority.

In any event, the information did not charge Nguyen under the aggregation provision of RCW 77.15.260(2)(b). CP 6; see also State v. Rivas, 168 Wn. App. 882, 887-891, 278 P.3d 686 (2012) (aggregation language for malicious mischief, similar to that in subsection (2)(b), is essential element that must be pled in information), review denied, 176 Wn.2d 1007, 297 P.3d 68 (2013). And jurors were never instructed regarding aggregation, so it could not have affected their deliberations. See CP 15-19.

The State's failure to charge or request instructions on aggregation is not surprising since subsection (2)(b) did not apply. By its own terms, the subsection only applies when "any series of transactions that constitute unlawful trafficking would, when considered separately, constitute unlawful trafficking in the second degree due to the value of the fish, shellfish, or wildlife." This

condition precedent was not satisfied because – as the State readily concedes – each of three charged transactions satisfies the value threshold for a *first* degree offense (a wholesale value of \$250 or more) without aggregation. See Brief of Respondent, at 1, 15-16 (value for each transaction at least \$360.00). In other words, because it is not true that the transactions, if considered separately, would only have established a second-degree offense, section (2)(b) was never triggered.

Alternatively, the State argues that, because the quality of its evidence and Nguyen's defenses were identical as to each of the three transactions, jurors must have been unanimous for each of the three incidents. See Brief of Respondent, at 14-18. The State focuses extensively on the fact the \$250.00 threshold for a first-degree offense was clearly established for each incident. Brief of Respondent, at 14-16. But Nguyen has not argued one or more jurors may have entertained a reasonable doubt as to the crabs' value.

Rather, the possibility of doubt arises from several circumstances unique to the January 4, 2013 incident. First, the State presented reduced evidence that this particular sale occurred. Detective Chris Clemenson (the supposed seller on that date) did not

testify, Detective Cook did not see cash change hands, and there was no evidence of what was said leading up to that alleged sale. Nguyen denied purchasing crab from Clemenson on this date.¹ Brief of Appellant, at 8-9. Second, there was greater evidence of entrapment for this particular sale. Nguyen testified that he believed purchases from Clemenson were legal, and Clemenson reassured him they were, because Clemenson was Native American. This was the only sale of the three in which Clemenson was involved.² Brief of Appellant, at 9. And it was only during a subsequent purchase on March 29, 2013, that Nguyen was told – by Detective Cook – that the purchases were illegal, weakening any entrapment defense *from that date on*. See RP 81.

Because one or more jurors could have entertained reasonable doubt whether Nguyen unlawfully trafficked in shellfish on

¹ Although conceding that Nguyen denied any purchase on January 4, 2013, the State constructs an elaborate chain of inferences from which jurors may nonetheless have concluded the purchase occurred. See Brief of Respondent, at 17. The point remains, however, jurors could easily have entertained doubt regarding proof of this particular transaction.

² The State notes that, at one point during Nguyen's testimony, he appears to claim that, not only had Clemenson revealed himself to be Native American, Cook also claimed to be Native American. Brief of Respondent, at 18 (citing RP 159). But Cook then took the stand and denied ever claiming such heritage. See RP 166. There was no similar denial from Clemenson, once again highlighting the differences in proof between what occurred January 4, 2013, and what occurred months later on the other two dates.

January 4, 2013, reversal is the proper course. See State v. Kitchen,
110 Wn.2d 403, 405-406, 756 P.2d 105 (1988).

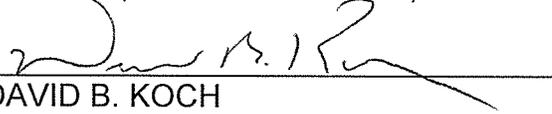
B. CONCLUSION

For the reasons argued in the opening brief and above, this
Court should reverse Nguyen's conviction.

DATED this 22nd day of June, 2016.

Respectfully Submitted,

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