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MAR 16 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 287629

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

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STATE OF WASHINGTON,

Respondent,

v.

WILLIAM A. PAGE,

Appellant.

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

The Honorable Allen C. Nielson, Judge  
Cause No. 081000478

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SUPPLEMENTAL BRIEF OF RESPONDENT

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#### A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in allowing the jury to find Page guilty of RCW 77.15.260(2)(a), Unlawful Trafficking in the First Degree, in Counts 2, 5, and 6, when the unit of prosecution under RCW 77.15.030 requires each individual animal or animal part unlawfully trafficked to be treated as a separate offense, and the state provided no evidence to show that any of the individual bear gall bladders sold in Counts 2, 5, and 6 were valued at or more than \$250.

2. Whether the trial court can enter convictions of RCW 77.15.260(1)(a), Unlawful Trafficking in the Second Degree, for Counts 2, 5, and 6, since the jury necessarily found all the facts required to convict Page beyond a reasonable doubt of second-degree unlawful trafficking when they found him guilty of first-degree unlawful trafficking.

#### B. STATEMENT OF THE CASE.

William Page ("Page") was charged by First Amended Information on May 6, 2009, with six counts of RCW 77.15.260, Unlawful Trafficking in Wildlife. The number of bear gall bladders Page purchased for each count, and the price he paid for each sale, are as follows: Count 1, one bear gall bladder, for \$80; Count 2, four bear gall bladders, for \$370; Count 3, one bear gall bladder, for \$100; Count 4, one bear gall bladder, for \$100; Count 5, seven bear gall bladders, for \$650; and Count 6, three bear gall bladders, for \$300. 11/9/09 RP 142, 151-52, 158, 161, 164, 166, 173, 177, 179, 181-82; 11/10/09 RP 136, 140, 142-43, 180-82. Counts 1, 3, and 4 were charged as RCW 77.15.260(1)(a), second-degree

unlawful trafficking, because the value of the single bear gall bladder Page purchased from undercover agents of the Washington Department of Fish and Wildlife (WDFW) in each count was less than \$250. Counts 2, 5, and 6 were charged as RCW 77.15.260(2)(a), first-degree unlawful trafficking, because the aggregate value of the bear gall bladders Page purchased from WDFW undercover agents in each of these counts was more than \$250. The jury found Mr. Page guilty on all six counts.

#### C. STANDARD OF REVIEW

Determining the proper "unit of prosecution" is a question of law. *State v. Hall*, 168 Wn.2d 726, 729, 230 P.3d 1048, 1050 (2010). Review is de novo. *Id.*; *State v. Sutherby*, 165 Wn.2d 870, 878, 204 P.3d 916, 919 (2009).

#### D. ARGUMENT.

1. The trial court erred in allowing the jury to find Mr. Page guilty of RCW 77.15.260(2)(a), Unlawful Trafficking in the First Degree, in Counts 2, 5, and 6, because the unit of prosecution under RCW 77.15.030 requires each individual animal or animal part unlawfully trafficked to be treated as a separate offense, and the state provided no evidence to show that any of the individual bear gall bladders sold in Counts 2, 5, and 6 were valued at or more than \$250.

To convict a person of first-degree unlawful trafficking under RCW 77.15.260(2)(a), which is a class C felony, the person has to

traffic in fish or wildlife that has a value of \$250 or more. RCW 77.15.030 sets the unit of prosecution for big game. It says,

Where it is unlawful to hunt, take, fish, possess, or traffic in big game or protected or endangered fish or wildlife, then each individual animal unlawfully taken is a separate offense. RCW 77.15.030.

To determine whether the unit of prosecution described in RCW 77.15.030 applies to RCW 77.15.260(2)(a), courts must analyze the statutes in question and ascertain the legislature's intent. *Hall*, 168 Wn.2d at 730; *Sutherby*, 165 Wn.2d at 878; *State v. Varnell*, 162 Wn.2d 165, 168, 170 P.3d 24, 27 (2007); *State v. Ose*, 156 Wn.2d 140, 144, 124 P.3d 635, 637 (2005). A recent decision that is directly on point held that RCW 77.15.030 is applicable to RCW 77.15.260(2)(a). *State v. Yon*, 159 Wn. App. 195, 202, 246 P.3d 818 (2010).

In *Yon*, the defendant was charged with two counts of violating RCW 77.15.260(2). *Id.* at 198. The charges stemmed from two separate \$400 purchases of two black-bear gall bladders per purchase. *Id.* After the state rested its case, Yon moved for dismissal of both counts. He argued that RCW 77.15.260 does not allow the value of bear gall bladders to be aggregated to reach the \$250 threshold required for first-degree unlawful trafficking. He

also argued that RCW 77.15.030 requires each gall bladder purchase to be charged separately. *Id.*

The trial court denied Yon's motion to dismiss, finding RCW 77.15.030 inapplicable to RCW 77.15.260 and Yon's argument against value aggregation unpersuasive. *Id.* Yon was convicted on both counts.

The reviewing court reversed. *Id.* at 203. It held that, analyzing the plain language of RCW 77.15.030 and the legislature's intent, the statute is meant to apply to crimes charged under chapter 77.15 RCW involving trafficking in big game. *Id.* at 200. It also held that RCW 77.15.030 does not permit the value aggregation of different animals or animal parts. *Id.* at 202.

In the present case, Page was charged with and convicted of first-degree unlawful trafficking in Counts 2, 5, and 6. Count 2 involved the purchase of four bear gall bladders for \$370, total. Count 5 involved the purchase of seven bear gall bladders for \$650, total. Count 6 involved the purchase of three bear gall bladders for \$300, total.

Based on *Yon*, the state's aggregation of the bear gall bladders for Counts 2, 5, and 6 was improper. The trial court erred

in allowing the jury to find Mr. Page guilty of RCW 77.15.260(2)(a), Unlawful Trafficking in the First Degree, in Counts 2, 5, and 6.

2. The trial court can enter convictions of RCW 77.15.260(1)(a), Unlawful Trafficking in the Second Degree, for Counts 2, 5, and 6, since the jury necessarily found all the facts required to convict Page beyond a reasonable doubt of second-degree unlawful trafficking when they found him guilty of first-degree unlawful trafficking.

In *Yon*, the reviewing court held that it could direct the trial court to enter convictions for the lesser included offense of second-degree unlawful trafficking if the jury made findings to support those convictions. *Id.* at 202-03, citing *State v. Gilbert*, 68 Wn. App. 379, 385, 842 P.2d 1029 (1993). It held that in order to convict *Yon* of Unlawful Trafficking in the First Degree, the jury necessarily found all of the evidence required to convict him beyond a reasonable doubt of Unlawful Trafficking in the Second Degree. *Yon*, 159 Wn. App. at 203. Therefore, the court reversed *Yon*'s two convictions and remanded for resentencing consistent with the court's opinion. *Id.*

This case is identical to *Yon*, except that Page has three convictions of first-degree unlawful trafficking, not two. In finding Page guilty of these three first-degree offenses in Counts 2, 5, and 6, the jury necessarily found all of the evidence required to convict

him beyond a reasonable doubt of second-degree unlawful trafficking under RCW 77.15.260(1)(a). The trial court can enter convictions of RCW 77.15.260(1)(a), Unlawful Trafficking in the Second Degree, for Counts 2, 5, and 6.

E. CONCLUSION

The trial court erred in allowing the jury to find Page guilty of RCW 77.15.260(2)(a), Unlawful Trafficking in the First Degree, in Counts 2, 5, and 6, because the unit of prosecution under RCW 77.15.030 requires each individual animal or animal part unlawfully trafficked to be treated as a separate offense, and the state provided no evidence to show that any of the individual bear gall bladders sold in Counts 2, 5, and 6 were valued at or more than \$250. The trial court can enter convictions of RCW 77.15.260(1)(a), Unlawful Trafficking in the Second Degree, for Counts 2, 5, and 6, because the jury necessarily found all the facts required to convict Page beyond a reasonable doubt of second-degree unlawful trafficking when they found him guilty of first-degree unlawful trafficking.

The state respectfully asks that this Court follow *Yon* by reversing Page's convictions in Counts 2, 5, and 6, and remanding the case for resentencing.

Respectfully submitted this 14<sup>th</sup> day of March 2011.

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