

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

NO. 38910-0-II

09 SEP 29 10:00 AM  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY                       
COURT REPORTER

STATE OF WASHINGTON

Respondent,

vs.

LINDA RAE BOZAK

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR JEFFERSON COUNTY  
Cause Number: 08-1-00206-9  
The Honorable Craddock Verser

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**BRIEF OF RESPONDENT**

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Date: September 24, 2009

 ORIGINAL

PM 9-25-09

**TABLE OF CONTENTS**

	<u>Page</u>
<b>TABLE OF AUTHORITIES.....</b>	<b>iii</b>
<b>I. Restatement of Issues Presented.....</b>	<b>1</b>
<b>II. Statement of Facts.....</b>	<b>1</b>
<b>III. ARGUMENT.....</b>	<b>5</b>
<b>A. There was only one act of theft.....</b>	<b>5</b>
<b>B. The trial court properly imposed Domestic         Violence Perpetrator Treatment .....</b>	<b>8</b>
<b>C. The No-Contact Order issued as a condition of         sentence should reflect that the underlying         conviction is for a Gross Misdemeanor .....</b>	<b>10</b>
<b>IV. CONCLUSION.....</b>	<b>10</b>

**TABLE OF AUTHORITIES**

Page

**CASES**

**Washington Supreme Court**

*Balise v. Underwood*, 71 Wn.2d 331, 428 P.2d 573 (1967).....8  
*Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d  
271 (1992).....8  
*State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976).....7  
*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 34, 482 P.2d 775  
(1971).....8  
*State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).....6, 7  
*State v. Osborne*, 39 Wn. 548, 81 P. 1096 (1905).....5  
*State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).....6  
*State v. Sargent*, 62 Wn. 692, 114 P. 868 (1911).....5  
*State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980).....5  
*State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).....8  
*State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987).....7  
*State v. Workman*, 66 Wn. 292, 119 P. 751 (1911).....5, 6  
;

**Washington State Court of Appeals**

*Watson v. Maier*, 64 Wn.App. 889, 896, 827 P.2d 311, review  
denied, 120 Wn.2d 1015, 844 P.2d 436 (1992).....8  
*State v. Allen*, 57 Wn.App. 134, 788 P.2d 1084 (1990).....6

**Other Authorities**

*Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705,  
24 A.L.R.3d 1065) (1967).....6

## STATEMENT OF THE CASE

### I **Restatement of Issues Presented**

- A. **There was only one act of theft.**
- B. **The trial court properly imposed Domestic Violence Perpetrator Treati**
- C. **The No-Contact Order issued as a condition of sentence should reflect that the underlying conviction is for a Gross Misdemeanor.**

### II **Statement of Facts**

Michael Bozak and Linda Bozak were married and lived in a house at 3230 San Juan Avenue, Port Townsend, WA, 98368. They owed money on a mortgage on the house. They divorced and Mr. Bozak was awarded the house and responsibility for its mortgage in the settlement. Mrs. Bozak was to move out of the house by September 9, 2008.

On September 19, 2008, Mr. Bozak went to the house and found the house had been seriously damaged and Mrs. Bozak was still in residence. Mr. Bozak called the police and Port Townsend Police Officers Corrigan and Erickson arrived at the house at approximately 1335 hours on September 19, 2008. They were met by Mr. Bozak who told them, "the house is trashed, she trashed the whole thing." CP 5.

Mrs. Bozak then met the officers and she began to yell at them. She said, "This house is mine, I've lived in it all my life. I have to comply with everything but he doesn't?" CP 5.

Officer Corrigan walked into the house and noted all the doors were off hinges, and most of the hinges were missing. The laundry room was empty. Mr. Bozak told him there had been a washer, dryer, and freezer in it. The kitchen was devoid of appliances (range, refrigerator, and microwave) and all of the cupboard doors and hinges had been removed. Officer Corrigan asked Mrs. Bozak what happened to everything? She replied, "The house is mine. I can do what I want to it." Officer Corrigan again asked what she did with everything and she just shrugged her shoulders. CP 5.

Officer Corrigan noted that in one bedroom a five foot diameter section of sheetrock had been cut out and was missing. The framing members were visible. On the porch three windows were broken and one of the breaks had a face painted around it and words written on the glass. In the bathroom the shower attachment was missing as was the medicine cabinet, leaving a hole in the wall. A phallic symbol was sprayed in gold paint on one wall of the bathroom and gold words sprayed on the facing wall that said, "If this were U cockroach." Officer Corrigan asked Ms. Bozak

why she sprayed paint on the walls and she replied, "They're my walls." CP 5.

Officer Corrigan observed the living room carpet had been removed and thrown outside. Outside there were several large piles of debris that Mr. Bozak told Officer Corrigan were new and seemed to be the content of the house minus any appliances or cabinet doors. CP 5.

Ms. Bozak was arrested and charged by information with Theft in the First Degree – Domestic Violence, contrary to RCW 9A.56.030(1)(a), RCW 9A.56.020(1)(a), and RCW 10.99.020.; and Malicious Mischief in the First Degree – Domestic Violence, contrary to RCW 9A.48.070(1)(a) and RCW 10.99.020. The text of Count I read:

On or about the 19<sup>th</sup> day of September, 2008, in the County of Jefferson, State of Washington, the above named Defendant did wrongfully obtain or exert unauthorized control over property, other than a firearm, as defined in RCW 9.41.010, of Michael Bozak, a family or household member, to-wit: multiple household appliances, and hardware of a value exceeding \$1,500, with intent to deprive such other of property; contrary to RCW 9A.56.030(1)(a), 9A.56.020(1)(a), & 10.99.020, a class B felony. CP 2.

A jury trial was held on January 23, 2009.

Officer Corrigan testified to the state of the house as he observed it on September 19. He stated that the appliances,

cabinet doors and hardware were removed from the house. RP 33-35.

Ms. Bozak was found guilty of Theft in the Third Degree. CP 69 She was sentenced to serve 10 days in jail; to pay \$1,715.56 in court costs and attorney fees, and \$100 to Mr. Bozak in restitution; 24 months probation; to obtain Domestic Violence Perpetrator Treatment. A 10.99 Domestic Violence No Contact Order was imposed on her forbidding contact with Mr. Bozak or their former residence. CP 71-3.

During the sentencing hearing the Prosecutor recommended that Mrs. Bozak take an Anger Management course. RP 379. Mrs. Bozak argued that since she was then resident in another county that this would be a hardship, and because she had no criminal record it was not needed. RP 381.

The following colloquy then occurred:

THE COURT: ...the jury convicted you of that crime. And that is a domestic violence crime. It's my understanding if you get convicted of domestic violence you have to go through that perpetrator's program.

MR. CRITCHLOW: The judge has discretion –

THE COURT: And I'll order that, whatever that is. I don't know how long it takes. If it includes anger management it

does, but you've been convicted of a crime of domestic violence so you have to do that. RP 387.

This appeal followed.

### III. ARGUMENT

#### A. There was only one act of theft.

Ms. Bozak argues that there were many acts of theft, any of which could have been the basis for her conviction, and since the State did not elect one of the acts to prosecute, the jurors might not have each considered the same one for their decision, thus violating the requirement for a unanimous verdict.

To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). In cases where there is evidence of multiple acts of like misconduct which relate to one charge against the defendant, the State is required to elect which act it is relying upon for a conviction. *State v. Workman*, 66 Wn. 292, 119 P. 751 (1911); *State v. Sargent*, 62 Wn. 692, 114 P. 868 (1911); *State v. Osborne*, 39 Wn. 548, 81 P. 1096 (1905). *Workman* states:

(W)hile evidence of separate commissions of the offense may be admitted as tending to prove the commission of the specific act relied upon, the proper course in such a case, after the evidence is in is to require the state to elect which of such acts is relied upon for a conviction.

*Workman*, 66 Wn. at 295, 119 P. 751.

The courts have construed the rule in *Workman* to require the trial court to instruct the jury that all 12 members had to agree that the same underlying act has been proven beyond a reasonable doubt if the State neglects to elect which act constituted the crime. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). In effect, *Petrich* was a reiteration and clarification of *Workman*. The *Workman-Petrich* rule assures a unanimous verdict on one criminal act thereby protecting a criminal defendant's right to a unanimous verdict.

Failure of the court to follow the rule in *Workman* and *Petrich* is "violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial." *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Allen*, 57 Wn.App. 134, 788 P.2d 1084 (1990); Const. art. 1, § 22 (amend 10); U.S. Const. amend. 6. When error occurs during a trial the jury verdict will be affirmed only if that error was harmless beyond a reasonable doubt. *Chapman v. California*,

386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 24 A.L.R.3d 1065) (1967); *State v. Kitchen*, supra 110 Wn.2d at 409, 756 P.2d 105.

In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987) and *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976).

In this case, there was one charge of theft, committed by the defendant assuming control over many pieces of property of another. The Information on Count 1 describes the property as, "multiple household appliances, and hardware of a value exceeding \$1,500." Evidence was presented only of a single act of theft. This is not a case "where there is evidence of multiple acts of like misconduct which relate to one charge against the defendant." Since there was not "evidence of separate commissions of the offense," there was no possibility that the jurors could be considering different acts.

This is not a case which falls under the unanimity rule and this appeal should be denied.

**B. The trial court properly imposed Domestic Violence Perpetrator Treatment.**

Mrs. Bozak argues that the trial court erred in imposing domestic violence treatment because the court mistakenly thought that it was required for a domestic violence conviction.

Appellate courts review sentencing conditions for an abuse of discretion. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Ms. Bozak quotes *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 34, 482 P.2d 775 (1971): “To assert an abuse of discretion implies a lack of use of any discretion at all.” This is an excerpt from the dissent in that case. The full statement there is:

“To assert an abuse of discretion implies a lack of use of any discretion at all. The exercise of an honest judgment, regardless of its erroneous appearance, is not an abuse of discretion, and simply because judicial opinion differs as to the exercise of one's discretion, does not make such exercise an abusive one. *Balise v. Underwood*, 71 Wn.2d 331, 428 P.2d 573 (1967). *Carroll* at 34.

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992);

*Watson v. Maier*, 64 Wn.App. 889, 896, 827 P.2d 311, review denied, 120 Wn.2d 1015, 844 P.2d 436 (1992).

Here, the trial judge said, "... the jury convicted you of that crime. And that is a domestic violence crime. It's my understanding if you get convicted of domestic violence you have to go through that perpetrator's program." This was an incorrect statement. RCW 26.50.150 does give rules for approval of DV Perpetrator Programs, but does not require their use. However, immediately after the trial judge made this statement the Defense Counsel corrected him by telling him that he had discretion in the matter. Then the trial judge ordered Ms. Bozak to take the required DV Perpetrator Treatment Program. Whether or not the trial judge mistakenly believed that he was required to order Ms. Bozak to take the treatment program, it is clear he thought it was a good idea.

The trial court did not abuse its discretion when it ordered a convicted Domestic Violence perpetrator to take the state approved Domestic Violence Perpetrator Program. This appeal is without merit and should be denied.

**C. The No-Contact Order issued as a condition of sentence should reflect that the underlying conviction is for a Gross Misdemeanor.**

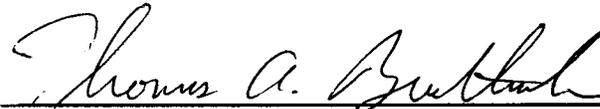
The State acknowledges that the No-Contact order issued as a condition of sentence should reflect that the underlying crime is a gross misdemeanor. The case should be remanded for entry of the proper No-Contact Order.

**IV. CONCLUSION**

The State respectfully requests that this Court affirm the trial court's verdict and sentence, remand the case for entry of the correct No-Contact Order, and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 24th day of September, 2009,

JUELANNE DALZELL, Jefferson County  
Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624  
Deputy Prosecuting Attorney

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STATE OF WASHINGTON,  
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LINDA RAE BOZAK,  
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Case No.: 38910-0-II  
Superior Court No.: 08-1-00206-9

**DECLARATION OF MAILING**

09 SEP 29 11 09 AM '09  
STATE OF WASHINGTON  
CLERK OF COURT  
JANICE N. CHADBOURNE

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 25<sup>th</sup> day of September, 2009, I mailed, postage prepaid, a copy of the BRIEF OF RESPONDENT to the following:

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Linda Bozak  
PO Box 1122  
Sumner, WA 98390

I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 25<sup>th</sup> day of September, 2009, at Port Townsend, Washington.

  
Janice N. Chadbourne  
Legal Assistant

