IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LINDA RAE BOZAK, Appellant.	No. 38910-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Linda and Michael Bozak lived in a home that had been in Linda's[1] family for many years. When the couple divorced, the trial court awarded Michael ownership of the home. Before authorities forced Linda to vacate the residence, Linda removed fixtures, appliances, other pieces of Michael's personal property, and she severely damaged the home. As a result, the Jefferson County Prosecutor's Office charged Linda with first degree theft (domestic violence) and first degree malicious mischief (domestic violence). A jury found her guilty of only the lesser charge of third degree theft (domestic violence). Linda argues that the trial court (1) failed to provide the jury with a unanimity instruction, (2) abused its discretion by imposing domestic violence perpetrator treatment as a condition of her sentence, and (3) erred by listing her

[1] We use the Bozaks' first names for clarity.

underlying crime as a felony, rather than a gross misdemeanor on her no-contact order. The State concedes Linda's no-contact order erroneously indicates she was convicted of a felony. We affirm Bozak's third degree theft conviction, but we remand for the trial court to correct the erroneous reference to a felony conviction in its no-contact order.

FACTS

Linda and Michael were married and lived in a home in Port Townsend, Washington. The house initially belonged to Linda's mother; Linda acquired it after her mother's death in 1999. Linda had lived in the home most of her life.

In 2007, Michael moved out of the house and, in 2008, Linda and Michael divorced. The trial court entered the dissolution decree on July 16, 2008, awarding Michael the house and the responsibility for its mortgage and ordering Linda to vacate the house on or before September 8, 2008. On September 8, Linda had not found another place to live and she remained in the house. Michael did not object to her continued, temporary residence in the house and did not attempt to take actual possession of the house until September 19.

On September 19, Michael became concerned by the condition of the property and called his divorce attorney and then the police. Two Port Townsend police officers met Michael, Linda, and Michael's attorney at the house. Both Linda and Michael were physically upset.

The officers walked through the house noting extensive damage. All the doors were off their hinges and most of the hinges themselves were missing. All the cabinet doors in the kitchen had been removed and taken elsewhere. The refrigerator, range, microwave, washing machine, dryer, and chest freezer were gone. In the bedroom, a piece of drywall approximately five feet in diameter which contained a mural had been cut out of the wall. A medicine cabinet had been

removed from the bathroom wall. Spray painted on the bathroom walls were a phallic symbol and the words "If this were U cockroach" using gold paint. Clerk's Papers (CP) at 5. The living room carpet had been ripped up and thrown outside in the yard next to several other large piles of debris. Three porch windows had been broken.

During the review of the house, Linda responded to questions posed by the police. When an officer initially spoke to Linda, she yelled, "[T]his house is mine, I've lived in it all my life. I have to comply with everything but he doesn't?!" CP at 5. In response to a question about why she spray painted on the bathroom walls, Linda replied, "They're my walls." CP at 5. When an officer asked about the missing appliances, hardware, and the removed doors, Linda stated, "The house is mine, I can do what I want to it." CP at 5. Finally, Linda simply shrugged her shoulders when asked what she did with everything that had been removed.

The State charged Linda with first degree theft (domestic violence) and first degree malicious mischief (domestic violence). The State argued that the trial court had awarded Michael the house and its contents in the decree of dissolution; therefore, by removing the appliances, cabinet doors, and hardware, Linda committed theft.

The State presented evidence of missing items and their values. The missing appliances were valued at $300 for the microwave; $400 each for the washer, dryer, and freezer; $540 for the range; and $800 for the refrigerator.[2] Michael indentified two outboard motors and a chainsaw that were missing from an unsecured barn on the property. The dissolution decree

[2] Linda allowed Michael to retrieve the range ($540) and the freezer ($400) about a month before trial. It does not appear that Michael recovered any other pieces of missing property except for the kitchen cabinet doors that he found three days after he took possession of the property on adjacent land Linda owned.

valued the chainsaw at $150, one outboard motor at $100, and the other outboard motor at $200. A Pontiac Grand Prix valued at $100 and awarded to Michael in the decree of dissolution was also missing.

At trial, Linda testified and admitted that she had removed the Pontiac Grand Prix from the property before the entry of the dissolution decree. The car belonged to her before the marriage and she wanted to keep it. She stated that she was willing to pay Michael the value of the car listed in the dissolution decree ($100) to do so. Linda testified that she had no idea what happened to the chainsaw or the outboard motors; she assumed that Michael had retrieved them after he moved out of the house before the finalization of their divorce. As for the house appliances, Linda did not believe that they belonged to Michael because they were not specifically listed in the dissolution decree. She interpreted the dissolution decree as awarding Michael the house but not its contents. Finally, Linda explained that she removed the doors, cabinets, and hardware because she was working on improvements to the home before she vacated it.

