

COURT OF APPEALS

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No. 34921-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Darrell Johnson,

Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00590-7

The Honorable Judge David Foscue

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: 740-1650

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ASSIGNMENTS OF ERROR

1. Mr. Johnson was denied his constitutional right to a unanimous jury.
2. The trial court erred by failing to give a unanimity instruction.
3. The trial court erred by failing to properly determine Mr. Johnson's criminal history and offender score.
4. The prosecutor failed to establish that Mr. Johnson had criminal history.
5. The trial court erred by entering Finding of Fact No. 2.2, which set forth Mr. Johnson's criminal history as follows:

Crime	Date Of Sent	Sentencing Court (Court and State)	Date Of Crime	Adult or Juv	Type Of Crime
PSP 1		Grays Harbor County Cause No 05-1-210-0	03/01/05	A	F
VUCSA		Clark County Cause No 93-1-915-1	08/02/93	A	F
THEFT 2		Whatcom County Cause No 81-1-281-4 *Washed Out			
FORGERY		Whatcom County Cause No 81-1-301-9 *Washed Out			
THEFT 1		Whatcom County Cause No 83-1-301-9			
CRIMINAL IMPERSONATION		Clark County District Court Cause No 980231			
DWLS 1*		Clark County District Court Cause No 1993			

CP 4.

6. The trial court erred by including an alleged 1993 VUCSA charge in Mr. Johnson's offender score.
7. The trial court erred by sentencing Mr. Johnson with an offender score of 3.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Darrell Johnson was charged with one count Trafficking in Stolen Property in the First Degree. At trial, the prosecution presented evidence that Mr. Johnson sold motorcycle parts to one person, and traded a guitar at a music store. The court did not give a unanimity instruction, and the state did not elect which episode formed the basis for the charge. The jury returned a general verdict finding Mr. Johnson guilty.

1. Did the absence of a unanimity instruction violate Mr. Johnson's constitutional right to a unanimous verdict? Assignments of Error Nos. 1, 2.

2. Did the prosecution's failure to elect a single incident as the basis for the charge violate Mr. Johnson's constitutional right to a unanimous verdict? Assignments of Error Nos. 1, 2.

At sentencing, the prosecuting attorney alleged that Mr. Johnson had numerous prior convictions. Mr. Johnson did not admit or acknowledge any prior convictions. No presentence report was requested or submitted, and the prosecution did not offer any evidence supporting its allegations of prior convictions. Despite this, the court found that Mr. Johnson two prior felonies, as well as other criminal history that washed. The court determined that Mr. Johnson had an offender score of three. It did not explain how it reached this result.

3. Did the trial court err by failing to properly determine Mr. Johnson's criminal history? Assignment of Error No. 3-7.

4. Did the trial court err by failing to properly determine Mr. Johnson's offender score? Assignment of Error No. 3-7.

5. Did the trial court err by sentencing Mr. Johnson with an offender score of three? Assignment of Error No. 3-7.

6. Did the prosecuting attorney fail to establish that Mr. Johnson had criminal history? Assignment of Error No. 3-7.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Darrell Johnson was charged with one count of Trafficking in Stolen Property in the First Degree in Grays Harbor County Superior Court. CP 1-2. At his jury trial, which began on January 10, 2006, the prosecution presented evidence that Mr. Johnson sold motorcycle parts to one person, and traded a guitar at a music store. RP 2-64.

The court did not give a unanimity instruction to the jury, and the prosecutor did not elect which episode formed the basis for the charge. Supp. CP; RP 67, 71-75.

Mr. Johnson was convicted as charged. CP 3, Supp. CP.

At sentencing, the state filed a Statement of Prosecuting Attorney, alleging that Mr. Johnson had criminal history. RP 91; Supp. CP. The prosecutor told the court that Mr. Johnson had an offender score of three, but did not present any evidence to establish his criminal history. The court found that Mr. Johnson had two felony convictions (as well as other convictions that washed). The court apparently included Mr. Johnson's alleged 1993 VUCSA conviction, but did not find any subsequent criminal history that would prevent this offense from washing out. CP 4; RP 91-96. The court counted two of Mr. Johnson's alleged prior convictions and sentenced him with an offender score of three. CP 3-10. The court did

not explain its calculations on the record. This timely appeal followed.
CP 14.

ARGUMENT

I. THE TRIAL COURT'S FAILURE TO GIVE A *PETRICH* INSTRUCTION DENIED MR. JOHNSON HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. King*, 75 Wn. App. 899 at 902, 878 P.2d 466 (1994), *review denied*, 125 Wn.2d 1021 (1995). Where the state charges one count of criminal conduct and presents evidence of more than one criminal act, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any given single criminal act. *State v. Kitchen*, 110 Wn.2d 403 at 411, 756 P.2d 105 (1988).

In order to ensure jury unanimity, the state must elect a single act upon which it will rely for conviction, or the jury must be instructed that all must agree as to what act or acts were proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566 at 569, 683 P.2d 173 (1984); *State v. Brooks*, 77 Wn.App. 516 at 521, 892 P.2d 1099 (1995). Failure to follow *Petrich's* protections is constitutional error that raises "the

possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Kitchen* at 411. Because of this, the error can be raised for the first time on appeal, and is presumed prejudicial. *State v. Greathouse*, 113 Wn.App. 889 at 916, 56 P.3d 569 (2002); *Kitchen* at 411. The jury verdict will be overturned unless no rational juror could have a reasonable doubt as to any of the incidents alleged. *Kitchen, supra. at* 411.

In this case, the prosecution presented evidence that Mr. Johnson trafficked in stolen property on two occasions. First, the state claimed that Mr. Johnson sold stolen motorcycle parts to David Shaver. RP 19, 23-25. Second, the state claimed that Mr. Johnson traded a stolen acoustic guitar for a new guitar at Rosevear’s Music Center in Aberdeen. RP 16-17, 38-41, 61. The court did not give a unanimity instruction, and the prosecutor addressed both episodes in closing. RP 71-75, 82-84.

Because a rational juror could have entertained a reasonable doubt as to either incident, the conviction must be reversed and the case remanded for a new trial. *Kitchen, supra; Greathouse, supra.*

II. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MR. JOHNSON'S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing "before imposing a sentence upon a defendant." Furthermore, "[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record..." RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and "shall include, where known, for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration." RCW 9.94A.030(13). To establish criminal history, "the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2). Acknowledgement includes "not objecting to information stated in the presentence reports." RCW 9.94A.530(2). Presentence reports are documents prepared by the Department of Corrections (at the court's request) under RCW 9.94A.500.

Illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 472 at 477, 973 P.2d 452 (1999).

The appellate court reviews the calculation of an offender score de novo.

State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004).

A trial court's findings are reviewed for substantial evidence.

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Rogers Potato*, at 391; *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005). It is more than "a mere scintilla" of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003).

In this case, the state filed a "Statement of Prosecuting Attorney," which alleged that Mr. Johnson had numerous prior convictions. Supp. CP. Mr. Johnson did not admit or acknowledge any of these alleged prior convictions; nor did the prosecuting attorney offer any proof to establish them. RP 91-96. No presentence report was ordered or prepared under RCW 9.94A.500, and so Mr. Johnson's failure to object to the prosecutor's allegations cannot be held against him under RCW 9.94A.530(2).

Despite the absence of any evidence, the judgment and sentence included a finding that Mr. Johnson two prior felony convictions (as well as other offenses that “washed” and were not included in the offender score.) CP 4. There is no indication in the record of how the court arrived at this finding. RP 91-96. Because the state produced no evidence establishing these convictions, and because Mr. Johnson never admitted or acknowledged them, the court’s finding is unsupported and must be stricken. *Rogers Potato, supra*.

Despite finding only two prior felonies, the court inexplicably calculated Mr. Johnson’s offender score as three, and determined his standard range to be 13-17 months. CP 4. The court did not indicate how it reached this result. RP 91-96. Given his two prior felonies and the washout period for the alleged 1993 VUCSA offense, Mr. Johnson should have been sentenced with an offender score of (at most) one, not three. *See* RCW 9.94A.525(2). Even if the alleged 1993 VUCSA were properly included, the offender score should only have been two rather than three.

For all these reasons, the sentence must be vacated, and the case remanded for resentencing.

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial. In the alternative, the sentence must be vacated and the case remanded for a resentencing.

Respectfully submitted on December 6, 2006.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Darrell Johnson, DOC # 279026
Stafford Creek Corrections Center
H-1, B-43
191 Constantine Way
Aberdeen, WA 98520

06 DEC 11 10:31 AM '06
U.S. MAIL
FIRST CLASS PERMIT NO. 1001
OLYMPIA WA 98501

and to:

Grays Harbor Prosecuting Attorney
102 West Broadway Ave., Room 102
Montesano, WA 98563-3621

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 6, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 6, 2006.



Jodi R. Backlund, No. 22917
Attorney for the Appellant