

68836-7

68836-7

No. 68836-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ISIAH DODD,

Appellant.

---

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

The Honorable Christopher Washington

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to Instruction 15. CP 67-68.
2. Appellant assigns error to Instruction 10. CP 62.
3. Appellant assigns error the packet of instructions because they did not clearly explain the applicable law to the jury. CP 49-70.
4. Mr. Dodd's constitutional right to a unanimous jury verdict was violated when the trial court did not instruct the jury that it was required to be unanimous as to what act formed the basis of the conviction.
5. The State did not prove beyond a reasonable doubt the two alternative means of committing trafficking of stolen property in the second degree that were included in the "to convict" instruction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The defendant's constitutional right to due process and a jury trial require that the jury be clearly instructed as to its requirement to find every element of the crime beyond a reasonable doubt. The "to convict" instruction is a "yardstick" that the jury relies upon in determining guilt. The "to convict" instruction in Mr. Dodd's case is repetitive and confusing because it attempts to incorporate the definition of recklessness into the elements of the crime of trafficking

in stolen property in the second degree. Must Mr. Dodd's conviction be reversed because the jury was not clearly instructed on the elements of the crime? (Assignment of Error 1)

2. Jury instructions must convey the applicable law to the jury. The definition of the crime of trafficking in stolen property is confusing, and the packet of instructions is confusing and repetitive because the definition of recklessness is found in three separate instructions and the jury was unnecessarily instructed as to a mental state that did not apply. Must Mr. Dodd's conviction be reversed because the definition of the charged offense, the "to convict" instruction, and the instructions as a whole did not clearly set forth the elements of the crime and over-emphasized the mental state of recklessness? (Assignments of Error 1-3)

3. The defendant has a constitutional right to a unanimous jury verdict. When the jury hears evidence of multiple acts that could constitute the charged crime, (1) the jury must be instructed that a guilty verdict must be based upon a unanimous finding that one particular act was proved beyond a reasonable doubt, or (2) the prosecutor must elect which act it is relying upon for a conviction. The jury heard evidence that Mr. Dodd sold another person's property at a

garage sale and that he took some of that person's property to his own home. The prosecutor discussed both incidents in closing argument, and the court did not instruct the jury it had to unanimously rely upon the same act to convict Mr. Dodd. Where a rational jury could have entertained a reasonable doubt that Mr. Dodd kept the other person's property with the intent to distribute it to another, must his conviction be reversed due to the violation of his constitutional right to a jury trial? (Assignment of Error 4)

4. A criminal conviction must be based upon a unanimous jury determination beyond a reasonable doubt of every element of the charged offense. The jury was instructed it could convict Mr. Dodd under either of two alternative means of committing the crime and that it was not required to be unanimous as to which means. Viewing the evidence in the light most favorable to the State, the State did not produce proof beyond a reasonable doubt that Mr. Dodd committed trafficking in stolen property under one of the alternative means. Where the jury returned a general verdict, must Mr. Dodd's conviction be reversed? (Assignment of Error 5)

### C. STATEMENT OF THE CASE

Isiah Dodd moved into a Shoreline house belonging to James Schindler in 2008. 2RP 32-33.<sup>1</sup> In exchange for reduced rent, Mr. Dodd agreed to help Mr. Schindler care for the property and prepare it for sale. 2RP 28-29, 57. Mr. Schindler had inherited the house and its contents from his deceased partner, William Irmischer, and it was emotionally difficult for him to enter the home and organize its contents. 2RP 25-28, 62. The arrangement worked well because Mr. Dodd did work in the yard and on the house and his presence helped Mr. Schindler work on organizing the contents of the home. 2RP 57-58. Initially Mr. Dodd and Mr. Schindler had an oral agreement, but they signed a written lease when Mr. Dodd's wife and stepchildren moved into the home with him in 2010. 2RP 29-30, 56-57, 33; Ex. 2 at 11:50, 16:10.

Mr. Schindler became upset because Mr. Dodd's family had moved things around inside the home to accommodate the children and because Mr. Dodd was not making full rent payments every month or completing all of the repairs Mr. Schindler wanted. 2RP 33-34. Mr.

