

68836-7

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No. 68836-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ISIAH DODD,

Appellant.

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STATE OF WASHINGTON
DIVISION ONE

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

The Honorable Christopher Washington

REPLY BRIEF OF APPELLANT

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Const. art. I § 22 1

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A. ADDITION TO STATEMENT OF THE CASE

James Schindler testified that he and William Irmscher were life partners. 2RP 25. The two, however, maintained separate residences. 2RP 26, 57. When Mr. Irmscher died, Mr. Schindler inherited his home and its contents. 2RP 27, 71.

B. ARGUMENT IN REPLY

1. **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.**

The defendant in a criminal case has the constitutional right to a unanimous jury verdict. Const. art. I, § 21; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Thus, when multiple acts are alleged as evidence of a single charge, the court must instruct the jury that the State that they must unanimously agree that the State proved beyond a reasonable doubt a single act constituting the charged offense or the prosecution must clearly elect the act it is relying upon for conviction. State v. Coleman, 159 Wn.2d 509, 511-12, 150 P.3d 1126 (2007); State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); Petrich, 101 at 571-72; U.S. Const. amends. VI, XIV; Const. art. I § 22. No unanimity instruction is required, however, when the defendant's acts constitute a "continuous course of conduct." Petrich, 101 Wn.2d at 571.

The State presented evidence of multiple acts in Isiah Dodd's trial, but the jury was not given a unanimity instruction and the State did not elect the act upon which it was basing the prosecution. The State argues no unanimity instruction was required because Mr. Dodd was engaged in a continuing course of conduct. Brief of Respondent (BOR) at 13. This Court reviews the facts "in a common sense manner" to determine if they demonstrate a continuous course of conduct. Petrich, 101 Wn.2d at 571. A review of the facts demonstrates the fallacy of the State's argument.

At trial, the prosecutor argued the jury could convict Mr. Dodd of trafficking in stolen property in the second degree for either (1) selling Mr. Schindler's property at a garage sale or (2) taking Mr. Schindler's property to his new home. 2RP 128-30, 146. Acts that occur at separate times and in separate places are generally not a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); see State v. Crane, 116 Wn.2d 315, 329-30, 333, 804 P.2d 10 (no unanimity instruction required in murder case where fatal blows occurred within two-hour period), cert. denied, 501 U.S. 1237 (1991).

The two acts in Mr. Dodd's case are separate in time and place. The garage sale occurred in July 2010 at the house Mr. Schindler owned at 2117 N. 185th Street in Shoreline. 1RP 112; 2RP 18, 20. Mr. Dodd sold at least one of the outdoor decorations belonging to Mr. Schindler at the garage sale.¹ 2RP 21, 52. A search warrant was executed on August 18, 2010, at Mr. Dodd's new home at 16088 Greenwood Avenue North in Shoreline. 1RP 109-10, 122-23. Property from Mr. Schindler's house was found at Mr. Dodd's residence and seized. Because of the separation in time, place, and type of activity, a unanimity instruction was thus required. State v. York, 152 Wn. App. 92, 216 P.3d 436 (2009) (unanimity instruction required for count of rape of a child where child testified sexual intercourse occurred numerous times but did not specify particular incident).

The State argues the two acts are tied by a common objective – “to deprive Schindler of his property and to distribute it to others.” BOR at 15-16. This may have been the objective of the yard sale, but the same can not be said of Mr. Dodd's possession of Mr. Schindler's property at his home. There is no indication Mr. Dodd was trying to

¹ Mr. Dodd also sold his own property at the yard sale. 2RP 22.

sell that property to others, as his family was using it. 2RP 43-47
(property in use at Mr. Dodd's residence).

The jury heard evidence of two separate acts. Because the acts were at separate locations on separate dates and did not share the same objective, they are not a continuous criminal act. This Court cannot be confident the jury unanimously agreed which act supported the guilty verdict because there was no unanimity instruction and the prosecutor did not elect one act in closing argument.

Evidence that Mr. Dodd took Mr. Schindler's property and used it in his new home does provide proof of trafficking in stolen property, which 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). In addition, there was evidence that Mr. Dodd believed he was helping Mr. Schindler prepare the house for sale by holding the garage sale. A reasonable juror could entertain a reasonable doubt that either act constituted second degree trafficking in stolen property, and Mr. Dodd's conviction must be reversed. Kitchen, 110 Wn.2d 412; York, 152 Wn. App. at 96.

2. 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 argues the State did not prove beyond a reasonable doubt that he committed trafficking in stolen property in the second degree. Because the jury was instructed it could convict Mr. Dodd under either of two alternative means, his conviction must be reversed unless this Court is convinced there is sufficient evidence to support both means. CP 67-68; State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). 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. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

The State agrees the jury was instructed that it could convict Mr. Dodd under alternative means of the crime, but argues there was sufficient evidence to prove each alternative means beyond a reasonable doubt. BOR at 16 n.2. 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).

According to the State, a reasonable juror could believe that Mr. Dodd continued to intend to sell or distribute Mr. Schindler's property after the garage sale was over and it was in his new house. BOR at 19-20. The evidence, however, shows that Mr. Dodd and his family were using the property. The clothes washer and dryer, for example, were hooked up and fully functioning. 2RP 45. The lawn decorations and lawn mower were in Mr. Dodd's yard. 2RP 44-45. Other domestic items were found in appropriate rooms inside the home; a silverware set was in the dining room and a glass-top table and dictionary were found in the living room. 2RP 46-47. There was no indication Mr. Dodd was trying to sell or distribute those items.

The State did not prove beyond a reasonable doubt that Mr. Dodd possessed or retained control over Mr. Schindler's property with the intent to sell or transfer it to another person. 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. 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.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, Mr. Dodd's conviction for trafficking in stolen property in the second degree must be reversed and remanded for a new trial.

DATED this 17th day of April 2013.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF APRIL, 2013, I CAUSED THE ORIGINAL **REPLY 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:

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