IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JASON WILLIAM ROBERTS, Appellant.	)	DIVISION ONE No. 63538-7-I UNPUBLISHED OPINION FILED: October 11, 2010

Dwyer, C.J. — Jason Roberts appeals from the judgment entered on the jury's verdicts finding him guilty of possessing stolen property in the first degree and trafficking in stolen property in the first degree. He contends that the search of his vehicle was unconstitutional, that his multiple convictions violate the prohibition against double jeopardy, and that the court erred by not issuing a unanimity instruction to the jury. He also raises several additional claims in his statement of additional grounds. We hold that the trial court's admission of evidence obtained through the unlawful search of Roberts' vehicle constituted harmless error. Finding no other error, we affirm.

I

In June 2008, Susan McCullough posted flyers seeking to sell a litter of seven Australian Shepherd puppies, indicating that she was selling them for

$600 to $700 each. McCullough sold two of the puppies for $600 each.

On August 22, 2008, McCullough received a telephone call from a person inquiring about the puppies and requesting to see them that evening. Two men arrived together at McCullough's home to see the puppies, and the prospective buyer identified himself as Jason. After seeing the puppies and the kennels, Jason indicated that he was interested in a puppy and that he would call McCullough the next morning. Jason never called.

The next morning, McCullough discovered that her puppies were missing. Shortly after discovering that the puppies were gone, McCullough called the police. McCullough also notified King 5 News, which ran a story about the puppy theft. King 5 News received a call from a person who gave a tip as to the possible location of the puppies. The anonymous tipster indicated that the puppies were located at a Kent home.

Police officers went to the Kent home to investigate. While there, the officers recovered three of the five missing puppies. Photographs provided by McCullough were used to identify the puppies. The homeowner, Tammy Jackson Orduno, told the officers that a person named Jason had left the puppies at her house at 4:00 a.m. on August 23. She indicated that Jason's last name might be Roberts. Orduno also told the officers that "Jason drove a green Chevrolet Blazer with a 'John Deere' bumper sticker just above the rear bumper." One of the officers searched for the name "Jason Roberts" in the

database on his patrol car computer and found a photograph of the man. McCullough came to Orduno's home, looked at the picture on the officer's computer screen, and identified Roberts as one of the two men who had visited her house on August 22. Tamia Jackson, the homeowner's teenage daughter, testified at trial that Roberts left with one of the puppies, "didn't come back with it," and said "he sold it to a friend in West Seattle." Tamia Jackson also testified that Roberts tried to sell the puppies to her neighbor and advertised the puppies for sale on the Internet.

On August 26, Kent Police Officer Scott McQuilkin spoke with McCullough on the telephone and McCullough told him that the aforementioned tipster had called again to tell her that the suspect vehicle had returned to the same home. Officer McQuilkin researched and found that two of the stolen puppies had still not been found. As a result, he responded to the address and requested that Officer David Ghaderi respond as well. Officer McQuilkin told Officer Ghaderi that the suspect would be in a green SUV, with a specific license plate number, in a specific area. Officer McQuilkin also told Officer Ghaderi that the "green [C]hevy blazer . . . was believed to be associated with a puppy theft out of Des Moines" and that the registered owner, Jason Roberts, had a confirmed arrest warrant from the Kirkland Municipal Court.

On his way to the Kent residence, Officer Ghaderi spotted the suspect vehicle and initiated a traffic stop. The driver's identification indicated that he

was Jason Roberts. Officer McQuilken arrived to assist, and Roberts was arrested pursuant to the Kirkland warrant. Officer Ghaderi then "searched the vehicle incident to arrest." In the vehicle, he discovered one of the missing puppies in the backseat.

The State charged Roberts with one count of possessing stolen property in the first degree, a violation of RCW 9A.56.150, and one count of trafficking in stolen property in the first degree, a violation of RCW 9A.82.050. A jury found Roberts guilty of both counts.

Roberts appeals.

