SUPREME COURT NO. 102220-4

NO. 83212-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THERESA SHELTON,

Petitioner.

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

The Honorable David Steiner, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Theresa Shelton, appellant below, asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished decision in State v. Shelton, No. 83212-3-I, (filed June 26, 2023) (Appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Evidence of two credit cards opened without permission was introduced at trial but no unanimity instruction was given, and the prosecution did not disclaim its intention to rely on one of these cards, instead referencing both during closing argument. Is review appropriate under RAP 13.4(b)(1) where Shelton was denied her right to a unanimous jury verdict and the Court of Appeals opinion conflicts with precedent from this Court requiring the prosecution to not only discuss the acts on which it is relying, but also to disclaim its reliance on other acts?

2. The trial court interrupted defense counsel's closing argument and admonished Shelton for shaking her head in agreement with counsel's interpretation of the evidence. Is review appropriate under RAP 13.4(b)(2) where the trial court's interruption and comments constituted an improper judicial comment and the Court of Appeals opinion conflicts with Seattle v. Arensmeyer[1]?

C. STATEMENT OF THE CASE

1. Trial evidence.

Shelton and Linda West were close friends for nearly 20 years, traveling together and staying at each other's homes. RP 554-57, 586-87. In 2016, West moved to Mexico. RP 552-53. West continued to use Shelton's home address as her own mailing address, including listing it on her driver's license. RP 565-68, 570-71, 587-89. She also periodically came back to the United States and stayed rent free with Shelton during those visits. RP 554-55, 559-60, 570, 579, 586-87.

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[1] 6 Wn. App. 116, 120, 491 P.2d 1305 (1971).

In February 2017, West made a new will and named Shelton as her executor. RP 560-61, 592. West did not remember if she also gave Shelton power of attorney. RP 571-72, 593, 603. West added Shelton's name to her Chase bank account and provided her with the relevant passwords and log-in information. RP 562-63, 592-93.

West intended for Shelton to only access her banking information if she died. She denied giving Shelton permission to access her bank accounts or open credit cards in her name. RP 572, 585-86, 603-04. Yet, West also gave Shelton permission to withdraw $12,000 from her bank account in September 2017. She expected Shelton would pay the money back within one year. RP 564-65, 594.

West returned to Shelton's home in October 2017. Shelton told her that she had opened a Citibank credit card in her name. RP 577. No purchases were made on the card. RP 630. West put the card in her wallet and never used it. RP 577-79, 597. She did not immediately cancel the credit card account.

RP 599. A separate Citibank credit card issued for Home Depot under West's name, also existed. RP 630-31; Ex. 14.

West and Shelton's relationship eventually began to deteriorate. RP 576. West became frustrated with having to buy groceries, cook, and walk Shelton's dog while staying with her. RP 559. Given the rising interpersonal conflict, West left Shelton's Kirkland home on January 9, 2018. RP 558-60, 576-77, 579, 600. That same day, West called Citibank and reported the credit card opened in her name was fraudulent. RP 578-79, 597. She also told Citibank that Shelton did not have permission to withdraw the $12,000 from her bank account. RP 596-98.

West later learned an American Express credit card had also been opened in her name. RP 579-81, 597, 623. $13,130.53 was charged to the credit card between July 14 and December 20, 2017. RP 624-25, 628. Although American Express had not flagged the account as suspicious, West reported the activity as fraudulent. RP 537, 547-48, 550-51, 581.

The username on the credit card account was listed as Shelton's and correspondence from American Express was sent to her Kirkland mailing address. RP 536, 539-40, 542, 632. The listed account email address was lisawest57@gmail.com. RP 544. West claimed to use a different email address. RP 583-85. West's name, address, social security number, and date of birth were required to open the account. RP 524, 543-44.

Both Shelton and West were issued individual credit cards with different account numbers. RP 525-26, 540-41. It was not unusual for multiple card holders to exist under a single account. RP 548. West denied she ever received a credit card, made any purchases on the account, or gave permission for it to be opened. RP 581, 584, 603-04, 623, 631, 644-45. American Express could not determine whether Shelton opened the account or whether West had given permission to do so, but the company accepted West's fraud claim as true, and closed the account. RP 537-38, 547-50, 642-43.

Several more weeks passed before West reported the allegedly fraudulent activity. On April 3, 2018, West contacted Kirkland police officer, Glenn Shackatano, and reported the alleged fraud. RP 584, 597-98, 601, 650-51, 655, 657, 664. West also "implied" to Shackatano that Shelton had taken the $12,000 from her bank account without permission. RP 607, 656-57.

Shackatano also spoke with Shelton by telephone. RP 651-52. Shelton acknowledged having West's social security number and date of birth consistent with her role as executor. RP 654. Shelton explained a checking account had been opened in both her and West's names with West's permission. RP 652. Shelton also explained credit cards had been opened in both women's names and that she had access to the American Express credit card for emergency purposes. RP 645, 653-54.

Shackatano referred the case to Kirkland police detective, Derrick Hill. RP 621-22, 635-36. Hill reviewed the financial documents and spoke with West by telephone. RP 622-24, 629-

30. West again claimed Shelton had taken the $12,000 from her bank account without permission. RP 638-41.

Hill explained all the credit card charges appeared to have been made under the card issued to Shelton. RP 623-24, 629, 643. There was no indication that West had accessed the American Express account. RP 631. Most purchases were made at "normal businesses" on the east side of Western Washington, for items such as groceries, gasoline, and entertainment. RP 532, 625-27, 636-37. Hill could not say Shelton was the one using the credit card. RP 642-43. The financial records also showed four timely credit card payments were made to the credit card issued under Shelton's name. RP 529, 534, 546-47, 628.

