IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES R. VAN RENSELAAR, Appellant.	No. 41417-1-II UNPUBLISHED OPINION

Penoyar, C.J. — James Van Renselaar appeals his convictions of second degree theft and first degree trafficking in stolen property. He argues that the State was required to charge him under the more specific statute relating to timber theft, former RCW 79.02.310 (2003), rather than the general statute defining theft, RCW 9A.56.020(1), and that this charging error resulted in several due process violations. He also argues that the State failed to prove the "property of another" element of theft because the timber was publicly owned. We affirm.

FACTS

On March 10, 2008, United States Forest Service Officers Robert Tokach and Jeffrey Summers were patrolling the Snoqualmie Baker National Forest in Lewis County, Washington. They noticed an unoccupied car parked off the road. Glancing into its open window, Tokach saw a piece of cedar and wood harvesting tools. He followed tracks leading away from the car into the forest. Tokach also smelled fresh-cut cedar. He climbed up a steep slope and discovered Van Renselaar and another person throwing cedar bolts[1] down the slope toward the road.

Tokach asked Van Renselaar what they were doing with the cedar and whether they had a

[1] A cedar bolt is a block of cedar wood generally either 16 inches long (a shingle bolt) or 24 inches long (a shake bolt) and varying widths and depths.

permit. Van Renselaar immediately admitted wrongdoing. He said he did not think he could get a permit for the cedar, but he needed money so he took the cedar without a permit to sell it. Van Renselaar did not cut down the tree; it was blown down. Tokach later confirmed through Forest Service records that Van Renselaar did not have a permit to take cedar from the National Forest.

Tokach photographed the area. Later, Tokach and Summers returned to the site and measured the cedar bolts and the tree from which they had been cut. They submitted these figures and photographs to another Forest Service employee, Steve Hansen, who calculated the approximate value of the wood cut from the tree, including the blocks found at the scene, at $2,659.77. The State charged Van Renselaar with first degree theft[2] and first degree trafficking in stolen property.[3]

At trial, Tokach testified that the trees are owned by the United States Department of Agriculture and managed by the Forest Service. A Forest Service permit is necessary to harvest trees from National Forest land, even if the tree harvested was already down. The Forest Service rarely issues permits for harvesting trees in the Snoqualmie Baker National Forest.

A landowner may obtain a permit to sell cedar from the landowner's own private property through the county. Donald Sargent testified that he had such a permit and that on March 8, 2008, he used that permit to help Van Renselaar sell half a cord[4] of old growth cedar to a mill in Napavine. The mill owner also testified to purchasing half a cord of good quality old-growth cedar from Sargent for $562.03.

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[2] RCW 9A.56.020(1); former RCW 9A.56.030(1)(a) (2007).

[3] RCW 9A.82.050(1).

[4] A cord is 128 cubic feet of wood. Report of Proceedings (Aug. 17, 2010 pm) at 52.

The jury convicted Van Renselaar of second degree theft and first degree trafficking in stolen property.[5] Van Renselaar appeals.

ANALYSIS

I. Concurrent Statutes Doctrine

Van Renselaar contends that the State was required to prosecute him under the statute prohibiting timber theft, former RCW 79.02.310, because it is concurrent and specific in relation to the general statute prohibiting theft, RCW 9A.56.020(1). Consequently, Van Renselaar contends that because he was not charged under the timber theft statute, multiple due process violations resulted, including a defective information, and a defective to convict instruction. He also alleges that the State presented insufficient evidence to prove the elements of the timber theft crime.

When a specific statute and a general statute punish the same conduct, the statutes are concurrent. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984); *State v. Presba*, 131 Wn. App. 47, 52, 126 P.3d 1280 (2005). This rule gives effect to legislative intent and ensures that charging decisions comport with that intent. *State v. Conte*, 159 Wn.2d 797, 803, 154 P.3d 194 (2007); *State v. Danforth*, 97 Wn.2d 255, 258, 643 P.2d 882 (1982). Statutes are only concurrent when every violation of the specific statute would result in a violation of the general statute. *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006). Whether statutes are concurrent involves examining the elements of the statutes, not the facts of the particular case. *Chase*, 134 Wn. App. at 802–03. This implicates a rule of statutory construction, which we

[5] Van Renselaar was also convicted of separate counts of driving with a suspended license. He does not appeal those convictions.

review de novo. *State v. Heffner*, 126 Wn. App. 803, 807, 110 P.3d 219 (2005).

There are two ways to raise a concurrent statute argument. The first is under the equal protection clause. Equal protection is violated when two statutes declare the same acts to be crimes but penalize a defendant more severely under one statute than the other. *State v. Leech*, 114 Wn.2d 700, 711, 790 P.2d 160 (1990). The second is a statutory construction argument, contending that the legislature effectively preempted the general statute when it passed the more specific statute prohibiting the same conduct. *See State v. Darrin*, 32 Wn. App. 394, 397, 647 P.2d 549 (1982).