II

Roberts first contends that the search of his vehicle was unlawful. We agree.

In reviewing "a trial court's denial of a suppression motion," we review for substantial evidence challenged findings of fact. State v. Sadler, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008). "Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding." Sadler, 147 Wn. App. at 123. We review de novo "the trial court's conclusions of law." Sadler, 147 Wn. App. at 123.

"A warrantless search is presumed unreasonable except in a few established and well-delineated exceptions." State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). "The State must establish the exception to the

warrant requirement by clear and convincing evidence." State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). Both the United States Supreme Court and the Washington Supreme Court have recently clarified the "vehicle search incident to arrest" exception to the warrant requirement. See Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 1723, 173 L. Ed. 2d 485 (2009); State v. Patton, 167 Wn.2d 379, 394–95, 219 P.3d 651 (2009). In Gant, the Court held that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." 129 S. Ct. at 1723. Similarly, in Patton, the Washington Supreme Court held

> that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.

167 Wn.2d at 394–95.[1]

Pursuant to the holdings in Gant and Patton, the search of Roberts' vehicle incident to his arrest was unlawful. Roberts was securely handcuffed in the backseat of a patrol car when the officer searched his car. He did not pose a "safety risk" to the officers, Patton, 167 Wn.2d at 394–95, and he was not "within reaching distance of the passenger compartment at the time of the search."

[1] The State vigorously argues that a good faith exception to the exclusionary rule should apply in this case. However, our Supreme Court has explicitly rejected this position. State v. Afana, 169 Wn.2d 169, 181–84, 233 P.3d 879 (2010).

Gant, 129 S. Ct. at 1723.

Additionally, Roberts was arrested pursuant to his confirmed Kirkland warrant, not based on his suspected involvement in the puppy theft. Indeed, there was no "reasonable basis to believe that . . . the vehicle contain[ed] evidence of the crime of arrest that could be concealed or destroyed." Patton, 167 Wn.2d at 395. While there is evidence in the record that the officers were aware that Roberts was the suspected puppy thief before they arrested him, the trial court did not make any findings with respect to whether the officers would have had probable cause to arrest Roberts on the basis of the puppy theft. Thus, the search of Roberts' vehicle incident to his arrest did not fall within the narrow vehicle search incident to arrest exception. Roberts' motion to suppress the evidence obtained during this search should have been granted.

However, even where evidence was improperly admitted in violation of a defendant's constitutional rights, reversal is not required if the admission was "harmless beyond a reasonable doubt." State v. Hanson, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990) (citing Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). The harmless error rule dictates that "[i]f the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless." State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v.

Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

The record herein establishes that McCullough owned seven puppies, two of which she sold for $600 each. Roberts came to McCullough's home to look at the remaining five puppies, and the next morning all five were missing. Police officers found three of the puppies at a Kent home after receiving an anonymous tip. The homeowner told the officers that the person who left the puppies at her house was named Jason and that his last name might be Roberts. McCullough identified Jason Roberts as having been at her house looking at the puppies. Tamia Jackson testified that Roberts had sold one of the puppies to a friend, had tried to sell the puppies to her neighbor, and had posted the puppies for sale on the Internet. Additionally, no evidence was presented connecting the Kent homeowner or her family to McCullough. In fact, the evidence presented established a connection only between Roberts and McCullough, in that Roberts went to McCullough's home to look at the puppies shortly before they were stolen.

The facts in the record establish that (1) Roberts possessed stolen property that he knew to be stolen, (2) the property had a value that exceeded $1,500, (3) Roberts "withheld or appropriated" the stolen property to the use of someone other than the true owner, and (4) Roberts sold or dispensed, or intended to sell or dispense, stolen property to another person. Thus, without considering the evidence obtained from the vehicle, the untainted evidence

necessarily leads to a finding of Roberts' guilt because it establishes both the elements of possessing stolen property in the first degree[2] and the elements of trafficking in stolen property in the first degree.[3] Therefore, any error in admitting the evidence obtained in the vehicle search was harmless.[4]

III

Roberts next contends that his convictions for both possessing stolen property in the first degree and for trafficking in stolen property violate the prohibition against double jeopardy. We disagree.