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<sup>1</sup> The verbatim report of proceedings contains four volumes. Two volumes are referred to as follows:

1RP - April 23 and April 25, 2012 (Judge Washington)

2RP - April 26 and 27 and May 4, 2012 (Judge Washington).

Other volumes are referred to by date.

Schindler did not confront Mr. Dodd directly about these issues. 2RP 61-62. Instead, in 2010, Mr. Schindler told Mr. Dodd he was ready to sell the house and asked him to be out by the time Mr. Schindler returned from a summer trip to Vienna. 2RP 25-26, 65.

Mr. Dodd had a garage sale at the house while Mr. Schindler was in Europe and offered for sale his own property as well as items from Mr. Schindler's house. 1RP 112-13; 2RP 22. Gina Alva, who lived next door to Mr. Schindler's house, purchased a concrete pedestal with a panther on top that she recognized as Mr. Schindler's. 2RP 18, 21-22. Mr. Dodd believed he was doing Mr. Schindler a favor by getting many of the items out of the house so that Mr. Schindler could sell it. Ex. 2 at 16:50.

Mr. Schindler did not remember giving Mr. Dodd permission to have a garage sale. 2RP 63. However, Yang Kuo, Mr. Dodd's teenage stepson, recalled a conversation in which Mr. Dodd and Mr. Schindler discussed what to do about the items in the attic. 2RP 69. When Mr. Dodd suggested a garage sale, Mr. Schindler said that was a good idea and told Mr. Dodd he could have one. 2RP 79.

When Mr. Schindler returned, he found the house largely empty. Mr. Schindler was extremely upset and called the police after sending

Mr. Dodd a threatening email. 2RP 37-39. Shoreline officers executed a search warrant on Mr. Dodd's new residence in August 2010. 1RP 109-10; 123. Mr. Schindler went to the house with the police and identified several items that belonged to him, which the police seized and returned to Mr. Schindler. Ex. 5; 2RP11. The items included a cement lantern, a cement statue of Neptune, a clothes washer and dryer, an electric lawnmower, a set of gold flatware, a glass-topped metal table, a dictionary, and Mr. Irmischer's expired Chevron credit card. 2RP 11, 44-48. Mr. Dodd assisted the police in returning items to Mr. Schindler. 2RP 14.

The King County Prosecutor charged Mr. Dodd with trafficking in stolen property in the first degree. CP 1. After a trial in January 2012 resulted in a deadlocked jury, the State amended the charge to trafficking in stolen property in the second degree. CP 44; SuppCP \_\_\_\_ (Order Declaring Jury Deadlock and Discharging Jury Pursuant to CrR 6.10, sub. no. 32, 1/17/12); 1/13/12RP 164-67. Mr. Dodd was convicted of second degree trafficking in stolen property after a jury trial before the Honorable Christopher Washington, and he appeals. CP 71, 89-95.

## D. ARGUMENT

### 1. **Mr. Dodd's conviction must be reversed because the "to convict" instruction was so confusing that it did not make the elements of the crime manifestly clear.**

a. The defendant's right to due process and a jury trial require that the jury be given accurate instructions on the applicable law. The state and federal constitutions guarantee the right to due process of law and to a jury trial.<sup>2</sup> U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 21, 22; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Jury instructions must convey to the jury that the State bears the burden of proving every element of the crime beyond a reasonable doubt. Bennett, 161 Wn.2d at 307. The jury instructions

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<sup>2</sup> U.S. Const. amend. VI provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

U.S. Const. amend. XIV states in pertinent part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Const. art. I § 3 states, "No person shall be deprived of life, liberty, or property, without due process of law."

Const. art. I § 21 provides, "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

Const. art. I § 22 provides, in pertinent part, "In all criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . ."

must also “properly inform the jury as to the applicable law, not mislead the jury, and permit each party to argue its theory of the case.”

Id.

b. Mr. Dodd objected to the confusing jury instructions provided by the court. Mr. Dodd was charged with trafficking in stolen property in the second degree, RCW 9A.82.055. CP 44. The elements of the crime are simple. The statute states, “A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree.” RCW 9A.82.055(1). “Traffic” is defined in the definition section of the statute, RCW 9A.82.010:

“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).

