No. 30104-4-III

Siddoway, A.C.J. (dissenting) — Before we decided *State v. Yon*, 159 Wn. App. 195, 246 P.3d 818 (2010), it appears—and Mr. Page has not argued otherwise—that the State regularly read and applied RCW 77.15.260(2), which defines unlawful trafficking in fish, shellfish, or wildlife, as creating a unit of prosecution that was a defendant's offering or selling one or more items at a particular place and time. Read in that manner, if a defendant offered or sold more than one item, the value of the items could be aggregated in determining whether their wholesale value exceeded two hundred fifty dollars and therefore supported a charge of first degree trafficking, a class C felony. RCW 77.15.260(2)(b). A wholesale value short of two hundred fifty dollars was chargeable as second degree trafficking, a gross misdemeanor. RCW 77.15.260(3).

In *Yon*, we construed the unit of prosecution as being the offer or sale of a single fish or wildlife item. As a result, if a defendant offers or sells multiple items each having a value of less than two hundred fifty dollars but aggregating more, he or she can be charged with multiple counts of second degree trafficking, but not first degree trafficking.

I note that the legislature recently amended RCW 77.15.260 to allow the State the option in the future of aggregating transactions that "are part of a common scheme or plan" in determining the degree of unlawful trafficking involved. Laws of 2012, ch. 176, § 19 (Substitute S.B. 6135, 62nd Leg., Reg. Sess. (Wash. 2012) (effective June 7, 2012)).[1]

Mr. Page was charged pursuant to the State's understanding of the statute at the time. He did not challenge the unit of prosecution. His appeal was pending at the time *Yon* was filed, and we invited the parties to address its application. *State v. Page*, noted at 161 Wn. App. 1036, 2011 WL 1758636, at *3. The State conceded that, in light of *Yon*, the trial court had erred. *Id.* Relying on our authority to direct the trial court to enter convictions for a lesser included offense as long as the jury made findings sufficient to support those convictions, we affirmed Mr. Page's convictions but remanded with directions that he be resentenced for the crimes as misdemeanors. *Id.* at *4.

It is against this background that Mr. Page argues that due process required that he be given the option of bail forfeiture when resentenced. He suggests that we look to *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) for the appropriate due process analysis. Although *Hunter* found no due process violation itself, it cited the U.S. Supreme Court's decision in *BMW of North America, Inc. v. Gore* for the proposition that "[c]itizens must

[1] The recent amendments also increase second degree trafficking to a class C felony and first degree trafficking to a class B felony. Laws of 2012, ch. 176, § 19.

have notice not only of what conduct is criminal but also of the severity of the penalty." 102 Wn. App. at 638 (citing 517 U.S. 559, 574, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996)). But *Hunter*, *BMW*, and the cases on which *BMW* relies all involved cases in which a defendant faced a penalty that proved unknowable in an absolute sense, either because a statute was unconstitutionally vague, as was asserted in *Hunter*; because state law provided no guideposts for punitive damages as in *BMW*; or because newly-enacted sentencing guidelines or a newly-construed statute were applied retroactively as in *Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) and *Bouie v. City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964), two decisions relied upon by *BMW*, 517 U.S. at 574 n.22. Here, any uncertainty Mr. Page faced as to what might prove to be the appropriate penalty in his case was not unknowability in an absolute sense. He knew the crime with which he was charged and knew the penalty provided for the crime. He was on notice of the lesser included offense of misdemeanor trafficking and its penalty. He faced uncertainty, but uncertainty within known parameters: uncertainty whether his attorney would make the best arguments and present the best evidence; the same uncertainty as to the performance of the prosecution; uncertainty as to the court's rulings and the decision-making of the jury; and uncertainty whether, as occurred here, he might benefit from the fortuity of favorable intervening law and a prosecutor's decision to concede a point rather than fight it. This everyday

uncertainty is not a deprivation of due process.

It is more appropriate, I believe, to look to our well-settled case law, of which Mr. Page (like all defendants) was on notice, that if the State's evidence falls short of proving the crime charged, the matter is subject to remand for resentencing on any lesser included offense that was necessarily found. *State v. Gilbert*, 68 Wn. App. 379, 385, 842 P.2d 1029 (1993). In this case, the State's evidence fell short because it misconstrued the statute as to the unit of prosecution and was therefore unable to prove the required wholesale value. In my view it is of no moment that the State's proof fell short because it misread the statute rather than because it misjudged the strength of its evidence. It was within the power of Mr. Page, with counsel, to assess both independently.

Mr. Page credibly contends that had he known he faced only misdemeanor charges, he would have forfeited bail. But any defendant facing resentencing on a lesser included offense following remand could credibly contend that the lesser charge, if originally charged, would have presented more attractive options. Prejudice alone does not establish a due process violation. For these reasons, I respectfully dissent.

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Siddoway, A.C.J.