

CO. 09-1-00177-4
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40547-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

JASON A. STOKEN
Appellant

40547-4-II

On Appeal from the Superior Court of Grays Harbor County

Cause No. 09-1-00177-4

The Honorable F. Mark McCauley

REPLY BRIEF

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I. **SUMMARY OF THE CASE**

Appellant, Jason A. Stoken, was charged under the Fish and Wildlife Act with second degree unlawful hunting big game in violation of RCW 77.15.410 (Count 1) and first degree hunting while license suspended or revoked contrary to RCW 77.15.670 (Counts 2 and 3). CP 15-16. A jury convicted him of Counts 1 and 3 and acquitted him of Count 2. CP 28-30. The sentencing court classified Count 1 as a gross misdemeanor and Count 3 as a Class C felony. CP 34. Stoken received 365 days with 185 suspended on Count 1, and six months on Count 3 to be served concurrently. CP 36-37.

Stoken's brother Russell and Russell's son, Garrett, had valid hunting licenses at all relevant times. RP 69, Ex. 13, 16. Stoken's license was suspended on April 22, 2006. Stipulation, CP 17. But Washington State Department of Fish and Wildlife (F&W) licensing officer Evan Yett testified that the 2006 restrictions on Stoken's license were released in January, 2008. RP 69.

II. ARGUMENTS IN REPLY

1. **The instructions contain the elements of second degree hunting while suspended, not a first degree offense.**

A conviction cannot stand if it rests upon a jury instruction that relieves the State of its burden to prove all the elements beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 22; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). An erroneous instruction given on behalf of the prevailing party is presumed prejudicial unless it affirmatively appears it was harmless. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

The court erroneously instructed Stoken's jury in Instructions No. 2 and No. 6 that Stoken was guilty of first degree hunting while license revoked or suspended if he hunted while his license was revoked or suspended. CP 20, 21. Hunting with a suspended license is a second degree violation, not first degree.

The State contends Instruction No. 2 is a correct statement of the law. Brief of Respondent (BR) 3. This is wrong.

Instruction No. 2 states:

A person commits the crime of Hunting while License Revoked in the First Degree when he knowingly hunts,

takes or possesses big game at a time when his privilege to engage in that activity was revoked or suspended.

CP 20. But RCW 77.15.670 says:

A person is guilty of violating a suspension of department privileges in the second degree if the person engages in any activity that is licensed by the department and the person's privileges to engage in that activity were revoked or suspended by any court or the department.

RCW 77.15.670(1) (emphasis added).

To find a first degree violation, the jury must find one or more additional statutory elements besides a revoked or suspended license, as set forth in RCW 77.15.670(2):

A person is guilty of violating a suspension of department privileges in the first degree if the person commits the act described by RCW 77.15.670(1) and:

- (a) The suspension of privileges that was violated was a permanent suspension;
- (b) The person takes or possesses more than two hundred fifty dollars' worth of unlawfully taken food fish, wildlife, game fish, seaweed, or shellfish; or
- (c) The violation involves the hunting, taking, or possession of fish or wildlife classified as endangered or threatened or big game.

RCW 77.15.670(2).

The State misrepresents Stoken's argument. He is not saying the State had to prove Stoken killed an animal that was threatened or

endangered. BR 3. What he argued is that the jury must be instructed as to all the essential elements of the offense and that his jury was not.

As instructed, the jury could have convicted Stoken of a first degree violation based on prove of no more than a second degree offense. The Court may address this issue for the first time on appeal. RAP 2.5(a)(3) because it is a fundamental constitutional error and Stoken alleged that his counsel was ineffective for not challenging the defective instruction. *Kyllo*, 166 Wn.2d at 862.

The to-convict instruction for Count 3 contains the same error. Instr. No. 6, CP 21. If the to-convict instruction does not include all the essential elements of the offense, the conviction must be reversed. *State v. Williams*, 158 Wn.2d 904, 917, 148 P.3d 993 (2006). The State offered no evidence that Stoken's suspension was permanent. There was no evidence of a dollar value of wildlife taken or possessed; and there was no evidence that wildlife taken was endangered or threatened.

The Court should reverse and dismiss the prosecution with prejudice because retrial following reversal for sufficient evidence is strictly prohibited. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Court should dismiss Count 3 with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

2. The absence of the exemption for F&W officials is an affirmative defense.

The State offers no authority for its contention that the fact that the accused is not a Fish and Wildlife employee is an affirmative defense.

But a statutory exception is an affirmative defense unless the statute reflects legislative intent to treat proof of the absence of the exception as one of the elements of a cause of action, or the exception operates to negate an element of the action. *Asplundh Tree Expert Co. v. Washington State Dept. of Labor and Industries*, 145 Wn. App. 52, 61, 185 P.3d 646 (2008). Stoken concedes that the statutory exception here is an affirmative defense.

3. The State failed to establish that the animal charged in Count 1 was killed out of season.

Stoken was charged with unlawfully killing a black-tail deer on April 22, 2008. CP 15, 20. The State alleged that this constituted taking big game out of season. CP 15.

The State claims that the F&W officer Alexander established all the facts essential to prove the elements of this offense. But then the State makes Stoken's point by asserting: "[Alexander] stated that it was not legal to kill a deer at that time of year." BR 4. Clearly, this is a legal conclusion. Likewise, the statement that "hunting season began in

September” is a legal conclusion. BR 4. It is simply a paraphrase of “it was not legal to kill a deer at that time of year.” It’s a conclusion of law.

The State does not dispute that Alexander provided no support for his opinion testimony as to the species, age and gender of the animal, i.e. that that the animal he saw on April 22, 2008, was (i) a deer, (ii) a black-tail; (iii) a doe; or (iv) a yearling. It was simply not sufficient to present circumstantial evidence from which the jury could have inferred the animal was dead. RP 136.

Also, Alexander’s testimony did not provide the facts the jury needed to apply the out-of-season element. The jurors had to speculate about what was out of season: the killing of any deer; killing a deer that was a black-tail; killing a black-tail buck; killing a yearling; or was it killing a black-tail yearling, a doe yearling or specifically a black-tail doe yearling? CP 20; RP 135.

Whether the animal found on April 22, 2008, was out of season is the sole disputed question the jury must answer in reaching a verdict on Count 1. Stoken had the right to have this determined by jury.

Alexander’s bald assertions did not constitute sufficient substantive evidence upon which to hang a conviction. Rather, Alexander’s testimony infringed upon the jury’s prerogative to apply the facts to the law, contrary to Const. art. 1, § 21 and § 22.

There is general agreement that rules protecting wild life are a good thing, but this does not relieve the State of its burden to present a cogent statement of the law supported by a coherent set of facts in order to sustain a conviction that results in the loss of a man's liberty.

The evidence was insufficient to prove the essential element that the animal alleged in Count 1 was out of season. Reversal is required. As a matter of law, retrial following reversal for sufficient evidence is strictly prohibited. *Hickman*, 135 Wn.2d at 103. The Court will, therefore, dismiss Count 1 with prejudice. *Stanton*, 68 Wn. App. at 867.

4. The jury unanimity requirement fails on Count 1.

The State does not address the failure of the court to provide even minimal assurances that Stoken was convicted by a unanimous jury.

Fundamental due process requires a unanimous jury verdict in criminal cases. Const. art. I, §§ 3, 21, 22; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The State here alleged a single charge that could be committed in multiple ways. Therefore, the State had either to elect on the record which act it was relying on as the basis for the charge or the judge should have instructed the jurors that they must unanimously agree that the State had proved a single act beyond a reasonable doubt. *State v. Petrich*, 101

Wn.2d 566, 572, 683 P.2d 173 (1984); *State v. Jones*, 71 Wn. App. 798, 821-22, 863 P.2d 85 (1993).

Failure to do this is reversible error if a rational trier of fact could have found that one of multiple means of committing the crime had been proved beyond a reasonable doubt. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

Failure to require unanimity cannot be harmless error where, as here, a rational juror could have entertained a reasonable doubt that the State proved the crime based on any of the potentially culpable scenarios. *Kitchen*, 110 Wn.2d at 405-06, 411. The jurors received evidence on Count 1 from which any one of them could reasonably have concluded that the animal Stoken allegedly killed on April 22, 2008, was out of season. The State made no election and the Court limited its unanimity instruction to hunting with a suspended license as alleged in Counts 2 and 3. Instr. 7, CP 22. We know all the jurors did not agree on all the relevant facts, because they disclosed that they were hung on Count 2. CP 24.

Reversal is required.

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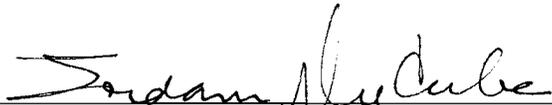
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IV. **CONCLUSION**

Mr. Stoken asks this Court to reverse his convictions and dismiss the prosecution with prejudice.

Respectfully submitted this 27th day of December, 2010.


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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, copies of this Appellant's Brief to:

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