As a preliminary matter, the State asserts that because Van Renselaar raises this issue for the first time on appeal, he has waived his right to challenge the charging decision. In general, we do not consider an issue raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). If the error is of constitutional magnitude, the defendant must show how the alleged error actually resulted in prejudice in the context of the trial. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The State argues that Van Renselaar has raised only a statutory interpretation question. The State contends that the constitutional claims that Van Renselaar does raise depend on a holding in favor of Van Renselaar on the concurrent statute question before it can reach any constitutional issue, such as a deficient information or a deficient to convict instruction. The State further contends that we should decline to address this new issue because (1) forcing litigants to raise issues at trial serves judicial economy, (2) forcing Van Renselaar to raise this issue at trial is fair because it permits the State to alter its proof accordingly, and (3) double jeopardy would

prevent retrial at this point if Van Renselaar succeeds on appeal. We agree with the State.

Van Renselaar does not raise an equal protection argument here, nor could he. Both statutes merely provide alternate definitions of theft. Courts must look to the statutes defining first, second, and third degree theft to determine the appropriate punishment. Therefore, the punishment under either statute is the same.

Van Renselaar raises only an argument based on statutory construction. He raises no constitutional basis for reviewing this issue under RAP 2.5. That constitutional problems may hypothetically result were he correct on his statutory argument does not justify review. Van Renselaar has not shown a manifest constitutional error, and we decline to hear his argument for the first time on appeal. Even if Van Renselaar had timely raised this argument, he would not be entitled to dismissal because the statutes are not concurrent.

To determine whether the statutes are concurrent, we must consider whether all of the elements to convict under the timber theft statute are also elements that must be proved for conviction under the generic theft statute. *Presba*, 131 Wn. App. at 52. First degree theft, as Van Renselaar was charged here, requires proof that a person wrongfully obtained or exerted control over property or services of value in excess of $1,500 with the intent to deprive the

owner of the property or services. RCW 9A.56.020(1)(a);[6] former RCW 9A.56.030(1)(a) (2007).[7] The timber theft statute in effect at the time of the crime, in comparison, stated:

> Every person who willfully commits any trespass upon any public lands of the state and cuts down, destroys or injures any timber, or any tree standing or growing thereon, or takes, or removes, or causes to be taken, or removed, therefrom any wood or timber lying thereon, or maliciously injures or severs anything attached thereto, or the produce thereof, or digs, quarries, mines, takes or removes therefrom any earth, soil, stone, mineral, clay, sand, gravel, or any valuable materials, is guilty of theft under chapter 9A.56 RCW.

Former RCW 79.02.310.

The statutes in question are not concurrent. One could "cut[] down, destroy[] or injure[] any timber, or any tree standing or growing thereon" or "maliciously injure[]" timber lying on

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[6] RCW 9A.56.020(1) defines theft as:

> (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
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> (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
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> (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

[7] Former RCW 9A.56.030 (2007) stated:

> (1) A person is guilty of theft in the first degree if he or she commits theft of:
> (a) Property or services which exceed(s) one thousand five hundred dollars in value other than a firearm as defined in RCW 9.41.010;
> (b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another; or
> (c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty.
> (2) Theft in the first degree is a class B felony.

public lands without removing it from the property. *See* former RCW 79.02.310. That action would not constitute theft under chapter 9A.56 RCW because it would lack the intent to deprive the property owner of the timber. *See* RCW 9A.56.020(1) (theft requires that the person act "with intent to deprive him or her of such property or services."). The statute is phrased in the disjunctive; therefore, the statute does not require that the timber be taken or removed in order for a person to have violated the statute. *See* former RCW 79.02.310.

The State argues that the statutes are not concurrent because the timber theft statute does not contain the value requirement listed in the first degree and second degree theft statutes. This argument is misguided. A violation of the timber theft statute constitutes, by definition, "theft under chapter 9A.56 RCW." Former RCW 79.02.310. Therefore, the timber theft statute does not replace former RCW 9A.56.030 and former RCW 9A.56.040 (2007) in determining the degree of theft. It essentially functions as an alternative to the definition of theft listed in RCW 9A.56.020. The State must still charge under a particular degree of theft when charging a person with timber theft.

Because RCW 9A.56.020's definition of theft is not necessarily violated every time former RCW 79.02.310 is violated, those statutes are not concurrent. The State did not, therefore, err by charging Van Renselaar under former RCW 9A.56.020 rather than former RCW 79.02.310.

Van Renselaar offers several arguments based on his contention that the State erred in charging under the general theft statute rather than the timber theft statute. Van Renselaar argues that because the State should have charged him with timber theft, the State was required to prove the element of trespass on public lands. Van Renselaar also contends that the evidence was insufficient to prove that trespass element. Finally, Van Renselaar argues that because the State

should have charged him with timber theft, the information and to convict instructions were deficient in not setting forth the elements of that statute. Because the State was not required to charge Van Renselaar under the timber theft statute, these arguments fail.