Ultimately, a jury convicted Linda of the lesser included offense of third degree theft contrary to former RCW 9A.56.050 (1998).[3] The jury could not reach a unanimous verdict on the malicious mischief charge. By special verdict, the jury found that Linda and Michael were members of the same family or household. The trial court sentenced Linda to serve 12 months of confinement, of which all but 10 days were suspended for 24 months, pay $1,715.56 in court costs and attorney fees, and pay $100 to Michael in restitution. Additionally, the trial court

[3] Former RCW 9A.56.050 (1998) states in pertinent part,

> (1) A person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed two hundred and fifty dollars in value . . . .
>
> (2) Theft in the third degree is a gross misdemeanor.

imposed 24 months probation and required Linda to undergo domestic violence perpetrator treatment. Finally, the trial court entered a domestic violence no-contact order, forbidding Linda from contacting Michael or visiting her former home. Linda appeals.

ANALYSIS

Unanimity Instruction

Linda argues that the trial court erred by failing to give a jury unanimity instruction. We disagree.

First, we note that Linda did not propose a unanimity instruction at trial as CrR 6.15 requires. But we may review for the first time on appeal a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). The right to a unanimous verdict is part of the fundamental constitutional right to a jury trial and previously we have reviewed challenges to the absence of such an instruction when made for the first time on appeal. *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985); *see also In re Det. of Sease*, 149 Wn. App. 66, 75, 201 P.3d 1078 (noting that a trial court's failure to give a unanimity instruction is subject to constitutional harmless error analysis but holding that the trial court did not err by failing to give unanimity instruction (citing *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988))), *review denied*, 166 Wn.2d 1029 (2009). Here, we review Linda's challenge to the trial court's alleged failure to specifically instruct the jury that it must be unanimous in its verdict.

We review the adequacy of jury instructions de novo as a question of law. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories

of the case, and, when read as a whole, they properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 908 n.1, 909, 976 P.2d 624 (1999).

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Where the State alleges multiple acts resulting in a single charge, either it must elect which act it is relying on as the basis for the charge or the trial court must instruct the jurors that they must unanimously agree that the State proved a single act beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). If the State fails to follow one of the alternatives, it commits a constitutional error stemming from the possibility that some jurors may have relied on one act or incident while other jurors may have relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *Kitchen*, 110 Wn.2d at 411.

Failure to give a unanimity instruction is not harmless unless no rational juror could have a reasonable doubt as to any of the incidents alleged. *Kitchen*, 110 Wn.2d at 411. This harmless error test turns on whether a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 405-06.

Here, the State charged Linda with one count of first degree theft, alleging that she wrongfully obtained or exerted unauthorized control over multiple household appliances and hardware exceeding $1,500 in value.[4] The crime here did not involve multiple incidents, merely

[4] In 2009, the legislature amended the monetary values that distinguish first, second, and third degree theft. Laws of 2009, ch. 431, §§ 7-9. Prior to the 2009 amendments, a person committed first degree theft when the value of the property involved exceeded $1,500, second degree theft when the value of the property involved exceeded $250 but did not exceed $1,500, and third degree theft when the value of the property involved did not exceed $250. Former RCW 9A.56.030 (2007); former RCW 9A.56.040 (2007); former RCW 9A.56.050. Here, because of the date of Linda's crime, the former monetary value ranges in the theft statutes apply.

multiple items. The State presented evidence of a single offense involving several pieces of property at the same time and place against one individual. *State v. Carosa*, 83 Wn. App. 380, 382-83, 921 P.2d 593 (1996) ("'[w]hen several articles of property are stolen by the defendant from the same owner at the same time and at the same place, only one larceny is committed'" (alteration in original) (quoting 3 Charles E. Torcia, Wharton's Criminal Law § 346, at 366 (15th ed. 1995))); *see also* RCW 9A.56.010(18)(c) (allowing for the aggregation of the values of stolen property stolen as part of a common scheme or criminal episode to determine the degree of theft). The trial court instructed the jury that its verdicts must be unanimous:

> When completing the verdict forms, you will first consider the crime of Theft in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form A.
>
> If you find the defendant guilty on verdict form A, do not use verdict form B or C. If you find the defendant not guilty of the crime of Theft in the First Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Theft in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach.
>
> If you find the defendant guilty on verdict form B, do not use verdict form C. If you find the defendant not guilty of the crime of Theft in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Theft in the Third Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words "not guilty" or the word "guilty", according to the decision you reach.
>
> If you find the defendant guilty of the crime of Theft but have a reasonable doubt as to which of two or more degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict forms A and B and to find the defendant guilty of the lesser included crime of Theft in the Third Degree on verdict form C.
>
> . . . .[5]
>
> Finally, you will consider a Special Verdict Form for any of the crimes for

[5] The trial court provided similar instructions for the different verdict forms relating to the various degrees of malicious mischief that the jury also had to consider.

> which you are considering. If you find the defendant not guilty of these crimes, do not use the Special Verdict Form. If you find the defendant guilty of these crimes, you will then use the Special Verdict Form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the Special Verdict Form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to this question, you must answer "no".
>
> 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 forms to express your decision.

CP at 60-63. Accordingly, the trial court properly instructed the jury on unanimity.

Even if the trial court had not properly instructed the jury on unanimity, any error was harmless. The jury ultimately convicted Linda of the lesser included offense of third degree theft. Viewing the evidence in its entirety, no rational trier of fact could have a reasonable doubt as to whether Linda committed third degree theft. *See Kitchen*, 110 Wn.2d at 405-06.

A person commits third degree theft when he or she exerts unauthorized control over property of another with a value that does not exceed $250. Former RCW 9A.56.050. Linda acknowledged she took the Pontiac Grand Prix and that the dissolution decree valued the car at $100. There is no evidence in the record that Michael gave her permission to take possession of the car. Linda also testified that she removed the hinges and some hardware from the property because she did not want anyone to steal them from the house. Michael testified that it cost him about $70 to replace the hardware to secure the exterior doors of the house. Any reasonable jury would have found beyond a reasonable doubt that Linda's removal of either the car or the hinges and hardware constituted third degree theft. Under these circumstances, any lack of unanimity instruction would have been harmless beyond a reasonable doubt. *See Kitchen*, 110 Wn.2d at 405-06.

Domestic Violence Treatment Sentencing Condition

Next, Linda contends that the trial court abused its discretion when it imposed domestic violence perpetrator treatment as a condition of her sentence under the mistaken belief that the law required it. She claims that the trial court abused its discretion by failing to exercise any discretion.

Generally, we review sentencing conditions for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Enstone*, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999) (quoting *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886 (1981)).

At sentencing, Linda objected to the State's recommendation that she take an anger management course. After hearing the parties' arguments, the following colloquy occurred:

> THE COURT: . . . [T]he 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.
> [DEFENSE COUNSEL]: The Judge has discretion --
> THE COURT: And I'll order that, whatever it 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 do have to do that.

Report of Proceedings (RP) (Jan. 23, 2009) at 387.

Linda cites *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005),[6] to support her argument that the trial court abused its discretion by failing to exercise discretion. But *Grayson*

[6] In her opening brief, Linda relies on *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971), to support her proposition that a trial court abuses its discretion by not exercising any discretion. Because Linda cites to an excerpt from the *State ex rel. Carroll*'s dissent, and that excerpt is taken out of its context, her reliance on *State ex rel. Carroll* does not warrant discussion.

does not apply. In *Grayson*, our Supreme Court held that the categorical refusal to consider a Drug Offender Sentencing Alternative sentence for *any* defendant was a failure to exercise discretion and reversible error. 154 Wn.2d at 341-42. Here, there is no similar failure to exercise discretion. Linda mischaracterizes the trial court's comments as a categorical refusal to exercise discretion for any defendant when it sentenced her to complete a domestic violence perpetrator treatment program. Although the trial court erroneously stated, "It's my understanding if you get convicted of domestic violence you have to go through that perpetrator's program," Linda's defense counsel immediately corrected that misstatement of the law by stating, "The Judge has discretion." RP (Jan. 23, 2009) at 387. The trial court then chose to order Linda to undergo the domestic violence perpetrator treatment program. Third degree theft is a gross misdemeanor to which the Sentencing Reform Act of 1981, ch. 9.94A RCW, does not apply. Former RCW 9A.56.050(2); RCW 9.94A.010. Accordingly, the trial court did not abuse its discretion when it imposed domestic violence perpetrator treatment as a condition of probation on Linda's suspended sentence. RCW 9.92.060(1) (stating that a superior court can suspend a sentence "upon such terms as the superior court may determine").

No-Contact Order Correction

Finally, Linda points out that the no-contact order erroneously states that her underlying conviction is a felony rather than a gross misdemeanor. The State concedes this error. The jury found Linda guilty of third degree theft, which is a gross misdemeanor under former RCW 9A.56.050(2). Accordingly, we accept the State's concession and remand for entry of a corrected no-contact order that properly reflects Linda's underlying conviction of third degree theft as a gross misdemeanor.

We affirm Linda's third degree theft conviction and the trial court's order that she complete domestic violence perpetrator treatment as a condition of her sentence on the gross misdemeanor conviction. But we remand for correction of the no-contact order's scrivener's error to reflect that Linda was convicted of a gross misdemeanor and not a felony.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, P.J.

ARMSTRONG, J.