

NO. 38910-0-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

LINDA RAE BOZAK,  
Appellant.

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STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

COURT OF APPEALS  
DIVISION II

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Craddock Verser

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE TRIAL COURT ERRONEOUSLY FAILED TO PROVIDE A UNANIMITY INSTRUCTION WHERE THE STATE PRESENTED EVIDENCE OF SEVERAL DISTINCT ACTS OF THEFT, ANY OF WHICH COULD BE THE BASIS OF A CRIMINAL CONVICTION.

Criminal defendants have a constitutional right to a unanimous jury verdict. U.S. Const. amend. 6; Wash. Const. art. 1, § 21. Where evidence is presented of multiple distinct acts any of which could be the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proven beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

The State argues that there was only a “single act of theft” in this case. Brief of Respondent at 7. The State is incorrect. At trial the State alleged numerous acts of theft, including the kitchen and laundry room appliances, cabinet doors, door hinges and doorknobs, drywall, the bathroom medicine cabinet and shower head, the master closet shelf and clothes rod, the chainsaw and

outboard motors, and the Grand Prix. RP 33-35, 37, 38, 66-68, 78, 80-81, 87, 90, 97-100, 117-18, 123, 230, 235-36, 279.

Where a defendant engaged in a “continuing course of conduct” as opposed to committing several distinct acts, a unanimity instruction is not needed. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). To determine whether criminal conduct constitutes one continuing act, however, the facts must be evaluated in a commonsense manner. Id.; Petrich, 101 Wn.2d at 571. A continuing course of conduct “requires an ongoing enterprise with a single objective.” State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395, rev. denied, 129 Wn.2d 1016 (1996).

To the contrary, evidence tends to show “several distinct acts” where the conduct occurs at different times and places. Handran, 113 Wn.2d at 17; Petrich, 101 Wn.2d at 571; State v. Workman, 66 Wash. 292, 204-95, 119 P. 751 (1911). In State v. King, 75 Wn. App. 899, 903, 878 P.2d 466 (1994), rev. denied, 125 Wn.2d 1021 (1995), the defendant was arrested after police found cocaine in a Tylenol bottle inside a vehicle in which he was a passenger. A search of his fanny pack at the police station revealed additional cocaine. These two acts of possession were

held to be “two distinct instances of cocaine possession” occurring at different times and places. Id.

In this case, there were numerous distinct acts of theft occurring at different times and in different areas of the home, as well as elsewhere on the premises. Mr. Hartsell testified at trial that he visited Ms. Bozak in her home sometime in August, 2008. RP 186. At that time, the doors and cabinet doors were hung, the medicine cabinet was in place, and there was no hole in the bedroom wall. RP 189, 199, 205-07. Presumably, then, those acts took place sometime between August and September 2008 when Mr. Bozak took possession of the home. With regard to the car, Ms. Bozak testified that she removed it from the property before the dissolution decree was issued in June 2008 and kept it since that time. RP 230, 273. And concerning the chainsaw and outboard motors, Mr. Bozak testified that they were in the barn when he moved out of the home in August 2007 and they were gone when he took possession of the home in September 2008. RP 67-68, 70, 117. There was no evidence presented to narrow down when those items were taken.

The error in failing to provide a unanimity instruction was not harmless beyond a reasonable doubt. The jury’s acquittal of Ms.

Bozak on theft in the first degree and theft in the second degree establishes that they did not find that all of the different acts had been committed. The greater the number of acts, the greater the probability that the jurors failed to unanimously agree as to any one act. Workman, 66 Wash. at 295. The conviction must be reversed.

2. THE TRIAL COURT ABUSED ITS DISCRETION  
WHEN IT IMPOSED DOMESTIC VIOLENCE  
PERPETRATOR TREATMENT AS A CONDITION  
OF SENTENCE UNDER THE MISTAKEN BELIEF  
THAT IT WAS REQUIRED BY LAW TO DO SO.

A decision based on an erroneous view of the law constitutes an abuse of discretion. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005); City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). Moreover, a trial court abuses its discretion when it fails to exercise its discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005) (categorical denial of a DOSA constituted an abuse of discretion).

The State concedes that the imposition of domestic violence treatment was not mandatory in this case. Brief of Respondent at 9. Nevertheless, the State argues that the trial judge did not abuse his discretion in ordering treatment, even if he mistakenly believed he was required by law to do so. Brief of Respondent at 9. In this

case, the trial court did not use its discretion when it imposed domestic violence treatment. Rather, the court imposed this condition because of a mistaken belief that it was required to do so. RP 387. This constituted an abuse of discretion, and the requirement for domestic violence treatment should be removed from the judgment and sentence.

B. CONCLUSION.

For the reasons set forth above, reversal of Ms. Bozak's conviction is required.

DATED this 22nd day of October, 2009.

Respectfully submitted,

  
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