The trial court, however, gave the State’s complicated “to convict” instruction, Instruction 15, which read:

To convict the defendant of the crime of Trafficking in Stolen Property in the Second Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during a period of time between on or about May 1, 2010, and on or about July 28, 2010, the defendant knowingly

CP 67-68.<sup>3</sup> The court's instruction defining the crime of trafficking in stolen property in the second degree suffers from the same lack of clarity. Instruction 10 reads:

A person commits the crime of Trafficking in Stolen Property in the Second Degree when he or she knowingly buys, receives, possesses, or retains control of stolen property, with the intent to sell, transfer, distribute, dispense, or dispose of the stolen property to another person or sell, transfers, distributes, dispenses, or disposes of stolen property to another person, and the defendant knew of and disregarded a substantial risk that the property was stolen property; and the defendant's disregard of such substantial risk that the property was stolen property was a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 62.

Mr. Dodd objected to the instruction defining trafficking in stolen property, Instruction 10, and requested the jury be instructed with the statutory language. 2RP 84, 86, 88-92, 110-12, 114-16. Defense counsel also objected to the jury instructions defining recklessness and intent. 2RP 83, 93, 95-99, 113. Defense counsel objected to the instruction defining "wrongfully obtained" as unnecessary because it defined terms the jury would already

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<sup>3</sup> Mr. Dodd was charged with a single offense. CP 44. The instruction's reference to Count I is incorrect and is not included in any other instruction or in the verdict form. CP 49-71.

understand. 2RP 102-04. Finally, counsel objected to the entire packet of instructions as confusing. 2RP 115-16.

Although the record does not contain an alternative written instruction proposed by defense counsel, she stated she was proposing the jury be instructed from the language of RCW 9A.82.055. 2RP 86. Defense counsel's proposal can be seen in the instructions recommended by Seth Fine and Doug Ende in their treatise on Washington criminal law.<sup>4</sup> Seth A. Fine & Douglas J. Ende, 13B Wash. Prac., Criminal Law § 2617 at pages 147-48 (2<sup>nd</sup> ed. 1998). The authors provide three clear sample instructions: a definition of second degree trafficking in stolen property as provided in RCW 9A.82.055(1), a corresponding "to convict" instruction, and a definition of the term "traffic" that recites the definition in RCW 9A.82.010(19). Id. The "to convict" instruction, for example, states:

To convict the defendant of the crime of trafficking in stolen property in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant trafficked in stolen property;
- (2) That the defendant acted recklessly; and

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<sup>4</sup> The Washington Supreme Court Committee on Jury Instructions has not produced pattern instructions for trafficking in stolen property. See Washington Supreme Court Committee on Jury Instructions, 11, 11A Wash. Prac., Washington Pattern Jury Instructions Criminal (2008).

(3) That the acts occurred in the State of Washington.  
If you find from the evidence that each of the elements  
has been proved beyond a reasonable doubt, then it will  
be your duty to return a verdict of guilty.  
On the other hand, if, after weighing all of the evidence,  
you have a reasonable doubt as to any one of these  
elements, then it will be your duty to return a verdict of  
not guilty.

Id.; see State v. Killingsworth, 166 Wn. App. 283, 288, 269 P.3d 1064  
(similar instructions utilized and upheld in prosecution for trafficking in  
stolen property in the first degree), rev. denied, 174 Wn.2d 1007  
(2012).

c. The “to convict” instruction did not clearly outline the  
elements of the crime. “The ‘to convict’ instruction carries with it  
special weight because the jury treats the instruction as a ‘yardstick’ by  
which to measure a defendant’s guilt or innocence.” State v. Mills, 154  
Wn.2d 1, 6, 109 P.3d 415 (2005); accord State v. Smith, 131 Wn.2d  
258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819,  
259 P.2d 845 (1953). Thus, it must accurately do so. Emmanuel, 42  
Wn.2d at 819-20 (instruction purporting to list all of the elements of the  
crime must actually do so). The “to convict” instruction in Mr. Dodd’s  
case was so confusing that this Court cannot be convinced the jury did  
not convict Mr. Dodd on improper grounds.