We review de novo a claim of double jeopardy. State v. Kelley, 168

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[2] The jury was instructed that to convict Roberts for possessing stolen property in the first degree, each of the following elements must be proved:

(1) That during a period of time intervening between August 22, 2008 and August 26, 2008, the defendant knowingly received, retained, possessed, concealed, or disposed of stolen property;

(2) That the defendant acted with knowledge that the property had been stolen;

(3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;

(4) That the value of the stolen property exceeded $1500; and

(5) That the acts occurred in the State of Washington.

[3] The jury was instructed that to convict Roberts for trafficking in stolen property in the first degree, each of the following elements must be proved:

(1)That during a period of time intervening between August 22, 2008 and August 26, 2008,

(a) the defendant

(i) knowingly received or possessed or retained control over property, knowing that the property was stolen; and

(ii) intended to sell or transfer or distribute or dispense that property to another person;

or

b) the defendant knowingly sold or transferred or distributed or dispensed or disposed of property to another person, knowing that the property was stolen;

(2) That the property was stolen property; and

(3) That the acts occurred in the State of Washington.

[4] Because of our disposition of this issue, we need not analyze the State's claim that concern about the puppy's safety constituted an exigent circumstance, excusing noncompliance with the warrant requirement.

Wn.2d 72, 76, 226 P.3d 773 (2010). The Fifth Amendment to the United States Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington Constitution provides that "[n]o person shall be . . . twice put in jeopardy for the same offense." These two provisions provide identical protection against double jeopardy. State v. Womac, 160 Wn.2d 643, 650–51, 160 P.3d 40 (2007).

Where a defendant is charged with multiple offenses for a single incident, double jeopardy protections are not offended if the legislature intended that cumulative punishments be imposed for the crimes. In re Pers. Restraint of Borrero, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007). "If the language of the criminal statutes under which the defendant has been punished does not expressly disclose legislative intent with respect to multiple punishments, the court then considers principles of statutory construction to determine whether multiple punishments are authorized." Borrero, 161 Wn.2d at 536. The rule of statutory construction to be applied is known as the "same evidence" test, which dictates that where "'there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.'" State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Thus, we must determine whether Roberts was convicted of

offenses that are identical in law and in fact, in which case double jeopardy principles are violated. Borrero, 161 Wn.2d at 536–37. The elements of the relevant provisions are to be considered as they were "charged and proved" and not in the abstract. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005).

Here, there is no express legislative intent as to whether cumulative punishments were intended to be imposed for the offenses for which Roberts was convicted. Thus, the "same evidence" test must be applied.

Roberts was convicted of possessing stolen property in the first degree and of trafficking in stolen property in the first degree. Roberts' convictions satisfy the legal prong of the "same evidence" test because each of these offenses, as charged and proved, contains an element that the other offense does not.[5] First, in order to convict Roberts of possessing stolen property in the first degree, the State was required to prove that the stolen property had a value that exceeded $1,500. Former RCW 9A.56.150(1) (2007); RCW 9A.56.140(1); To convict Roberts of trafficking in stolen property in the first degree, no value needed to be shown. Second, in order to convict Roberts of trafficking in stolen

[5] The elements of possessing stolen property in the first degree at the time the crime was committed and as charged were that a person must (1) "knowingly . . . receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen," (2) "withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto," and (3) the property value must exceed $1,500. Former RCW 9A.56.150(1) (2007); RCW 9A.56.140(1). The elements of trafficking in stolen property in the first degree as charged are that a person either knowingly "sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or . . . 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.82.050(1); RCW 9A.82.010(19).

property in the first degree, the State was required to prove either that Roberts did knowingly "sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person" or that Roberts did "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.82.050(1); RCW 9A.82.010(19). No such element exists for the charge of possessing stolen property in the first degree. Thus, each of these two offenses contains an element that the other offense does not, indicating that Roberts' convictions are not the same in law.