Based on this evidence, Shelton was charged and convicted of first degree identity theft. CP 1-6, 71-72; RP 723-26.

2. Jury instructions and argument.

Jurors were instructed that, to convict Shelton, the State

had to prove beyond a reasonable doubt:

> (1) That between July 1, 2017 and January 10, 2018, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person, living or dead;
>
> (2) That the defendant did so with the intent to commit or to aid or abet any crime;
>
> (3) That the defendant knew that the means of identification or financial information belonged to another person;
>
> (4) That the defendant obtained credit or money or goods or services or anything else in excess of $1500 in value from the acts described in element (1),
>
> and
>
> (5) That any of these acts occurred in the State of Washington.

CP 65 (instruction 11).

The defense argued the prosecution's case hinged on the credibility of West's testimony that the cards were opened without her permission, and that she had credibility issues given her failure to immediately cancel the Citibank credit card. RP

501-03, 703-05.

During opening statements, the prosecutor referenced both the American Express and Citibank credit cards, telling the jury,

> In the days following leaving Ms. Shelton's house, Lisa went to close a credit card that Ms. Shelton had told her she had opened, a Citi Bank card.
>
> The Citi Bank card was opened and had a line of credit of approximately $5,000. Ms. West went to call Citi Bank and closed that account.
>
> She said she did not authorize that account, but no spending was done on that account.
>
> Ms. West then learned that a American express card had also been opened in her name. And on January 10th and 11th, Ms. West took the steps that she needed to in order to close the American Express card that had been opened in her name. That was the card that Ms. Shelton, she learned, had been spending over $13,000 on.

RP 496-97.

During closing argument, the prosecutor told the jurors Shelton's alleged use of the American Express credit card without West's permission satisfied the elements necessary for a conviction of first degree identity theft. RP 689-90. But the

prosecutor also mentioned the Citibank credit card and the fraud claim West made regarding that credit card. RP 692, 714.

In her rebuttal argument, the prosecutor expressly rejected West's $12,000 loan to Shelton as the basis of the first degree identity theft charge, telling the jury:

> When she was asked if she made the loan, she said yes. And we're not here about that $12,000. We're here about the American Express charge – American Express charge card that, when confronted about it by the police, Ms. Shelton told the officer that she had access to all of Ms. West's information because she'd made -- been made executor of the will and that she had -- she was aware that there was an American Express card but she didn't have the numbers to that card. She didn't know the account.
>
> So she acknowledged that she knew that the account existed but didn't tell the officer that she had permission to wrack up over $13,000 of purchases for personal expenses. Instead, she said, "I don't know what the account number is, and I had permission to access Ms. West's accounts for emergency reasons."

RP 715-16.

The jury was not instructed it had to be unanimous as to which act formed the basis for its verdict on first degree identity

theft.

3. Judicial comment.

During defense counsel's closing argument, the trial court, in the absence of any objection, stated, "I'm going to interrupt for just a moment. So you [Shelton] may not nod your head during the closing argument. Thank you very much." RP 708.

Defense counsel moved for a mistrial, arguing the court's comments created an "abiding impression" of advocacy or impartiality to the jury. RP 718. The trial court denied the motion, reasoning Shelton was nodding her head in response to defense counsel's recitation of the facts, and that was "essentially testimony from your client without taking the stand." RP 718-19.

Defense counsel also filed a written motion for new trial, arguing the trial court's comment was an improper comment on the evidence and projected an appearance of advocacy and partiality to the jury. CP 73-82; RP 734-35. The prosecutor

disagreed, arguing that instructing Shelton not to shake her head did not indicate what the trial court believed or did not believe about the evidence. RP 738.

The trial court acknowledged that, "[i]n hindsight, I think it would have been better to dismiss the jury before I said anything, frankly[,]" but it nonetheless again denied the motion for new trial, reasoning Shelton's head shaking was in agreement to facts and therefore constituted impermissible testimony. RP 736, 743-46.

4. Appeal.

Shelton argued on appeal that the prosecution failed to clearly elect the American Express card as the basis of the theft charge and the trial court violated her constitutional right to a unanimous jury verdict but not providing a clarifying instruction. Shelton also argued the trial court's interruption and admonishment of her during closing argument constituted an improper judicial comment on the evidence.

The Court of Appeals concluded Shelton's right to jury unanimity was not violated because the American Express card was not the focus of the trial evidence, was not the focus of counsel's argument during closing argument, and the prosecutor clearly identified the American Express card as the basis of the charge throughout trial. Slip op. at 5-11.

The Court of Appeals also concluded the trial court properly exercised its discretion in admonishing Shelton and did not comment on the evidence. The Court reasoned the trial court was "brief, polite, and justified." Slip op. at 5-6, 11-13.

Shelton now seeks review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Review is appropriate under RAP 13.4(b)(1) because Shelton was denied her constitutional right to jury unanimity and the Court of Appeals opinion conflicts with precedent from this Court.