II. Property of Another

Van Renselaar also argues that the State failed to show the "property of another" element of RCW 9A.56.020(1)(a). Van Renselaar argues that property owned by the public cannot be property of another. We disagree.

RCW 9A.56.020(1)(a) defines theft as, "To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services."[8] Van Renselaar argues that natural resources on public lands are not property or services of another until reduced to possession. Van Renselaar relies solely on *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256 (2000). That case involved theft of clams from privately-owned tidelands. *Longshore*, 141 Wn.2d at 421. The court in that case noted in dictum that on state-owned tidelands, clams in naturally occurring beds are not the personal property of any individual until reduced to actual possession. *Longshore*, 141 Wn.2d at 421. That case is distinguishable.

[8] Although the "property of another" element of theft is not defined in the theft statute, its meaning can be derived from the definition of "owner." *State v. Pike*, 118 Wn.2d 585, 590, 826 P.2d 152 (1992). "Owner" is defined as "a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services." Former RCW 9A.56.010(9) (2006).

For clams and other wild animals, the state has only a sovereign interest in the property. *See Citizens for Responsible Wildlife Mgmt. v. State*, 124 Wn. App. 566, 569, 103 P.3d 203 (2004) ("Title to animals *ferae naturae*[9] belongs to the state in its sovereign capacity and the state holds this title in trust for the peoples' use and benefit."). In contrast, the government's ownership of timber is proprietary. Timber and crops pass to the purchaser as appurtenant to the land. *Kruger v. Horton*, 106 Wn.2d 738, 744, 725 P.2d 417 (1986) (holding that title to timber and crops pass with title to the land). Therefore, unlike clams the State protects, timber need not be reduced to actual possession before it becomes property. Tokach's testimony confirmed that the Department of Agriculture owned the trees, not merely the government in general. Other theft cases involving theft of public property demonstrate that government owned property can constitute "property of another." *See, e.g.*, *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 91-92, 66 P.3d 606 (2003) (theft of state-owned timber in Lake Washington); *State v. Holt*, 52 Wn.2d 195, 324 P.2d 793 (1958) (theft of federally-owned and state-owned scrap metal).

Van Renselaar puts forth no other authority in support of his claim that theft of federally-owned timber does not satisfy the property of another element. We hold that as a matter of law federally-owned timber constitutes the property of another for the purposes of the theft statute.

Van Renselaar argues that his taking of the timber did not constitute theft of the property of another because the State did not prove that Van Renselaar needed a permit before taking the cedar. Again, we disagree.

The State is not required to prove that the Van Renselaar lacked a required permit to

[9] Animals *ferae naturae* are wild, untamed, or undomesticated. *Citizens for Responsible Wildlife Mgmt.*, 124 Wn. App. at 569 n.1 (citing Black's Law Dictionary 635 (7th ed. 1999)).

prove theft because that is not an essential element of the crime. If anything, Van Renselaar's argument that he was not required to have a permit is a part of a defense to the crime, specifically that he had the right to take the timber. To require the State to prove that a permit was required to take timber that did not belong to Van Renselaar would be the equivalent of requiring the State to show that a bank robber did not have an account at the bank. We will not impose such a requirement, especially where Van Renselaar has not asserted that a permit was not required until appeal, long after the State's opportunity to present evidence to refute his claim.

Van Renselaar also describes this argument as a sufficiency of the evidence issue, specifically that the State presented insufficient evidence that Van Renselaar took the property of another because it did not prove that Van Renselaar's conduct required a permit. When reviewing a sufficiency challenge, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

As we previously discussed, the State is not required to prove that Van Renselaar needed a permit. Several items of evidence established that the timber was the property of another. The State presented evidence that Tokach found Van Renselaar cutting timber while in the Snoqualmie Baker National Forest. Tokach testified that the Department of Agriculture owned and the Forest Service managed the trees. Tokach also testified that a Forest Service permit is necessary to harvest trees from National Forest land in any amount. Taking this evidence in the light most favorable to the State, there was sufficient evidence to prove the "property of another" element of theft.

III. Sufficient Evidence of Trafficking in Stolen Property

Van Renselaar finally contends that, because the State failed to prove timber theft, his conviction for trafficking in stolen property must be reversed. Van Renselaar does not challenge the evidence supporting this conviction. He argues only that there was insufficient evidence to prove trespass. Because, as we previously explained, the State was only required to prove the elements of theft, sufficient evidence supports the conviction of trafficking in stolen property.

Additionally, Van Renselaar argues that because he was not required to have a permit, the State failed to show that the trafficked property was stolen. We addressed this issue above. We affirm the conviction without further analysis.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.