Roberts' convictions also satisfy the factual prong of the "same evidence" test because proof of one charge does not automatically prove the other charge. In support of the possession charge, the State presented evidence that the puppies had a value of $600 to $700 each, that Roberts came to see the puppies at McCullough's home shortly before the puppies were discovered missing, that Roberts left the stolen puppies at the Kent home, and that Roberts left with one of the puppies and did not come back with it. This evidence would not have proved the trafficking charge. In contrast, in support of the trafficking charge, the State presented evidence that Roberts sold one of the puppies to a friend, tried to sell the puppies to the Kent family's neighbor, and posted the puppies for sale on the Internet. This evidence would not have proved the possession charge. Thus, Roberts' convictions are not the same in fact.

Roberts' convictions do not violate the prohibition against double jeopardy because each offense contains an element that the other does not, and proof of one of these offenses does not necessarily prove the other.

IV

Roberts next contends that the trial court erred by failing to instruct the jury that it must be unanimous as to which act proved that he either sold or intended to sell the puppies in order to convict him on the trafficking charge. We disagree.

We review de novo claimed jury instruction errors. State v. Sloan, 149 Wn. App. 736, 742, 205 P.3d 172, review denied, 220 P.3d 783 (2009).[6]

A criminal defendant may be convicted by a jury only if the members of the jury unanimously conclude that the defendant committed the criminal act with which he or she was charged. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled on other grounds by State v. Kitchen, 110 Wn.2d 403, 405–06, 756 P.2d 105 (1988). A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in article I, section 22 of the Washington Constitution. Kitchen, 110 Wn.2d at 409 (citing Const. art. 1, § 22; U.S. Const. amend. 6).

In cases where "the evidence indicates that several distinct criminal acts have been committed," either the State must tell the jury which act to rely on or

[6] Although Roberts did not raise the issue of a unanimity instruction before the trial court, he may raise it for the first time on appeal, as it concerns an alleged manifest constitutional error. State v. Bobenhouse, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

the trial court must instruct the jury to agree on a specific act. Petrich, 101 Wn.2d at 572. However, "[w]here the State presents evidence of multiple acts which indicate a 'continuing course of conduct' . . . neither an election nor a unanimity instruction is required." State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). In distinguishing between distinct criminal acts and a continuing course of conduct, we have held that "evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred," while "evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct." State v. Fiallo-Lopez, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995).

We previously held that several acts extending over a time frame of a few days constituted a continuing course of conduct when the acts were in furtherance of the same objective. State v. Gooden, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988) (holding that defendant's actions over the course of 10 days were a continuing course of conduct furthering the objective of making money from prostituting two girls).

Roberts asserts that either the act of selling the one puppy or the act of advertising the dogs with the intent to sell them "could form the basis for conviction," but that the jury had to be unanimous as to the specific act that proved that he sold or intended to sell the stolen puppies. Thus, he contends

that the trial court should have instructed the jury that it must unanimously agree as to which of these acts proved that Roberts was guilty of the trafficking charge. However, the State presented evidence that Roberts acted in a continuing course of conduct. The evidence revealed that Roberts sold one of the puppies to a friend, tried to sell the puppies to the Kent family's neighbor, and posted the puppies for sale on the Internet. These facts establish "actions intended to secure the same objective." Fiallo-Lopez, 78 Wn. App. at 724. His objective was to sell the puppies. His actions in distributing and advertising the stolen puppies furthered this objective. Thus, no unanimity instruction was required.

V

In his statement of additional grounds, Roberts first contends that he was entitled to instructions on the lesser included offenses of attempted trafficking in stolen property in the first and second degree. We disagree.

Assuming that these attempted crimes are lesser included offenses of trafficking in stolen property in the first degree, State v. Wiggins, 114 Wn. App. 478, 485, 57 P.3d 1199 (2002), an instruction on a lesser included offense was not warranted here.

