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No. 37668-7-II

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ALAN EARL SANT,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-03475-9
The Honorable Katherine Stolz, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. Alan Earl Sant's constitutional right to a unanimous jury verdict was violated when the State failed to present substantial evidence to support each alternative means of first degree trafficking in stolen property.

B. Issues Pertaining to the Assignments of Error

1. Where Alan Earl Sant was charged with eight alternative means of committing first degree trafficking in stolen property and the jury was similarly instructed, was Sant's constitutional right to a unanimous jury verdict violated by the State's failure to present substantial evidence to support each alternative means? (Assignment of Error 1)

II. STATEMENT OF THE CASE

Richard Bate is the owner and operator of Creative Ornamental Iron in the South Tacoma neighborhood. (03/03/08 RP 121)¹ On the morning of May 16, 2007, Bate and his employees discovered that several items had been taken from a truck parked in their fenced lot. (03/03/08 RP 121-22) One of the missing items

¹ Citations to the transcripts will be to the date of the proceeding followed by the page number.

was a plastic case containing an electric drill and several drill bits. (03/03/08 RP 123, 139) Bate discovered a hole cut into the fence next to where the truck was parked. (03/03/08 RP 124) Bate immediately called police to report the theft. (03/03/08 RP 123)

Several days later, Bate decided to canvass local pawn shops to see if any of the missing items had been acquired. (03/03/08 RP 136) Randy's Loan & Coin Shop, a pawn shop located about a mile from Bate's business, had a drill that Bate believed matched the drill taken from his lot. (03/03/08 RP 136-37, 158) Bate called Tacoma Police Detective Dave Hofner and reported his finding. (03/03/08 RP 137, 175)

Hofner went to the pawn shop and talked to the pawnbroker, Theodore Wilkinson. (03/03/08 RP 158, 165-66, 178) The drill case, the drill and the drill bits matched the one taken from Bate's lot. (03/03/08 RP 139, 152, 179-80) Wilkinson testified that a man and a woman came to his shop on May 17 and received a \$100 loan in exchange for the drill. (03/03/08 RP 158, 169) Theresa Sampson was listed as the customer on the pawn ticket. (03/03/08 RP 160)

Sampson testified that her boyfriend, Alan Earl Sant, brought home the drill and told her he had found it. (03/03/08 RP 7) Sant

also testified that he found the drill in the bushes on the morning of May 16. (03/04/08 RP 13-14) They went together to pawn the drill on May 17. (03/03/08 RP 6; 03/04/08 RP 14-15)

Sant also told Detective Hofner that he found the drill in the bushes near Bate's shop. (03/03/08 RP 185) He believed the drill was probably stolen. (03/03/08 RP 189, 190) Hofner suggested to Sant that perhaps a man named Jason Elkins committed the theft. (03/03/08 RP 215) Sant then told Hofner that Elkins told him where to find the drill, and that he believed that Elkins probably stole the drill. (03/03/08 RP 192) Hofner later determined that Elkins was in custody on the day of the theft. (03/03/08 RP 194)

The State charged Sant by Information with one count of first degree trafficking in stolen property (RCW 9A.82.050(2)) and one count of second degree possessing stolen property (RCW 9A.56.140, .160). (CP 1-2) Following a CrR 3.5 hearing, the trial court found that statements Sant made to detectives were voluntary and admissible. (02/28/08 RP 97; CP 39-43) At the close of the State's case-in-chief, Sant moved to dismiss for lack of sufficient evidence to establish the crimes charged. (03/04/08 RP 9-11)

The jury convicted Sant of both charges. (03/04/08 RP 77-78; CP 26-27) The trial court sentenced Sant within his standard

range to a total of 18 months of confinement. (04/11/08 RP 6; CP 50, 53) This appeal timely follows. (CP 59-60)

III. ARGUMENT & AUTHORITIES

Alternative means statutes identify a single crime and provide more than one means of committing the crime. State v. Arndt, 87 Wn.2d 374, 376-77, 553 P.2d 1328 (1976). RCW 9A.82.050(1) provides eight alternative means of committing first degree trafficking in stolen property: knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others; or (8) knowingly trafficking in stolen property. State v. Strohm, 75 Wn. App. 301, 307, 879 P.2d 962 (1994). "Traffic' means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person." RCW 9A.82.010(19).

In this case, the State charged Sant with, and instructed the jury on, all eight alternative means of first degree trafficking in stolen property. (CP 1, 20) The court gave the jury the following to-convict instruction:

To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree as charged each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 17th day of May, 2007, the defendant either
 - (a) did knowingly initiate, organize, plan, finance, direct, manage, or supervise the theft of property for the sale to others, or
 - (b) did knowingly traffick in stolen property; and
- (2) That the defendant acted with knowledge that the property had been stolen; and
- (3) that the acts occurred in the State of Washington[.]

If you find from the evidence that elements (2) and (3) and either (1)(a) or element (1)(b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. Elements (1)(a) and (1)(b) are alternatives and only one need be proved.

(CP 20)

A fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt. Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 607 P.2d 304 (1980). When the crime charged can be committed by more than one means, the defendant does not have a right to a unanimous jury determination as to the alleged means used to carry out the charged crime. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988). But, in order to safeguard the defendant's constitutional right to a unanimous verdict as to the alleged crime,

substantial evidence of each of the relied-on alternative means must be presented. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

In other words, in alternative means cases, jury unanimity as to the means used to commit the crime is not required if there is substantial evidence to support each of the alternative means charged. Arndt, 87 Wn.2d at 377. Conversely, if the evidence is insufficient to establish that the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

In this case, the State failed to provide any evidence to support the means instructed in section (1)(a) of the to-convict instruction. The State presented evidence that Bate's lot was burglarized on the night or morning of May 15-16, and that several items, including an electric drill, were taken. (03/03/80 RP 121, 122-23) But the State presented absolutely no evidence connecting Sant to the burglary. The fact that Sant subsequently possessed the stolen drill does not alone establish that he had anything to do with the actual theft of the drill. There was no evidence that Sant initiated, organized, planned, financed, directed, managed, *and* supervised the theft of the drill and other items from

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Bate's lot.

IV. CONCLUSION

Because the State failed to present substantial evidence to establish seven of the eight alternative means of committing the crime of first degree trafficking in stolen property, Sant's constitutional right to a unanimous jury verdict was violated, and his conviction must be reversed.

DATED: October 28, 2008

/S/STEPHANIE C. CUNNINGHAM

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CERTIFICATE OF MAILING

I certify that on 10/28/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

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