Two credit cards were opened in West's name, one with Citibank and one with American Express. Either card could

have formed the basis for the jury's verdict because credit was obtained on both cards without West's permission. Because the jury instructions and prosecution's closing argument failed to guarantee a unanimous verdict, Shelton's first degree identity theft conviction must be reversed.

Both the United States and Washington constitutions guarantee criminal defendants the right to a unanimous jury verdict. Ramos v. Louisiana, ____ U.S. ____, 140 S. Ct. 1390, 1397, 206 L. Ed. 2d 583 (2020) (citing U.S. Const. amed. VI); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (citing Const. art. 1, § 21). The failure to adequately inform the jury of the need for unanimity is manifest constitutional error that may be raised for the first time on appeal. State v. Watkins, 136 Wn. App. 240, 245, 148 P.3d 1112 (2006).

When evidence is presented of multiple acts, any of which could form the factual basis for a guilty verdict, the jury must be unanimous as to which act it relies on to convict the defendant.

State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).[2] The error stems from the possibility that some jurors may have relied on one act or incident, while other jurors relied on a different act or incident, resulting in a lack of unanimity. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

To guard against this error, in a multiple acts case, either the court must give an instruction expressly requiring jury unanimity as to the act underlying the conviction, or the state must expressly elect which act it relies on in seeking the conviction. State v. Carson, 184 Wn.2d 207, 357 P.3d 1064 (2015).

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[2] This instruction, known as a Petrich instruction, reads as follows: "The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime)." 11 WASH. PRACTICE: WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL 4.25 (4th ed. 2016).

Here the evidence established at least two separate occasions of first degree identity theft, one based on the Citibank credit card, and one on the American Express credit card. Credit was obtained on both credit cards within the charging period. West's testimony repeatedly referenced the Citibank card and her affidavit of fraud submitted to Citibank was admitted as an exhibit. See RP 577-79, 597, 599; Ex. 12. The jury instructions did not specify a particular financial institution or financial information. Nor was the jury instructed it had to be unanimous as to which act formed the basis for its verdict on first degree identity theft.

While the prosecutor attempted an election during closing argument, this election was insufficient under Carson. To effect a clear election, the prosecution must not merely discuss what act it relies on; it must, in some way, disclaim its intention to rely on other acts. Carson, 184 Wn.2d at 228 n. 15. This Court emphasized in Carson that, to be effective, the election of a specific incident must be sufficiently clear. Carson, 184 Wn.2d at

228 n. 15 (citing State v. Kier, 164 Wn.2d 798, 811-13, 194 P.3d 212 (2008)).

In Carson, where the defendant was charged with three counts of child molestation, the election sufficed where the prosecution "specifically disclaimed" its intent to rely on other incidents by telling the jury it was "'focusing on'" three specific incidents and directing the jury "'to focus on [only those incidents] for the purposes of your deliberations.'" Id. at 228 (quoting the record).

By contrast, in State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007), there was no clear election where the prosecutor "emphasized" one act over others but did not "expressly elect to rely on" one act "in seeking the conviction." Similarly, in State v. Kier, 164 Wn.2d 798, 811-13, 194 P.3d 212 (2008), the prosecutor merely named the acts on which he was

relying; he did not, as the prosecutor did in Carson, tell the jury they were the *only* acts on which the prosecution was relying.[3]

The prosecution's argument in Shelton's case is akin to the deficient elections in Williams and Kier. The prosecutor emphasized Shelton's alleged opening and use of the American Express credit card. But the prosecutor also mentioned the Citibank credit card, the credit limit under that card, and the corresponding fraud claim that West made regarding that credit card. RP 496, 692, 714; Ex. 19.

Unlike Carson, the prosecutor never asked Shelton's jury to focus solely on the American Express credit card act to the specific exclusion of the Citibank credit card while deliberating. In contrast, the prosecutor did specifically disclaim reliance on

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[3] Kier is a double jeopardy case, rather than a unanimity case, but the court nevertheless noted "[t]he situation here is somewhat analogous to a multiple acts case in which the State must make a clear election of the conduct forming the basis of each charge or the court must instruct the jury to agree on a specific criminal act." 164 Wn.2d at 811. The Carson court also considered Kier to be persuasive authority in analyzing the sufficiency of an election. Carson, 184 Wn.2d at 228 n.15.

the $12,000 bank withdrawal as the basis for the charge, telling the jury, "[W]e're not here about that $12,000. We're here about the American Express charge – American Express charge card[.]" RP 715. While the prosecutor's comment clearly disclaimed reliance on the $12,000 bank withdrawal, it stopped short of also disclaiming the idea that the Citibank credit card could form the basis for a guilty verdict on first degree identity theft. Under precedent from this Court, this is insufficient for a clear election.

The Court of Appeals opinion acknowledges the prosecutor failed to make an "explicit statement" informing the jury which acts it did not intend to elect but reasons that "impliedly electing one act disclaim the other." Slip op. at 10. But emphasizing the American Express card is not the same as expressly disclaiming reliance on the Citibank card. Under Carson, this latter requirement is essential to a clear election. 184 Wn.2d at 228 n. 15.

Indeed, the Court of Appeals can only surmise "jury confusion was *unlikely*" given the evidentiary focus on the

American Express card. Slip op. at 9 (emphasis added). This is insufficient. An unanimity error occurs when there is even a possibility that some jurors may have relied on one act or incident, while other jurors relied on a different act or incident, resulting in a lack of unanimity. Kitchen, 110 Wn.2d at 411.

