

FILED
April 22, 2016
Court of Appeals
Division I
State of Washington
NO. 73756-2-I

IN THE COURT OF APPEALS – 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 Dave Needy, Judge

RESPONDENT’S BRIEF

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I. SUMMARY OF ARGUMENT

Phoung Nguyen was charged with one count of Trafficking in Shellfish in the First Degree for making three purchases of large amounts of crabs without a license. Each transaction had a value that exceeded \$250. Nguyen's defense at trial was entrapment. The jury convicted Nguyen.

On appeal Nguyen contends that since Nguyen was charged with a single count, a jury might not have been unanimous as to his conduct.

However, the shellfish trafficking statute provides for aggregation of conduct. Given the permissible statutory aggregation, there was sufficient evidence presented to support a single count. In addition, each transaction here was for in excess of \$250 dollars' worth of crab and Nguyen's defense was entrapment. Thus, given the evidence presented any error was harmless beyond a reasonable doubt since, the verdict must have been unanimous.

For those reasons, Nguyen's conviction must be affirmed.

II. ISSUES

1. Does Trafficking in Shellfish in the First Degree permit aggregation of purchases?
2. Where a statute permits aggregation of transactions, is the issue of juror unanimity implicated?

3. Where each purchase was for more than \$250 worth of crab, and the defense was entrapment, could the jury have failed to be unanimous?
4. Given each purchase was for more than \$250 worth of crab and the defense of entrapment, was any error in aggregation of multiple transactions harmless beyond a reasonable doubt?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On March 31, 2015, Phuong Nguyen was charged with a single count of Trafficking in Fish, Shellfish or Wildlife in the First Degree alleged to have occurred on or about and between July 28, 2012, and August 3, 2012. CP 48-9. It was alleged that Nguyen illegally purchased crab from one undercover officer four times and from another two times. CP 3-5.

On May, 27, 2015, a 3.5 hearing was conducted. RP 5. All of Nguyen's statements to officers were held to be admissible.¹

On June 8, 2015, Nguyen proceeded to trial. RP 38. That day the State filed an amended information which corrected that the charge was Class B felony instead of a class C felony. CP 1, 6, RP 63-4.

¹ Given the single report of proceedings, the State will refer to the verbatim report of proceedings using the note "RP: The hearings in this case in that report are as follows:

May 27, 2015,	3.5 Hearing	Pages 5-38
June 8, 2015,	Trial day 1	Pages 38-49
June 9, 2015	Trial day 2	Pages 50-213
July 2, 2015	Sentencing	Pages 213-219.

On June 9, 2015, the jury found Nguyen guilty as charged. CP 63.

On July 2, 2015, the trial court sentenced Nguyen to 20 days of jail time with 5 days served as 40 hours of community service work and the remaining 16 days to be served as jail alternatives. RP 217, CP 34-44.

On July 24, 2015, Nguyen timely filed a notice of appeal. CP 50-61.

2. Summary of Trial Testimony

On June 9, 2015, Julie Cook of the Department of Fish and Wildlife testified she had worked for the department for twenty-four years and had been a detective for three years. RP 67. Cook was involved in an investigation of the purchase of illegal Dungeness crab. RP 67-8.

Cook had contact with the defendant, Phuong Nguyen, in January, 2013. RP 68. Cook was assisting Detective Clemenson with a sale of crab at Diamond Nails, a nail salon, in Sedro Woolley, Washington. RP 69. Nguyen was the owner of the salon. RP 69. By the time of trial, Clemenson was on deployment in Afghanistan. RP 71. Clemenson and Cook arrived at the back alley to the business and Clemenson called Nguyen who walked out the front door and went behind the building to the alley. RP 70. Clemenson unloaded a garbage can which had 88 Dungeness crabs that he and Nguyen carried into the back door of the salon. RP 70-1. The crabs had been at a live storage facility in Snohomish County. RP 71. 57 of the crab were under the six and a

half quarter inch legal size for Dungeness crab. RP 71.