The appellate court reviews a challenged “to convict” instruction de novo. Mills, 154 Wn.2d at 7. Other instructions are also reviewed de novo in the context of the instructions as a whole. Bennett, 161 Wn.2d at 307. An erroneous instruction given on behalf of the party in whose favor the verdict was entered is presumed prejudicial unless it is affirmatively shown to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). An instructional error is harmless only if it is “trivial, or formal, or merely academic, was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” Wanrow, 88 Wn.2d at 237. Thus, an erroneous jury instruction is not harmless “when the evidence and the instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” State v. Schaler, 169 Wn.2d 274, 288, 236 P.3d 858 (2010).

Instruction 15 does not properly inform the jury of the elements of trafficking in stolen property in the second degree, but rather muddles them. The mental state for the crime is recklessness, and the jury was provided with a separate instruction defining recklessness. RCW 9A.82.055(1); CP 61 (Instruction 9). Instead of relying upon the jury to read that instruction, Instruction 15 repeats part of the

recklessness definition in elements (a) and (b), and then adds the remainder of the definition as a separate element, element (2). CP 67; RCW 9A.08.010(1)(c).

It is unclear if Mr. Dodd's counsel specifically objected to the "to convict" instruction. See 2RP 106-09 (objection may be to the definitional instruction or the "to convict" instruction). She did, however, object to the instructions as a whole. 2RP 115-16. Moreover, because the jury is entitled to rely upon the "to convict" as a complete and accurate statement of the elements of the crime, a defective "to convict" instruction is a manifest constitutional issue that Mr. Dodd may raise on appeal. RAP 2.5(a)(3); Mills, 154 Wn.2d at 6.

d. The jury instructions as a whole did not clearly and accurately describe the applicable law. Just as Instruction 15 did not make the elements of trafficking in stolen property in the second degree clear to the jury, so did the instructions as a whole.<sup>5</sup> Instruction 10, defining the crime, combines the statutory definition of "traffic" and the statutory definition of recklessness to create an overly confusing instruction. CP 62.

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<sup>5</sup> A copy of the court's instructions, CP 49-70, is attached to this brief.

In addition, the instructions as a whole over-emphasized the element of recklessness to the benefit of the State. In addition to Instructions 10 and 15, the jury had a separate instruction defining recklessness, and was told that this mental element is established if the defendant acted intentionally or knowingly. CP 61; RCW 9A.08.010(2). Jury instructions should not unduly emphasize certain evidence or one party's theory of the case. Samuelson v. Freeman, 75 Wn.2d 894, 897, 454 P.2d 406 (1969); Harris v. Groth, 31 Wn. App. 876, 881, 645 P.2d 1104 (1982), aff'd, 99 Wn.2d 438 (1983).

Jurors are not legal scholars or legislators, and they should not be asked to parse technical meanings or to judge ambiguities. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (legal standard must be "manifestly apparent" in instruction; reversing because grammatical reading of instruction could have left jury with incorrect impression of law). Where jury instructions may be read to permit an erroneous interpretation of the law, they are fatally flawed. LeFaber, 128 Wn.2d at 902. Absolute clarity is required as jurors are neither required nor expected to guess at the precise meaning of terms, nor required to apply interpretive tools. Id.

e. Mr. Dodd's conviction must be reversed. The "to convict" instruction in Mr. Dodd's case was so confusing, that the elements of the crime were not made clear to the average juror. In addition, the instructions provided by the court over-emphasized the mental element of recklessness to the advantage of the prosecution. Mr. Dodd's conviction must be reversed and remanded for a new trial. Mills, 154 Wn.2d at 10, 15 (reversing where jury not "clearly instructed" as to all the elements of the crime) (emphasis in original).

**2. Mr. Dodd's conviction must be reversed because the jury may not have been unanimous as to which of two acts constituted the crime of trafficking in stolen property.**

a. The accused may not be convicted of a crime unless the State proves every element of the charged crime beyond a reasonable doubt and the jury returns a unanimous verdict. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi, 530 U.S. at 476-77; U.S. Const. amends. V, VI, XIV; Const. art. I, §§ 3, 22. Washington's constitution guarantees a unanimous verdict in criminal cases. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right requires the jury to unanimously agree as to what criminal act constitutes the crime charged in the information.

State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Thus, when multiple acts are alleged, any of which could independently prove a charge, the court must clearly explain to the jury that a guilty verdict must be based on a unanimous finding that one particular act was proven beyond a reasonable doubt or the prosecution must clearly elect the act upon which it is relying for the conviction. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); Petrich, 101 Wn.2d at 571-72. Otherwise, there is a possibility that some jurors relied upon one act and other jurors on a different act, “resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” Kitchen, 110 Wn.2d at 411.

b. The court did not instruct the jury on unanimity, and the State did not elect what acts it was relying upon to support a conviction. Mr. Dodd rented a home from Mr. Schindler that contained furnishings and other belongings. Mr. Schindler testified that Mr. Dodd did not always pay his rent or do the repairs needed to get the house ready for sale. While Mr. Schindler was in Europe, Mr. Dodd had a garage sale at house and sold a concrete pillar belonging to Mr. Schindler to a neighbor. When Mr. Schindler returned from Europe

and found the house largely empty, he called the police who located some of Mr. Schindler's property at Mr. Dodd's new home.

In closing argument, the State did not elect what act would support a conviction for trafficking in stolen property. Instead, the prosecutor argued the jury could convict Mr. Dodd based upon two separate acts – selling Mr. Schindler's property at the garage sale and taking Mr. Schindler's property to his new home. RP 128-30, 146. In addition, the court did not give an instruction on unanimity. Mr. Dodd's conviction must therefore be reversed.

c. Mr. Dodd may raise this issue. Appellate courts do not normally address issues that were not addressed in the lower court. RAP 2.5(a). An appellant, however, may raise "a manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3). Constitutional errors are given special treatment on appeal because they may result in a serious injustice to the accused and adversely impact public perception of the criminal justice system. State v. Scott, 110 Wn.2d 682, 686-87, 686 n.3, 757 P.2d 492 (1988). The appellate court will review a constitutional issue raised for the first time on appeal if it first determines the error is "truly of constitutional

magnitude.” Id. at 688. If so, the court will examine the effect the error had on the trial in light of the constitutional harmless error standard. Id.

This Court has held that the failure to provide a unanimity instruction is a manifest constitutional issue that may be addressed for the first time on appeal. State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997), rev. denied, 134 Wn.2d 1002 (1998); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995). The same reasoning applies in Mr. Dodd’s case. Mr. Dodd had the right to a unanimous jury verdict, so the issue is a constitutional one. The prosecutor admitted evidence of separate acts – selling Mr. Schindler’s property at a garage sale and taking Mr. Schindler’s property to his new home – but did not elect which act the jury should consider in deciding the case. As will be argued below, this error is presumed prejudicial and given the facts of the case, this Court cannot be assured that the jury returned a unanimous verdict. This Court should therefore address this manifest constitutional issue.

d. The State cannot prove the constitutional error is harmless.

Mr. Dodd’s right to a unanimous jury verdict was violated when the State presented evidence of multiple acts but failed to elect which incident it relies upon for conviction and the jury was not instructed as

to unanimity concerning the act constituting the crime. Petrich, 101 Wn.2d at 572; State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911). Constitutional error is presumed prejudicial and requires reversal unless the State proves beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Kitchen, 110 Wn.2d at 405, 409. The constitutional error in this case is harmless “only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.” Kitchen, 110 Wn.2d at 405-06.

A rational juror in Mr. Dodd’s case could have entertained a reasonable doubt that each incident established second degree trafficking in stolen property beyond a reasonable doubt. First, the evidence that Mr. Dodd took Mr. Schindler’s property and used it in his new home does not prove trafficking in stolen property. Trafficking requires the defendant take possession over stolen property in order to transfer it to another person, not to keep it. RCW 9A.82.010(19); see State v. Herman, 138 Wn. App. 596, 604, 158 P.3d 96 (2007) (trafficking statute encompasses “the transfer of stolen property;” legislature intended to punish “any commercial transaction involving

property known to be stolen”); Killingsworth, 166 Wn. App. at 287-88 (sufficient evidence to support first degree trafficking conviction where defendant pawned stolen property). The prosecutor, for example, argued that Mr. Dodd intended to keep the items he took from Mr. Schindler’s home to his own. 2RP 29-30. A reasonable juror could easily conclude that the Mr. Dodd’s acts in taking Mr. Schindler’s property to his home did not provide proof beyond a reasonable doubt that Mr. Dodd recklessly trafficked in stolen property.