Nothing in the instructions or prosecutor's argument prevented the possibility that some jurors may have found identity theft based on the Citibank credit card, while others may have found guilt based on the American Express credit card. In short, contrary to the Court of Appeals reasoning, nothing assures this Court the jury was unanimous.

The only remaining issue is whether this violation can be deemed harmless. Prejudice is presumed. Kitchen, 110 Wn.2d at 411. This constitutional error requires reversal unless "all rational triers of fact would find that each alleged act was proved beyond a reasonable doubt. State v. Espinoza, 14 Wn. App. 2d 810, 815-16, 474 P.3d 570 (2020) (citing Kitchen, 110 Wn.2d at 405-06).

For example, when a complaining witness testifies to several incidents, without distinguishing features, such that if the jury believed the witness about one incident, it necessarily believed the witness about all of them, a lack of express unanimity may be harmless. See, e.g., State v. Bobenhouse, 166 Wn.2d 881, 894, 214 P.3d 907 (2009); State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990). Here, by contrast, the two credit cards were distinguishable on their facts. The evidence showed that Shelton opened the Citibank credit card without West's permission but made no charges on it and alerted West to its existence. West did not close the credit card account or report it as fraudulent for several months. The American Express credit card, in contrast, was opened without West's permission, but she was not aware of its existence, and thousands of dollars in charges were secretly made on it.

Some jurors could have relied on the secret charging of $13,000 to the American Express card as evidence of Shelton's intent to commit theft, while others could have relied on the

Citibank card being opened without permission as evidence of Shelton's intent to commit or to aid or abet any crime.[4] Other jurors may have reasonably viewed Shelton alerting West to the Citibank card's existence, as insufficient evidence of her intent to commit any crime.

There were many reasons for the jury to doubt West's credibility. First, despite claiming the card was not opened with her permission, she waited roughly three months before closing the account and reporting it as fraudulent. Second, West did not take any other immediate action in response to the credit card, such as removing Shelton as executor. West also reported the Citibank card as fraudulent only after having a falling out with Shelton over the $12,000 loan and disagreements about the sharing of household responsibilities. Finally, West repeatedly

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[4] "'Identity theft only 'requires use of a means of identification with the intent to commit an unlawful act.'" State v. Christian, 200 Wn. App. 861, 866, 403 P.3d 925 (2017) (quoting State v. Baldwin, 150 Wn.2d 448, 455, 78 P.3d 1005 (2003)). Neither a specific crime, nor commission of the other crime, are elements of identity theft. Id. at 866-67.

lied to police and credit card investigators about the true nature of the $12,000 withdrawal, telling them that Shelton had taken the money without permission, when in fact, she had expressly granted Shelton permission. RP 564-65, 594, 596-98, 607, 638-41, 657; Ex. 12. It cannot be said that all reasonable jurors would have believed every aspect of West's testimony.

The record in this case fails to ensure that Shelton was afforded the constitutional right to a unanimous jury verdict on the charge of first degree identity theft. The Court of Appeals reasoning to the contrary is error. The failure to protect the right to a unanimous jury verdict, either by instruction or clear election, violates Shelton's right to a jury trial and requires reversal of her conviction.

2. Review is appropriate under RAP 13.4(b)(2) because the trial court's interruption and admonishment of Shelton for shaking her head was an impermissible judicial comment and the Court of Appeals opinion conflicts with *Seattle v. Arensmeyer*.

Due process requires both fairness and the appearance of fairness in the tribunal. U.S. Const. amend. V; XIV; Wash. Const. Art. I, § 3, 21, 22; Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749 (1927); State ex rel. McFerran v. Justice Court of Evangeline Starr, 32 Wn.2d 544, 549-50, 202 P.2d 927 (1949). "An insistence on the appearance of fairness is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication." Williams v. Pennsylvania, 579 U.S. 1, 136 S. Ct. 1899, 1909, 195 L. Ed. 2d 132 (2016). "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral

hearing." State v. Gamble, 168 Wn. 2d 161, 187, 225 P.3d 973 (2010).

To this end, article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This constitutional prohibition on commenting on the facts "prevent[s] the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted." State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). The prohibition against comments on the evidence is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971).

Washington courts have held, almost since statehood, that all remarks or observations regarding the facts before the jury are rigorously prohibited by article IV, section 16. State v. Bogner, 62 Wn.2d 247, 252, 383 P.2d 254 (1963); State v. Walter, 7 Wash. 246, 250, 34 P. 938 (1893); State v. Coella, 3 Wash. 99, 121, 28 P. 28 (1891). "A statement by the court

constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). That is, a court's improper comment on the evidence may be either express or implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "The touchstone of error is whether or not the feelings of the trial court as to the truth value of the testimony of a witness have been communicated to the jury." State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976).

Here, the trial court's interrupting of defense counsel's closing argument to admonish Shelton for shaking her head constituted an improper comment on the evidence, projected an appearance of advocacy and partiality to the jury, and violated the appearance of fairness. A trial court's interruption of closing arguments can constitute an unconstitutional comment on the evidence. Arensmeyer, 6 Wn. App. at 121. In Arensmeyer, "the trial court interrupted defense counsel's closing argument to say

that he was mistaken as to the evidence." Id. at 116. As the court recognized, defense counsel's argument was a reasonable interpretation of the evidence that was favorable to his client. As such, "[w]hen the court interrupted and ruled as it did, it commented on the evidence by revealing what it believed the evidence to mean." Id. at 121.

Similar to Arensmeyer, here Shelton simply nodded her head in agreement with defense counsel's reasonable interpretation of the evidence that was favorable to her. The Court of Appeals opinion here fails to cite, much less address, Arensmeyer.

Instead, the Court of Appeals reasons that Shelton's nodding was "essentially giving testimony without being subject to cross-examination." Slip op. at 13. The Court cites State v. Barry, 183 Wn.2d 297, 352 P.3d 161 (2015) in support. Id. But Barry concerned whether a court's response to a jury's question improperly implicated the defendant's right to remain silent. 183 Wn.2d at 305-09. Significantly, Barry does not stand

for the proposition that a defendant is prohibited from affirmatively agreeing with defense counsel's argument.

A trial court's improper comment on the evidence is reversible error unless it affirmatively appears from the record that the defendant could not have been prejudiced. Lane, 125 Wn.2d at 838-389; Bogner, 62 Wn.2d at 253-54. As discussed in section D.1., supra, there were many reasons for the jury to doubt West's credibility about the details surrounding the credit cards. Defense counsel's reasonable interpretation of this evidence in a manner favorable to Shelton was proper. The trial court's interruption and admonishment of Shelton undermined defense counsel's argument and improperly implied to the jury that defense counsel's interpretation of the facts should not be believed. Reversal is required.

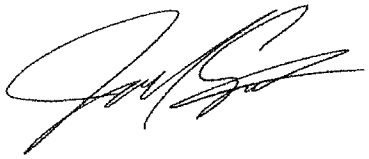
E. CONCLUSION

Shelton respectfully asks this Court to grant review and reverse her conviction.

I certify that this document contains 4,666 words, excluding those portions exempt under RAP 18.17.

DATED this 26th day of July, 2023.

Respectfully submitted,
NIELSEN KOCH & GRANNIS, PLLC



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. THERESA L. SHELTON, a/k/a TERESSA L. SHELTON, Appellant.	No. 83212-3-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Lisa West named Theresa Shelton as the executor of her will and gave her sensitive personal information. Shelton used the information to open two lines of credit and charged approximately $13,000 on one of them, an American Express credit card, without West's knowledge or permission. A jury found Shelton guilty of identity theft and she received a three-month sentence. Shelton appeals, contending that the trial court erred by (1) failing to give an instruction that guaranteed a unanimous verdict (2) admonishing Shelton to stop nodding in agreement with her attorney during closing argument, and (3) failing to enter written findings of facts and conclusions of law under CrR 3.5 and 3.6.

The trial court did not err by failing to instruct the jury that it must unanimously agree which act formed the basis of the identity theft charge because the State affirmatively elected to rely on the American Express card, rather than the other credit line Shelton opened. Also, the trial court did not make a judicial comment on the evidence. Rather, it properly exercised its

discretion to stop Shelton from agreeing with her counsel's statements of fact. Finally, we agree with Shelton that the trial court erred when it failed to record its written findings, but conclude that its detailed oral findings make the error harmless. We therefore affirm.

FACTS

Shelton and West met while working together in Las Vegas, Nevada and remained close friends for nearly 20 years. After Shelton moved to Kirkland, Washington, the friends stayed in touch and West often stayed with Shelton for long visits. In 2016, West moved to Mexico and began using Shelton's home address as her mailing address and on her driver's license. A year later, West drafted a new will and listed Shelton as her executor. West subsequently added Shelton's name to her Chase bank account and gave Shelton all the relevant personal information needed to access her financial accounts, including her social security number. West testified that her intention was for Shelton to use this information only in her role as executor, not for personal reasons. Shelton asserted at trial, relying on her statements to law enforcement during the investigation, that she believed she could access funds and open credit cards in West's name "for emergency purposes."

In September 2017, about five months after losing her job, Shelton borrowed $12,000[1] from West. West insists that she loaned the money to Shelton on the condition that she pay it back within a year.

[1] West made a $10,000 loan to Shelton for Shelton's house, plus another $2,000 for Shelton's son's car.

In October 2017, West visited Shelton's home, where Shelton disclosed that she had opened a Citibank credit card in West's name. Shelton had not used the Citibank card and West did not close the Citibank account at that time.

During the visit, their relationship began to deteriorate as constant bickering over household chores and the $12,000 loan became the norm. West left Shelton's home in January 2018 due to their falling out and called Citibank to cancel the credit card. Citibank advised West to contact the credit bureaus. The credit bureau West contacted informed her that an American Express (Amex) account had been opened in her name and that $13,130.53 had been charged to that account between July 14 and December 20, 2017. The charges included living expenses such as gas, groceries, and restaurant bills, as well as recreational expenses like Ed Sheeran concert tickets. West reported this activity as fraudulent to Amex.

Several weeks later, West reported the activity to Officer Glenn Shackatano of the Kirkland Police Department.[2] During that conversation, in addition to reporting the fraudulent credit activity, she also implied that Shelton had taken the $12,000 from her bank account without permission, rather than receiving it as a loan. Officer Shackatano contacted Shelton, who acknowledged that there was an Amex card in both their names but asserted that she had permission to use it "for emergency purposes." The case was transferred to

[2] Mr. Shackatano is now a firefighter with the city of Kirkland. We refer to him in this opinion as Officer Shackatano because he acted in that role during the relevant events.

Derrick Hill, a detective from the Kirkland Police Department, who filed a warrant to obtain Amex records and spoke with West over the telephone, but did not speak with Shelton.

The State charged Shelton with identity theft in the first degree. Before trial, Shelton moved to suppress both her telephone conversation with Officer Shackatano and the Amex records. Shelton alleged that because she was not read her *Miranda*[3] rights, her telephone conversation was inadmissible. Shelton also alleged that there was no probable cause for the search warrant used to obtain Amex records, making the records inadmissible. The trial court, however, found that *Miranda* warnings were not required because the conversation was conducted over the phone and there was no evidence of coercion. The trial court also found that there was probable cause for the warrant because the Amex account existed in West and Shelton's names but West denied opening it. The trial court's findings were oral, and were not reissued in writing.

During trial, the court briefly interrupted the defense's closing argument to admonish Shelton for nodding her head in agreement with her counsel's statements concerning the facts of the case. The jury found Shelton guilty as charged and Shelton was sentenced to a total of 90 days—seven days in the King County Jail and 83 days on electronic home detention. Shelton timely appeals.

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[3] See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (requiring law enforcement to inform an individual of their right to counsel and their right to remain silent before engaging in a custodial interrogation).

ANALYSIS

Shelton raises three issues. First, she asserts that the State failed to clearly elect the Amex card as the basis of the theft charge and the trial court violated her constitutional right to a unanimous jury verdict by not giving a clarifying instruction. Second, she contends that the trial court made an improper comment on the evidence when it interrupted defense counsel's closing argument to admonish Shelton not to shake her head. Third, she claims that the trial court erred by failing to record written findings of fact and conclusions of law required by Criminal Rule (CrR) 3.5(c) and CrR 3.6(b). For these reasons, Shelton requests that her conviction be reversed.

We conclude that the trial court did not violate Shelton's right to jury unanimity. The State clearly identified the Amex card as the basis of the identity theft charge throughout the trial. Also, the jury could not have been confused which card—Citibank or Amex—formed the basis of the charge when an Amex employee testified, ten exhibits admitted at trial pertained to the Amex card, and even defense counsel agreed "[w]e're here for the American Express." Citibank by contrast was only the subject of one exhibit, did not have a dedicated witness, and was not the focus of counsel during closing argument.

We also conclude that the trial court's admonishment of Shelton was not a judicial comment on the evidence. The trial court properly exercised its discretion when it instructed Shelton to stop nodding along with her counsel's

argument and in doing so did not comment on the evidence. The trial court was brief, polite, and justified.

Lastly, we conclude that, despite the court's failure to enter written findings of fact and conclusions of law pursuant to CrR 3.5 and 3.6, the error was harmless. The error was harmless because the oral findings were clear and detailed and the record was transcribed, which allows for review. Additionally, Shelton did not demonstrate how the lack of written findings harmed her.

Jury Unanimity

The trial court's decision not to instruct the jury on which act—opening a line of credit either with Citibank or with Amex—constituted the basis of Shelton's theft charge was not error. The evidence presented at trial and the State's closing argument made it clear which credit card was the subject of the identity theft charge, making jury confusion unlikely.

Both the United States and Washington constitutions guarantee criminal defendants the right to a unanimous jury verdict. Ramos v. Louisiana, ___ U.S. ___, 140 S. Ct. 1390, 1391, 206 L. Ed. 2d 583 (2020) (citing U.S. CONST. amend. VI); State v. Armstrong, 188 Wn.2d 333, 340, 394 P.3d 373 (2017) (citing WASH. CONST. art. I, § 21). The issue of jury unanimity may be raised for the first time on appeal as manifest constitutional error. Armstrong, 188 Wn.2d at 339 (deciding a party may raise issues of " 'manifest error affecting a constitutional right' " for the first time on appeal) (quoting State v. Jorgenson, 179 Wn.2d 145, 150, 312 P.3d 960 (2013)); see RAP 2.5(a)(3). As a constitutional issue, jury

unanimity is reviewed de novo. Armstrong, 188 Wn.2d at 339; see also State v. Boyd, 137 Wn. App. 910, 922, 155 P.3d 188 (2007).

Where multiple acts could constitute the crime charged, the jury must be unanimous as to which act it relied on to support the conviction. State v. Marko, 107 Wn. App. 215, 220, 27 P.3d 228 (2001). There are two ways to ensure jury unanimity in multiple acts cases. The first is for the State to "elect the act on which it will rely for conviction," and the second is for the trial court to "instruct the jury that all of them must agree that the same act has been proved beyond a reasonable doubt [i.e., giving a "*Petrich*" instruction]."[4] Marko, 107 Wn. App. at 220 (citing State v. Petrich, 101 Wash.2d 566, 570, 572, 683 P.2d 173 (1984)); see also State v. Nason, 96 Wash. App. 686, 981 P.2d 866 (1999). An election "can be made by the prosecuting attorney in a verbal statement to the jury as long as the prosecution 'clearly identifie[s] the act upon which' the charge in question is based.' " State v. Carson, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (quoting State v. Thompson, 169 Wn. App. 436, 474-75, 290 P.3d 996 (2012)). When the evidence tends to show only those acts elected by the state, an election "arguably [is] not even necessary." Carson, 184 Wn.2d at 228.

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[4] "The [State] [County] [City] alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant [on any count] of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime)." 11 WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL 4.25 (5th Ed 2021).

In Thompson, where acts against two victims could have supported conviction, the court found that election occurred when the State's closing argument specifically mentioned the name of one of the victims. 169 Wn. App. at 474. The court in Carson found that election occurred when the State's closing argument identified three acts supporting three charges that it wanted the jury "to focus on for the purposes of [their] deliberations." Carson, 184 Wn.2d at 228. Conversely, where two assaults could have supported the charge, the court in Williams found no election when evidence demonstrating each was introduced, and the State emphasized one over the other in closing, but mentioned both and did not expressly rely on only one. State v. Williams, 136 Wn. App. 486, 497, 150 P.3d 111 (2007).

Here, similar to Thompson and Carter, the State clearly elected the Amex card as the basis of the charge in closing argument when the prosecutor said: "We're here about the American Express [card]." The State's closing PowerPoint slideshow also clearly referenced the Amex card as the basis of its analysis. Specifically, in its slide entitled "Intent to commit a Crime," the list of evidence supporting intent included "[c]ard purchases over $13,000." Because Shelton did not use the Citibank card, this could have only applied to the Amex card. Although the State did mention the Citibank card once during closing, the statement was, in context, only meant to explain how West discovered the Amex card and why it took her so long to discover it. The State said: "She made a fraud statement to—to the Citibank fraud department."

Defense counsel, during closing, also focused on Amex, saying "We're here for the American Express." Defense counsel then analyzed the to-convict instruction for identity theft as it applied to Shelton's opening and use of the Amex card. Defense counsel did mention the Citibank card, but only to undermine West's credibility concerning what she had or had not permitted Shelton to do with her personal information. Defense counsel said: "[West] was also aware of the Citibank card[] that [there was] no money charged on it [and] that she also called . . . on the 9th. She also knew about that back in October. Right? Yet, she waited. She waited until she got really mad at Theresa; right?"

More generally, jury confusion was unlikely because the evidence presented overwhelmingly referred to the Amex card instead of the Citibank card. During trial, the State presented Exhibits 1-10, which contained credit account history, correspondence, data account reports, and bank statements all linked to the Amex account—not the Citibank account. The State also provided testimony from an Amex employee—not a Citibank employee. The only Citibank exhibit is Exhibit 12, West's affidavit of fraud submitted to Citibank reporting that the account had been fraudulently opened. Defense counsel used the affidavit to attack West's credibility. In it, she presented her $12,000 loan to Shelton as acquired by fraud, despite later confessing that it had not been.

Shelton contends that the opening statements made by the State could have caused jury confusion. In its opening, the State said: "The Citibank card was opened and had a line of credit of approximately $5,000." Shelton's

contention is that jurors might apply this comment to jury instruction no. 11, which requires a jury to find "that the defendant obtained credit . . . in excess of $1,500." We disagree. Quickly after mentioning Citibank, the State continues: "Ms. West then learned that an American Express card had also been opened in her name." Read in the context of the entire opening, the State's references to Citibank is brief and used only to lay out the chronology of events.

Shelton contends that we should read Carson as requiring prosecution to not only specify the acts it is relying on, but also disclaim its intention to rely on other acts. She draws this rule from the Supreme Court's language in that case: "by specifying exactly three instances of sexual misconduct and disclaiming the State's intention to rely on other acts, the State effectively elected the acts on which the State sought a conviction." Carson, 184 Wn.2d at 229. A clarifying footnote reads: "[t]his latter element is essential to a clear election: the State must not only discuss the acts on which it is relying, it must in some way disclaim its intention to rely on other acts." Carson, 184 Wn.2d at 228 n. 15.

Even applying this more exacting test, the State successfully disclaimed the Citibank card. In Carson, the prosecutor explicitly told the jury what acts it did not intend to elect. 184 Wn.2d at 213. Here, the State did not make such an explicit statement. But when there are only two acts that could support a charge—the Amex and Citibank cards—we conclude that impliedly electing one act necessarily disclaims the other.

We hold the court did not err by declining to give a *Petrich* instruction because the State's election of the Amex card was clear.

Judicial Comment

Shelton next alleges that the trial court made an improper comment on the evidence when it asked her to stop nodding in agreement to her counsel's closing arguments. We reject this claim because the Judge's statement to Shelton did not constitute an opinion and was a proper use of discretion.

Under Washington's constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare law." WASH. CONST. art. IV, § 16. The purpose behind prohibiting judicial comments on the evidence "is to prevent the trial judge's opinion from influencing jury." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

This constitutional provision is violated if a court's statements indicate to the jury the court's opinion concerning the truth or falsity of evidence or the court's lack of confidence in the integrity of a witness. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968); see also Balandzich v. Demeroto, 10 Wn. App. 718, 725, 519 P.2d 994 (1974). Also, a trial court's statement amounts to a comment on the evidence if it is made " 'either directly or indirectly in such a way as to lead, or tend to lead, the jury to infer that such fact is an established one.' " Ewer v. Goodyear Tire & Rubber Co., 4 Wn. App. 152, 165, 480 P.2d 260 (1971) (quoting Haaga v. Saginaw Logging Co., 169 Wash. 547, 557, 14 P.2d 55 (1932)).