Cook stayed in the car playing the role of wife or girlfriend so she could do a future transaction. RP 77. When Clemenson came out with Nguyen, Nguyen started to grab a second garbage can intended for a different sale. RP 77-8. Nguyen then asked Clemenson for more crab. RP 78. Clemenson gave Cook \$140, which was based on a price of \$2 per crab, but rounded down because some crab were small and some were dead. RP 78. The crab died in transit which is common. RP 119.

The purchase by Nguyen was not legal because in commercial quantities like those purchased by Nguyen, he would have to have been a licensed wholesale dealer who would have had to document the catch. RP 72. Documents showing that Nguyen was not a licensed wholesale dealer in 2012 and 2013 were admitted. RP 73-4. The sales by Nguyen were not authorized by the Department of Fish and Wildlife. RP 74.

In 2013, the legitimate wholesale dealer price from crab was between \$3.50 and \$6.00 a pound. RP 74. In early 2013, the wholesale value was \$3.50 to \$4.00 a pound. RP 78. A crab weighs a pound and a half to two pounds. RP 78. The retail price would have been double the wholesale price. RP 79.

By March of 2013, Cook had taken over the investigation. RP 79. On March 29, 2013, Cook called Nguyen on his cell phone and asked Nguyen if

he wanted to buy more crab. RP 79-80. Nguyen said he would check with a friend and call back. RP 80. Nguyen called back twenty minutes later and told Cook to bring the crab to Diamond Nails. RP 80. Cook collected about seventy crabs, which included some undersized crab, from a Bellingham storage facility and drove them to Diamond Nails in Sedro Woolley. RP 81. Cook met Nguyen in the back alley and they carried the crab into the back door of the salon where there was a crab cooker. RP 81.

Nguyen asked where Clemenson was and Cook told Nguyen he had gotten in trouble for selling crab. RP 81. Nguyen asked Cook if she was Clemenson's wife, and Cook said she was his girlfriend. RP 81. Cook told Nguyen it was illegal to sell the crab and asked Nguyen not to say anything to anybody because she did not want to get in trouble. RP 81. Nguyen said he did not know it was illegal, he did not care if it was illegal or not, and that he buys from Indians all the time, claiming Clemenson was an Indian. RP 82.

Cook went out in the alley to wait to get paid. RP 82. Nguyen paid Cook in cash. RP 82. Nguyen paid \$2.00 per crab but just for sixty crabs because of small or dead crabs. RP 82-3. At the time, the wholesale price for crab was still around \$4.00 a pound. RP 82.

Cook contacted Nguyen again on August 3, 2013. RP 83. Nguyen called back a short time later and said he wanted to buy crab. RP 83. Cook

collected 84 crabs from a Snohomish County live storage facility and went to Diamond Nails. RP 84. Again some of the crabs were undersized. RP 84. Cook video recorded the transaction. RP 84. The crabs were in a cooler and the crabs inside would weigh over a hundred pounds so Nguyen had to help Cook carry the cooler. RP 86. Cook agreed to leave the cooler because Nguyen said he would give it back the next time Cook came to sell him crab. RP 87. Nguyen paid Cook \$160 cash for the crab. RP 87.

Cook asked Nguyen what he was going to do with the crab, and he said they had a lot of parties. RP 87.

After the August transaction, Nguyen called Cook three separate times leaving messages asking for more crab. RP 88. Each transaction was in cash. RP 88. The cash from the transactions was admitted. RP 89-96.

Each time Cook spoke with Nguyen, they spoke English and he never appeared to have trouble understanding her. RP 88.

Cook never did anything to induce Nguyen to purchase the crab. RP 120.

Officer John Ludwig, another Fish and Wildlife detective, testified about his interview of Nguyen on January 7, 2014. RP 121-2. Ludwig went to Diamond Nails in Sedro Woolley with another detective to talk to Nguyen about black market crab purchases. RP 122-123. When Ludwig told Nguyen what he was there to speak with him about, Nguyen immediately started

talking. RP 123, 136. Ludwig had to stop Nguyen and advise him of his *Miranda* rights. RP 124-5, 136. Nguyen said he understood his rights and agreed to talk. RP 126-7.