> A defendant is entitled to an instruction on a lesser included offense if two conditions are met. "First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed."

State v. Bowerman, 115 Wn.2d 794, 805, 802 P.2d 116 (1990) (quoting State v.

Workman, 90 Wn.2d 443, 447–48, 584 P.2d 382 (1978)). More specifically, "the evidence must raise an inference that *only* the lesser included[ ] offense was committed to the exclusion of the charged offense." State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000).

Here, there was no inference that Roberts *only* attempted to traffic in the stolen puppies. Instead, the evidence that was presented indicated that only the charged offense was committed. Thus, no jury instructions on attempted crimes were warranted.[7]

VI

In his statement of additional grounds, Roberts next contends that the trial court abused its discretion in denying his request for a bill of particulars. We disagree.

"The furnishing of a bill of particulars is discretionary in the trial court, whose ruling will not be disturbed absent a showing of abuse of discretion." State v. Devine, 84 Wn.2d 467, 471, 527 P.2d 72 (1974).

An information charging a defendant "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1. Where the information is "vague as to particulars," then "the defendant is entitled to a bill of particulars." State v. Maurer, 34 Wn. App. 573, 577–78,

[7] Roberts additionally contends that the trial court erred in not giving a jury instruction defining attempt. Because jury instructions on the charges of attempted trafficking in stolen property in the first and second degree were not warranted, a jury instruction defining attempt was not necessary.

663 P.2d 152 (1983).

> "The test in passing on a motion for a bill of particulars should be whether it is necessary that defendant have the particulars sought in order to prepare the defense and in order that prejudicial surprise will be avoided. A defendant should be given enough information about the offense charged so that he or she may, by the use of diligence, prepare adequately for the trial. If the needed information is in the indictment or information, then no bill of particulars is required."

State v. Allen, 116 Wn. App. 454, 460, 66 P.3d 653 (2003) (quoting 1 Charles Alan Wright, Federal Practice and Procedure § 129, at 652–54 (3d ed.1999)).

Roberts informally requested a bill of particulars regarding the trafficking charge in his trial memorandum. In denying this request, the trial court reasoned that the information did not lack particularity and that the facts known to the court and the parties supported the elements of the trafficking charge.

The charging document provided Roberts particularity regarding the type of stolen property. In addition, Roberts had been given other information in a pretrial memorandum and otherwise, informing him of the specific activities alleged to support the trafficking charge. Accordingly, the trial court did not abuse its discretion by denying Roberts' request for a bill of particulars. Roberts was able to adequately prepare his defense and was not caught by surprise at trial. There was no error.

VII

Roberts finally contends, in his statement of additional grounds, that there was insufficient evidence to convict him for possessing stolen property in the first degree. We disagree.

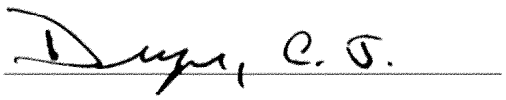
In determining the sufficiency of the evidence, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom." State v. Fleming, 155 Wn. App. 489, 506, 228 P.3d 804 (2010).

Here, the evidence presented was sufficient to find that the elements of possessing stolen property in the first degree were satisfied. The record establishes that McCullough was selling the puppies from her litter for $600 to $700 each; Roberts came to see the puppies at McCullough's home shortly before the puppies were discovered missing; Roberts left the stolen puppies at the Kent home; and Roberts left with one of the puppies and did not come back with it. A reasonable trier of fact would find that Roberts committed the charged offense because the facts fulfill the statutory elements that Roberts did knowingly possess stolen property valued at more than $1,500 and did "withhold or appropriate" the puppies to the use of someone other than the true owner.

RCW 9A.56.150(1); RCW 9A.56.140(1). Thus, taking the evidence in a

light most favorable to the State, Roberts' conduct fulfills the elements of possessing stolen property in the first degree.

Affirmed.



We concur: