

No. 35612-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

JASON D. WALKER,  
Appellant.

STATE OF WASHINGTON  
BY: [Signature]  
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COURT OF APPEALS  
DIVISION II

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE F. MARK McCAULEY, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTERSTATEMENT OF THE CASE**

### **Procedural History.**

The defendant was originally charged by Information with Theft in the First Degree, RCW 9A.56.030, alleged to have occurred on or about February 26, 2004. Subsequently, the Information was amended to add a second count charging Trafficking in Stolen Property in the First Degree, RCW 9A.82.055, alleged to have occurred on or about the same date, February 26, 2004. The matter was tried to a jury commencing on July 17, 2006. The defendant was found guilty of both counts of the Amended Information.

### **Factual Background.**

On the evening of February 25, 2004, the defendant contacted his friend, Tony McGraw. The defendant asked McGraw if he would give him a ride up the Waterline Road the following day to obtain "his wood." (RP 54-55). On the morning of February 26, 2004, McGraw drove the defendant, Michael Kelly, and Brian Boggs to a cedar theft site, a distance up the Waterline Road. (RP 56). McGraw and his five-year-old son remained at the site for a time while the others worked. The defendant and Brian Boggs split and packed cedar blocks. Michael Kelly stacked them. (RP 57-58). The theft site was located on United States Forest Service land. No one had permission to be cutting or removing the wood. (RP 15).

On the morning of February 26, 2004. Captain Jay Webster and Officer Jason Haberberger of the United States Forest Service were on patrol. They decided to go up the Waterline Road to investigate reports of the theft of old growth cedar. (RP 15). As they walked down the road on foot they saw fresh vehicle tracks. They could hear the sound of wood being split with a mallet and a froe from a distance of about 150 yards. (RP 15-16).

They walked to the area where the sound was coming from and saw three individuals. One was splitting the wood (Walker), one was bringing the blocks to the splitter (Boggs), and the other (Kelly) was stacking the split wood. Webster and Haberberger stood and watched for about half an hour. (RP 17). They noticed a full size Ford Bronco parked at the site. (RP 17). Webster noted that a cable had been strung and a system set for yarding the blocks. (RP 18). At trial, Webster identified the defendant as the individual he observed splitting the shake blocks. (RP 17).

Webster and Haberberger walked back out to their vehicle and drove to the intersection of Highway 101 and Waterline Road where they waited for other officers who they had summoned to the scene. While they were waiting, the Ford Bronco that they had seen at the cutting site drove out. They contacted the driver who was identified as Tony McGraw. They had earlier seen him sitting with a young child at the cutting site.

(RP 19-20, 68-69). McGraw told them that the others were still at the cutting site. (RP 69).

A group of officers then went back up the Waterline Road. They were within several hundred yards of the cutting site when they saw the defendant, Kelly and Boggs walking out. (RP 69). The officers identified themselves and yelled "Police. Stop." The defendant and Michael Kelly were arrested at the site. (RP 21). Boggs managed to run off. The defendant was found by a tracking dog, hiding behind a large tree. (RP 71).

The defendant was interviewed by Jason Haberberger at the cutting site following his arrest. He told Haberberger that he had heard of some cedar "out there" and that he had come out to cut blocks. (RP 126). The defendant related that he met up with Brian Boggs and Michael Kelly. The three of them then went to Tony McGraw's residence where they obtained a ride to the cutting site. (RP 126). He told Haberberger that he was going to cut about \$800 worth of blocks which he could later sell to raise money. He told Haberberger that he was going to cut the blocks that day and then come back later with a pickup truck and a wheelbarrow to load the blocks and sell them at a mill. (RP 126-127).

At the scene, officers found a relatively sophisticated system for cutting and loading shake blocks. A cable had been strung in what the officer described as a "skyline system" for loading slings of blocks. A winch and rope were at the site for hoisting the blocks. (RP 23-24, 26-27).

Officers seized a number of items from the cutting site, including tools such a mallet, a froe, and a peevey, an instrument used for moving logs or pieces of a tree. (RP 74). Officers discovered a repair box containing various items such as toilet paper, a flashlight, a multi-purpose tool, spark plugs and files for the chainsaw. (RP 75). Officers located clothing such as saw chaps. (RP 75). They also located cable and rope equipped with hooks. (RP 75-76). Small bags of food were found hidden under pieces of cedar bark. A container of water was also located. (RP 76-77). Significantly, they did not recover a chainsaw.

Investigation revealed that three separate trees were down at the site. One of the trees was identified as having been cut down within days of the arrest based upon the condition of the tree. (RP 32). A stack of 24 inch “rounds” that had been cut out of the tree was located nearby. These were ready for processing with the mallet and froe into blocks. (RP 33).

Investigation revealed that the defendant had sold cedar to a mill operated by Jose Leguizamo on February 23, 2004, and again on February 25, 2004. (RP 105). He showed Leguizamo a permit that belonged to Don Malone. The permit allowed cedar salvage at a site located near Stafford Creek, south of Aberdeen. (RP 87-88). Neither Malone nor his employee, Miguel Gonzales, were acquainted with the defendant. Neither gave him permission to have the permit or use it connection with the sale of wood. (RP 89).

The wood recovered at the cutting site was inventoried by Raymond Hershey, a forest industry technician for the United States Forest Service who is responsible for commercial timber sales on the Olympic National Forest. By his calculation, there were saw logs that had not yet been cut into shake blocks and shake blocks at the site having total value in excess of \$7,500. (RP 112-114).

### **RESPONSE TO ASSIGNMENTS OF ERROR**

- 1. The defendant's convictions for Theft in the First Degree and Trafficking in Stolen Property in the First Degree do not violate double jeopardy. (Response to Assignment of Error No. 1)**

Double jeopardy protects against multiple punishments for the same offense. Whalen v. U.S., 445 U.S. 684, 688, 63 L.Ed. 2d 715, 100 S. Ct. 1432 (1980). A defendant's double jeopardy rights are violated only if he or she is convicted of offenses that are identical both in fact and in law. State v. Calle, 125 Wn.2d 726, 777, 888 P.2d 155 (1995). If each offense, as charged, includes elements not included in the other, then the offenses are different and multiple convictions can stand. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983):

In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

Our courts have essentially enacted the rule as set forth in Blockburger v. United States, 284 U.S. 299, 304, 76 L.Ed.2d 306, 52 S. Ct. 180 (1932):

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not.

The Blockburger and Vladovic “same evidence” test is a rule of statutory construction which serves as a means to discern the Legislature’s purpose. Calle, 125 Wn.2 at 778. This rule applies unless there is a clear indication that the Legislature did not intend to impose multiple punishments. State v. Gohl, 109 Wn.App. 817, 821, 37 P.3d 293 (2001). There may be circumstances where it is clear that the Legislature did not intend multiple punishments. See State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979). Such is not the case here.

There is no legislative history or historical development of the statutes to demonstrate that the court intended only punishment for one of the two charged offenses. Indeed, our courts have previously held that a defendant may be convicted for both theft and trafficking in stolen property even when the two crimes arise from the same course of conduct. State v. Michielli, 132 Wn.2d 229, 237, 937 P.2d 587 (1997). Likewise, double jeopardy does not prohibit convictions for both the theft of property

and later possession of the same stolen property. State v. Melick, 131 Wn.App. 835, 129 P.3d 816 (2006).

The elements of the two offenses are different. Proof of one would not necessarily prove the other. To commit Theft in the First Degree one must, with intent to deprive, wrongfully obtain (“steal”) the property of another of a value in excess of \$1500. The crime of theft herein was completed once the defendant exercised unlawful control over the trees at the site by cutting down the tree or removing wood from it. State v. Reese, 90 Wn.App. 513, 518-19, 957 P.2d 232 (1998).

A person commits the crime of Trafficking in Stolen Property in the First Degree when he knowingly trafficks in stolen property. This includes the sale or transfer of stolen property to another, as well as possession of stolen property with intent to sell or transfer such property. RCW 9A.82.010(19). This is not a situation in which proof of one offense necessarily proves the other. State v. Potter, 31 Wn.App. 883, 887-88, 645 P.2d 60 (1982). The two offenses herein target different behavior and do not define a single crime. See State v. Bugen, 33 Wn.App. 1, 651 P.2d 240 (1982). These offenses are not the same “... in law and fact.” Gohl, supra, 109 Wn.App. at 822. Unlike State v. Womac, Wash. Supreme Ct, #78166-4 (06-14-07), these offenses were not found by the trial court to be the same criminal conduct.”

Quite clearly, the offenses have different elements. Theft is the taking of the property of another with intent to deprive. A person may be

convicted theft without regard to whether he or she intended to later sell or transfer the property to another. Trafficking in Stolen Property, on the other hand, may be committed without regard to whether the defendant committed the original theft of the property. All that is required is that the defendant knowingly possessed the stolen property, with intent to sell or transfer the property to another. Michielli, 132 Wn.2d at 236. The two statutes punish very different conduct. One is aimed at the thief. The other is aimed at individuals who knowingly redistribute stolen property. State v. Michielli, supra, 132 Wn.2d at 234-35.

There has been no violation of the defendant's double jeopardy rights. This Assignment of Error must be denied.

**2. The trial court properly calculated the defendant's offender score. (Response to Assignments of Error 2, 3 and 4).**

**Defendant has waived any claim that the current offenses constitute same criminal conduct.**

Generally speaking, issues not raised at trial may not be raised for a first time on appeal. (RAP 2.5(a)). Application of the "same criminal conduct" rule involves both factual determinations and exercise of discretion by the trial court. Under such circumstances failure to raise an objection at the sentencing will constitute a waiver. State v. Nitsch, 100 Wn.App. 512, 519, 997 P.2d 1000 (2000).

This defendant raised no objection at sentencing to the calculation of the offender score. The facts, as set forth below, demonstrate that these two offenses do not constitute same criminal conduct. Any

attempt to now try to raise the issue for the time on appeal should be denied.

**The defendant's conviction for Theft in the Second Degree and Trafficking in Stolen Property in the First Degree do not constitute "same criminal conduct."**

RCW 9.94A.589 provides, in pertinent part, as follows:

(1)(a) Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

Our courts have recognized that the two offenses are not the "same criminal conduct" because they involve different criminal intent. State v. Michielli, 132 Wn.2d 229, 937 P.2d 587 (1997); State v. Strohin, 75 Wn.App. 301, 879 P.2d 962 (1994). In Michielli, the court outlined the facts as follows, Michielli, 132 Wn.2d at 236:

Under the alleged facts, Defendant stole three items from the residence where he was a renter by “wrongfully obtain[ing]... the property ... of another ... with intent to deprive him of such property [.]” RCW 9A.56.020(1)(a) (definition of theft). Knowing these items were stolen, he sold them to pawnshops. Selling “stolen property to another person” meets the definition of trafficking. RCW 9A.82.010(10). Defendant “knowingly traffic(ked) in stolen property[.]” RCW 9A.82.050(2).

The court in Michielli specifically held that the above facts did not constitute the same criminal conduct and that there was nothing in the Legislative intent that would preclude prosecution of the thief for both the theft and later trafficking in stolen property. Michielli, 132 Wn.2d at 237.

On the contrary, nothing in the trafficking statute precludes the statutes from applying to the thief who initially stole the property. Legislative intent is derived first and foremost from the language of the statute. *See In re Electric Lightwave, Inc*, 123 Wash.2d 530, 536, 869 P.2d 1045 (1994). When the words in a statute are clear and unequivocal, this court must apply the statute as written. *See King County v. Taxpayers of King County*, 104 Wash.2d 1, 5, 700 P.2d 1143 (1985). Under the plain language of the trafficking statutes, one who knowingly sells stolen property can be charged with trafficking, regardless of whether that person is the one who stole the property, and regardless of whether the person sells the property to a fence or an unsuspecting purchaser.

While the case at hand may differ from the facts in Michielli, the same principles apply. The intent involved for theft is simply an intent to

deprive. The intent involved for trafficking includes the additional element of intending to dispose of the property for sale to other persons. In the case at hand, there was even evidence that the defendant, on at least two occasions shortly before his arrest, had sold cedar on a stolen permit. Under these circumstances, it makes no sense to treat the offenses as same criminal conduct.

There is no basis for allegation that counsel was ineffective. In light of Michielli, there was no basis for defense counsel to raise a claim that these two offenses were same criminal conduct.

Likewise, the additional element of intent to sell or dispose of the property distinguishes the case at hand from those cases prohibiting punishment for both theft and possession of stolen property of the same property. State v. Hancock, 44 Wn.App. 297, 301, 721 P.2d 1006 (1986); Melick, *supra*, 131 Wn.App. at 840-41.

In Hancock, the court reasoned that the legislature did not intend to punish for theft and possession of the same property "...for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken." Hancock, 44, Wn. App at p. 301, citing to Melanovich v. U.S., 365 U.S. 551, 558, 5 L.Ed.2d 773, 81 S.Ct. 728 (1961). In the case at hand, the jury found that the possession was for the purpose of sale to another. The defendant may be punished for such differing conduct.

**CONCLUSION**

For the reasons set forth, the convictions must be affirmed.

Dated this 16 day of July, 2007.

Respectfully Submitted,

By: Gerald R. Fuller  
GERALD R. FULLER  
Chief Criminal Deputy  
WSBA #5143

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
IDENTITY

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No.: 35612-1-II

**DECLARATION OF MAILING**

**DECLARATION**

I, Barbara Chapman hereby declare as follows:

On the 17<sup>th</sup> day of July, 2007, I mailed a copy of the Brief of Respondent to Jodi R. Backlund; Backlund & Mistry; 203 Fourth Avenue East, Suite 404; Olympia, WA 98501-1189, and Jason D. Walker; 1549 Kirkpatrick Road; Humptulips, WA 98552, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman

STATE OF WASHINGTON  
BY RM

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

STATE OF WASHINGTON,  
Respondent,  
v.  
JASON D. WALKER,  
Appellant.

No.: 35612-1-II

**DECLARATION OF MAILING  
(CORRECTED)**

**DECLARATION**

I, Randi M. Toyra, hereby declare as follows:

On the 24<sup>th</sup> day of July, 2007, I mailed a copy of the Brief of Respondent to Jason D. Walker, 1549 Kirkpatrick Road, Hoquiam, WA 98550, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 24<sup>th</sup> day of July, 2007, in Montesano, Washington.

Randi M. Toyra