Ludwig asked Nguyen who he had purchased crabs from, and Nguyen stated Chris. RP 130. Nguyen initially said that Chris was the only one, but then later admitted purchases from a man named Jack one time. RP 130-1. Nguyen said he bought 45 crabs from Jack and did not get receipt. RP 131.

Nguyen was questioned about purchases from Chris' wife, after which Nguyen admitted making two purchases from her. RP 132. Nguyen claimed he started buying crabs in 2012, and bought a total of five times. RP 132. Nguyen claimed to Ludwig that Chris and Cook had never told him it was illegal and that Chris had said it was legal because he was an Indian. RP 132-3. Nguyen said he gave the crab to customers, ate some himself, or shared with other nail salon owners at parties. RP 132. Nguyen claimed he paid three dollars per crab. RP 132-3.

Ludwig never had any trouble understanding Nguyen. RP 141-2. Nguyen had an intelligent conversation with Ludwig. RP 142.

Nguyen testified on his own behalf. RP 154. Nguyen said he came to the United States sixteen years before at age thirty-one. RP 154. Nguyen said he did not study English before he came to the United States, only learned to

speaking English after he arrived and only was able to write a few English words. RP 155. Nguyen testified that in Vietnam, there were no limitations on buying crab. RP 158-9.

Nguyen testified two officers came and asked him questions in English. RP 156. They asked if he had bought crab from Chris. RP 157. Nguyen claimed he thought the officers were coming to ask questions “to collect evidence to prosecute the other guy.” RP 158.

Nguyen said that he thought the people he was buying crab from were Native Americans and claimed they said they had the right to catch the crab. RP 159. He said he bought lots of time, including twice from Cook and that they made appointments with her other times but she did not show. RP 159, 162.

Nguyen said Cook “said she was the wife of Chris.” RP 160. He said they used everyday words when they spoke and that they spoke about how many crabs there were, how much it would cost, and that some were dead. RP 160. He claimed Cook did not tell him it was illegal to buy the crabs. RP 160, 162. He also claimed Chris Clemenson had said it was legal to buy them. RP 160.

On cross examination, Nguyen said he never got receipts for any of the purchases and never paid for taxes on the crabs. RP 163. He also admitted to making a purchase from a man named Jack. RP 163-4.

On rebuttal, Cook described that her conversations with Nguyen involved more than everyday words. RP 165. They spoke about where Chris was, that Chris got in trouble for the crab, and that Cook claimed to be Chris's girlfriend instead of his wife. RP 165. She also described that on one occasion, Nguyen had called her phone after she left and said he had paid her too much money. RP 165. She also testified that she never agreed to meet with him and then did not show up. RP 165.

3. Jury Instructions

The jury was instructed based that in order to convict the defendant, the state had to prove the following elements:

- (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. There was definition of shellfish.

Dungeness crab is defined as shellfish.

CP 18. There was an instruction regarding value.

“Value” means the wholesale market value of the shellfish at the time and in the approximate area of the act. If no wholesale value can be ascertained, then the value shall be

the fair market value of the shellfish at the time and in the approximate area of the act.

CP 17. Trafficking was defined.

“Trafficking” means offering, attempting to engage, or engaging in sale, barter or purchase of fish, shellfish, wildlife, or deleterious exotic wildlife.

CP 16. The defense obtained an instruction on the defense if entrapment.

Entrapment is a defense to a charge of Unlawful Trafficking in Shellfish in the First Degree if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.

The defense is not established if the law enforcement officials did no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.

The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty Unlawful Trafficking in Shellfish in the First Degree.

CP 20.

IV. ARGUMENT

1. Since trafficking in shellfish permits aggregation, there was sufficient evidence to support conviction on a single count.

The elements of the offense required the State to prove the following:

- (1) That on or between January 4, 2015, and August 3, 2015, 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 more than two hundred and fifty dollars or more, and
- (5) That any of these acts occurred in the State of Washington.

CP 19. The instructions to the jury specifically provided a time frame for Nguyen's conduct that covered all three dates.

The applicable statute permits the aggregation of multiple transactions to establish trafficking in shellfish in the first degree.

Unlawful trafficking in fish, shellfish, or wildlife—Penalty.

(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 the 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 (bold emphasis added).

In *State v. Yon*, 159 Wn. App. 195, 246 P.3d 818 (2010), the Court of Appeals reversed the defendant's first degree trafficking conviction based upon an the aggregation under RCW 77.15.260(2)(b) because of the limitation of RCW 77.15.030 that each animal was a separate offense.²

Subsequently RCW 77.15.030 was revised to permit aggregation for multiple animals by the adding the provision "Except as provided in RCW 77.15.260(2)(b)."

Except as provided in RCW 77.15.260(2)(b), where it is unlawful to hunt, take, fish, possess, or traffic in big game or protected or endangered fish or wildlife, then each individual animal unlawfully taken or possessed is a separate offense.

RCW 77.15.030, 2012 Laws of Washington, ch. 176, § 6.

² The remedy provided by the Court of Appeals in *Yon*, was to enter a conviction for the lesser included offense of Trafficking in Wildlife in the Second Degree, since by necessity the jury had found all the elements of the lesser offenses. *State v. Yon*, 159 Wn. App. 195, 202-03, 246 P.3d 818 (2010).

Here, Nguyen was charged under RCW 77.15.260(2) which implies application of both the first degree provisions of RCW 77.15.260(2)(a)(i) and (ii) and the aggregation provision of RCW 77.15.260(2)(b). CP 6.

Since aggregation is permitted, the evidence from different purchases supports the defendant's conviction for a single count of Trafficking in Shellfish in the First Degree. RCW 77.15.260(2)(a)(i).³

This was a part of a common scheme or plan involving the same crime.

A defendant acts pursuant to a common scheme or plan when he or she (1) commits several crimes, each of which constitutes a part of his or her larger plan or (2) he or she develops a plan and carries it out multiple times to achieve distinct, but substantively similar, crimes. *State v. Gresham*, 173 Wn.2d 405, 421-22, 269 P.3d 207 (2012) (holding that evidence of a defendant's prior bad act is admissible to show he or she acted with a common scheme or plan under ER 404(b)).

State v. Rivas, 168 Wn. App. 882, 889, 278 P.3d 686 (2012).

Nguyen acknowledged on appeal that the prosecutor argued to the jury that guilt flowed from aggregation of the three incidents. Brief of Appellant at page 8, citing RP 190-2. Despite being aware of the aggregation by the prosecutor, the defense failed to raise the issue below.

³ Without recognizing that each purchase exceeded \$250, essentially Nguyen is arguing that even though the prosecutor could have charged three separate felonies, the prosecutor's choice to be lenient by aggregating the purchases in one count caused the claimed error raised for the first time on appeal.

Since the prosecutor argued aggregation and aggregation is statutorily permitted, the case law cited by Nguyen to multiple acts cases is inapplicable. To determine whether a continuing course of conduct exists for purposes of requiring a *Petrich* instruction, for charges which do not include an aggregation provision, a court will “evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose.” *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518 (2010). Here the applicable statute includes an aggregation provision, the purchases involve the same individuals, the same location, the same product and the same ultimate purpose. Although the purchases were separated by months, they were part of ongoing conduct.

Since juror unanimity, which implicates a manifest error affecting a constitutional right, is inapplicable in the aggregation situation, the failure to argue against aggregation below precludes appellate review. RAP 2.5 (a)(3).

- 2. Where each transaction separately amounted to trafficking in the first degree, and the defense to all charges was entrapment, the jury must have been unanimous in convicting the defendant and any error is harmless beyond a reasonable doubt.**

The evidence at trial supported only that each date Nguyen purchased the Dungeness crab, a felony was committed. Detective Cook’s

testimony about the wholesale price of crab was uncontested.

In 2013, the legitimate wholesale dealer price from crab ranged between \$3.50 and \$6.00 a pound. RP 74. In early 2013, the wholesale value was \$3.50 to \$4.00 a pound. RP 78. A crab weighs a pound and a half to two pounds. RP 78. The retail price would have been double the wholesale price. RP 79.

In addition, a specific definition of wholesale value was provided.