A rational juror could also entertain doubts about whether Mr. Dodd committed trafficking in stolen property when he held the garage sale. In his statement to the police, Mr. Dodd explained that Mr. Schindler was trying to get the house ready for sale and he thought he was helping Mr. Schindler by holding the garage sale. At trial, Mr. Dodd’s stepson testified he heard Mr. Schindler give Mr. Dodd permission to hold a garage sale. Thus, there was evidence to lead a rational trier to conclude this was not a basis for conviction.

The court did not instruct the jury on unanimity, and the prosecutor did not elect a specific act to form the basis of a trafficking in stolen property conviction. The State cannot demonstrate beyond a reasonable doubt the error was harmless. Mr. Dodd’s conviction must

therefore be reversed and remanded for a new trial. Kitchen, 110 Wn.2d 412.

**3. Mr. Dodd's conviction must be reversed because the State did not prove each means of committing trafficking in stolen property beyond a reasonable doubt.**

Mr. Dodd was charged with trafficking in stolen property in the second degree, and the jury was instructed he could be convicted under two alternative means: by (1) recklessly possessing or retaining control over property with the intent to sell, transfer, dispense or distribute it to another person or (2) recklessly selling, transferring, distributing or dispensing stolen property to another person. CP 67-68. These alternatives are found in the statutory definition of "traffic." RCW 9A.82.010(19). The instructions informed the jury it was not required to unanimously agree as to which means it was finding the defendant guilty, and the jury returned a general verdict. CP 67-68, 71. Thus, there is no way for this Court to know if the jury returned a unanimous verdict as to one means or whether the jurors were divided as to which means they were relying upon for conviction. See State v. Green, 94 Wn.2d 216, 233, 616 P.2d 628 (1980) (court could not conclude jury was unanimous where instructions did not require jury to be unanimous as to which underlying crime the felony murder conviction relied).

This Court has previously held that the statutory definition of “traffic” does not create alternative ways of committing trafficking in stolen property in the first degree, where trafficking was one of the eight alternative methods of committing the offense. State v. Strohm, 75 Wn. App. 301, 307-09, 879 P.2d 962 (1994), rev. denied, 126 Wn.2d 1002 (1995); former RCW 9A.88.050(2). However, the instruction in question was proposed by the State. The law of the case doctrine provides that “jury instructions that are not objected to are treated as the properly applicable law on appeal.” Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). Thus, when the State undertakes to prove an element of a crime by not objecting to inclusion in the “to convict” instruction, that element must be proven beyond a reasonable doubt, even if it is not statutorily required. State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998).

Here, the State prepared an instruction that created two alternative means of committing the charged offense and the court gave the instruction. CP 67-68. In reviewing Mr. Dodd’s claim that the State did not prove the elements of the crime beyond a reasonable doubt, this Court must therefore used the standard of review for

sufficiency challenges to convictions where the jury was instructed as to alternative means.

When a crime may be committed in more than one way and there is no evidence of jury unanimity, the conviction will be upheld only if the reviewing court determines there is sufficient evidence to support each means. Ortega-Martinez, 124 Wn.2d at 707-08. “[I]f the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.” Id. at 708 (emphasis in original).

Evidence is sufficient if, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Hickman, 135 Wn.2d at 103; Green, 94 Wn.2d at 220-22; Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). In the present case, the State did not prove each of the two means beyond a reasonable doubt. The State presented evidence that sold some of Mr. Schindler’s property at a garage sale. In the light most favorable to the State, this evidence establishes that he recklessly sold, transferred,

distributed, dispersed or dispensed with stolen property, the first alternative means. CP 67; RCW 9A.82.010(19).

There was no proof, however, that Mr. Dodd trafficked in stolen property under the second alternative means – by obtaining control of property with the intent to sell, transfer, distribute, dispense or otherwise dispose of the property to another person. CP 67; RCW 9A.82.010(19). While Mr. Dodd took some of Mr. Schindler's property to his own house, there is no evidence it was with intent to distribute or otherwise give the property to another person. The State thus failed to prove at least one if not both of the alternative means beyond a reasonable doubt.