“Value” means the wholesale market value of the shellfish at the time and in the approximate area of the act. If no wholesale value can be ascertained, then the value shall be the fair market value of the shellfish at the time and in the approximate area of the act.

CP 17.

Cook’s testimony about the number and weight of the crabs was also uncontested.

In, January, 2013, Nguyen arranged to buy 88 crabs. RP 68, 70-1. He paid \$140 based upon a price of \$2 per crab. RP 78. Even assuming just 70 crabs due to dead loss and small, at a size of one and a half pounds, and at the low-range of the price of \$3.50 per pound, this would have still been \$367.50⁴ worth of crab in the January transaction.

⁴ 70 crab x 1.5 pounds x \$3.50 per pound = \$367.50.

On March 29, 2014, Nguyen bought 60 crabs. RP 82-3. At the time the price was \$4.00 per pound for crab. RP 82-3. This transaction had a wholesale price of \$360.00.⁵

On August 3, 2012, Nguyen bought and paid for 70 crabs at \$2 per crab. RP 83-4, 87. At the minimum price range that year of \$3.50 per pound, this transaction also had a wholesale value of \$367.50.⁶

Thus, the evidence and instructions supports that all transactions exceeded the statutory \$250 level for a first degree trafficking charge under RCW 77.15.260(2)(a)(i).

The failure to give a multiple acts unanimity instruction is reviewed under the constitutional harmless error standard. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). Under the standard, the error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *State v. Ashcraft*, 71 Wn. App. 444, 466, 859 P.2d 60 (1993). An error is not harmless if a rational trier of fact could have had a reasonable doubt one of the incidents established the crime beyond a reasonable doubt. *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990).

⁵ 60 crab x 1.5 pounds x \$4.00 per pound = \$360.00.

⁶ 70 crab x 1.5 pounds x \$3.50 per pound = \$367.50.

Nguyen contends that the jury may not have been unanimous both because Nguyen denied the purchase on January 4, 2013, and because the defense of entrapment was stronger for that date. Brief of Appellant at pages 8-9.

Nguyen contends that at trial he denied buying crab from Chris on January 4, 2013. In fact, what Nguyen was asked was if “on January, 4th you bought crab from Chris and Julie, who would be Detective Cook; correct?” RP 162. He answered no, but when asked about the next transaction on March 29th, 2013, he said “I think on that day there was her and the other man as well.” RP 162. There was no evidence that Cook was with other agents on the dates of transactions other than January 4, 2013. Thus, the record shows Nguyen was confused on dates and may have also answered “no” since the purchase on January 4th was from “Chris” and he was asked if the purchase was from both. This is accentuated by his testimony that he “asked Chris, is it legal to be buying this? And he said yes, it’s legal.” RP 160. And Ludwig testified that Nguyen admitted sales to Chris Clemenson. RP 130-1. Taken in context of his other testimony and the other evidence, Nguyen did admit the sales to Chris Clemenson on January 4, 2013.

And as opposed to claiming the entrapment applied solely to the transaction involving Clemenson, Nguyen’s testimony claimed entrapment

by both based upon the same representations by Chris Clemenson, who he claimed “said she was the wife of Chris.” RP 160.

Q. Has anyone ever come to your work or home in the United States and offered to sell you seafood?

A. Just these people. They said that they were Native Americans, and they said that they had the right to -- to catch all different kinds, and they gave me their telephone number and said that if I needed it, to call them, not to get it anywhere else.

RP 159.

Contrary to Nguyen’s contentions, Nguyen admitted all transactions, and the entrapment defense applied equally to all offenses. Any error was harmless beyond a reasonable doubt.

V. CONCLUSION

For the foregoing reasons, Phoung Nguyen’s conviction for Trafficking in Shellfish in the First Degree must be affirmed.

DATED this 22nd day of April, 2016.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
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Skagit County Prosecutor’s Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: DAVID B. KOCH, addressed as NIELSEN BROMAN & KOCH PLLC, 1908 E Madison Street, Seattle, WA 98122-2840. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 22nd day of April, 2016.



KAREN R. WALLACE, DECLARANT