The evidence thus did not support a conviction under the second alternative means of committing trafficking in stolen property outlined in the jury instructions. Because the jury returned a general verdict, it is impossible to know which prong the jury found persuasive or whether the jury was unanimous as to either prong. Because the State did not produce sufficient evidence to support a conviction under the second alternative means, Mr. Dodd's conviction must be reversed and remanded for a new trial on the first means of trafficking in stolen property. Green, 94 Wn.2d at 233-34.

E. CONCLUSION

Mr. Dodd's conviction for trafficking in stolen property in the second degree must be reversed because (1) the "to convict" instruction did not clearly set forth the elements of the crime, (2) the jury instructions as a whole did not clearly convey the applicable law to the jury, (3) the jury was not instructed it had to be unanimous as to which of multiple acts they based a conviction, and (4) the State did not prove each of the alternative means beyond a reasonable doubt.

DATED this 17<sup>th</sup> day of December 2012.

Respectfully submitted,



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Washington Appellate Project  
Attorneys for Appellant

**APPENDIX**

**COURT'S INSTRUCTIONS TO THE JURY**

**April 26, 2012**

**FILED**  
KING COUNTY, WASHINGTON

APR 26 2012

SUPERIOR COURT CLERK  
BY Ed Gucco  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

STATE OF WASHINGTON	)	
	)	No. 11-1-06392-1 SEA
Plaintiff,	)	
	)	
vs.	)	
	)	
ISIAH DODD	)	
	)	
Defendant	)	
	)	
	)	

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COURT'S INSTRUCTIONS TO THE JURY

April 26 2012

  
\_\_\_\_\_  
JUDGE CHRISTOPHER A. WASHINGTON

No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors

that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not

consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

No. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

No. 4

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 5

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

No. 6

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

No. 7

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

No. 8

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

No. 9

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act or result may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

No. 10

A person commits the crime of Trafficking in Stolen Property in the Second Degree when he or she knowingly buys, receives, possesses, or retains control of stolen property, with the intent to sell, transfer, distribute, dispense, or dispose of the stolen property to another person or sells, transfers, distributes, dispenses, or disposes of stolen property to another person, and the defendant knew of and disregarded a substantial risk that the property was stolen property; and the defendant's disregard of such substantial risk that the property was stolen property was a gross deviation from conduct that a reasonable person would exercise in the same situation.

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No. 11

Property means anything of value.

No. 12

Stolen means obtained by theft.

No. 13

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

No. 14

Wrongfully obtains means to take wrongfully the property or services of another.

To exert unauthorized control means, having any property or services in one's possession, custody or control, to secrete, withhold or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

To convict the defendant of the crime of Trafficking in Stolen Property in the Second Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That during a period of time between on or about May 1, 2010, and on or about July 28, 2010, the defendant knowingly
  - (a) possessed or retained control over property and
    - (i) the defendant knew of and disregarded a substantial risk that the property was stolen property; and
    - (ii) the defendant intended to sell or transfer or distribute or dispense that property to another person;
  - or
  - (b) sold or transferred or distributed or dispensed or disposed of property to another person and the defendant knew of and disregarded a substantial risk that the property was stolen property;
- (2) That the defendant's disregard of that risk was a gross deviation from conduct that a reasonable person would exercise in the same situation;
- (3) That the property was stolen property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that Elements (2), (3), (4), and either Elements (1) (a) or (1) (b) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count 1. Elements (1) (a) and (1) (b) are alternatives and only one need be proved. You need not unanimously agree as to which of elements (1) (a) and (1) (b) has been proved.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count 1.

No. 16

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and the verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68836-7-I
v.	)	
	)	
ISIAH DODD,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17<sup>TH</sup> DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ISIAH DODD 16088 GREENWOOD AVE N SHORELINE, WA 98133	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

APPELLATE PROJECT  
SERVED BY MARIA ARRANZA RILEY  
DATE SERVED 12/17/12  
TIME SERVED 11:50

**SIGNED** IN SEATTLE, WASHINGTON THIS 17<sup>TH</sup> DAY OF DECEMBER, 2012.

X \_\_\_\_\_  
*[Signature]*

**Washington Appellate Project**  
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