In Lampshire, the appellate court held that the trial court's comment was constitutionally impermissible when, after an objection to the materiality of the testimony, the judge said: "counsel's objection is well taken . . . I don't see the materiality." 74 Wn.2d at 891. Dissimilarly, in Balandzich, the appellate court held that the trial court's comment was permissible when the judge told counsel: "Get the rest of the file here. . . . [Y]ou have to have the entire file, not what is favorable to you and leave the rest out." 10 Wn. App. at 724.

Here, Shelton nodded in agreement while her lawyer discussed whether she could use the Amex account for "emergency reasons" after she lost her job. When the Judge noticed this behavior, he stopped counsel briefly and said "I'm going to interrupt for just a moment. So you may not nod your head during the closing argument. Thank you very much." There was no further interruption for the remainder of counsel's closing argument.

Unlike the judicial comment in Lampshire, this comment cannot be reasonably construed as an opinion on the truth or falsity of what counsel was saying, nor could it lead a juror to believe the fact is an established one. The comment is more similar to Balandzich because it is more of an instruction than an opinion.

Not only did the trial court's comment not amount to an opinion, but it was proper use of its discretion. The trial court is generally granted wide discretion to control the course and conduct of a criminal trial because it is in the best position to perceive and structure its own proceedings. State v. Dye, 178 Wn.2d 541,

547, 309 P.3d 1192 (2013). Judges are given especially "great latitude" when presiding and controlling the parties' closing arguments. State v. Woolfolk, 95 Wn. App. 541, 548, 977 P.2d 1 (1999) (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)).

Here, the trial court explained its decision to admonish Shelton when it said "So as you would state a fact, she would nod her head yes to that fact. So, it wasn't simply agreeing with your argument. She was—she was testifying to facts." This concern was well founded because nonverbal conduct " 'contains a testimonial component' " whenever the conduct reflects the "actor's communication of his thoughts to another." State v. Barry, 183 Wn.2d 297, 310, 352 P.3d 161 (2015) (quoting Pennsylvania v. Muniz, 496 U.S. 582, 595 n. 9, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990)). Shelton waived her right to testify. But by nodding while her attorney was speaking, she was essentially giving testimony without being subject to cross-examination.

We determine the trial court's remarks were constitutionally permissible and an appropriate use of discretion. Thus, we affirm the trial court's decision to deny the motion for a new trial.

CrR 3.5 and 3.6

Finally, Shelton requests a retrial due to the trial court's failure to record in writing its findings of fact and conclusions of law pursuant to CrR 3.5 and 3.6. We conclude that remand is not necessary because given that there was an

adequate record for appellate review, the errors were harmless and did not prejudice Shelton.

Shelton filed and was denied two motions: (1) to suppress Shelton's statements to law enforcement, and (2) to suppress all Amex records. In the first, defense counsel contended that that Shelton's telephone conversation with Officer Shackatano was inadmissible because it amounted to custodial statements made without first receiving *Miranda* warnings. The court determined that a telephone conversation between a suspect and a police officer is not a custodial interrogation or inherently coercive and that defense counsel failed to show coercion or custody. In the second, defense counsel claimed the Amex records were inadmissible because they were obtained using a warrant not justified by probable cause. The court held that evidence of the account's existence and Ms. West saying she did not give anyone permission to open it was probable cause. On appeal, Shelton alleges that the trial court erred, thereby entitling her to a retrial, because the court's findings were not recorded in writing pursuant to CrR 3.5(c) and 3.6(b).

CrR 3.5(c) requires that a trial court "set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether [a] statement [made by the defendant] is admissible and the reasons therefor." CrR 3.6 similarly requires that the court's "findings of fact and conclusions of law" be recorded in writing for motions to suppress physical evidence and evidentiary hearings. CrR 3.6(b). The purpose of both

requirements is to ensure that the parties involved and the appellate court " 'be fully informed as to the bases of [the trial court's judgment].' " State v. Agee, 89 Wn.2d 416, 421, 573 P.2d 355 (1977) (quoting Roberts v. Ross, 344 F.2d 747, 751 (3d Cir. 1965)).

"Although a trial court's failure to make written findings and conclusions after a CrR 3.5 hearing is error, it is harmless as long as oral findings are sufficient to allow appellate review." State v. Thompson, 73 Wn. App. 122, 130, 867 P.2d 691 (1994) (denying retrial when oral findings were detailed and defendant failed to demonstrate prejudice). Similarly, "[a] court's failure to enter written findings of fact and conclusions of law following a suppression hearing as required by CrR 3.6 is harmless error if the court's oral opinion and the record of the hearing are 'so clear and comprehensive that written findings would be a mere formality.' " State v. Smith, 76 Wn. App. 9, 16, 882 P.2d 190 (1994) (quoting State v. Smith, 68 Wn. App. 201, 208, 842 P.2d 494 (1992)).

Here, in response to Shelton's motion to suppress the Amex records, the trial court said:

> So I'm going to find that there wasn't anything, based upon the alleged missing information from the affidavits that would have had any effect on any material item in the application for the search warrants.
>
> . . .
>
> So the motion to suppress the items obtained in the search warrant is denied.

Not only did the trial court clearly state its findings and decisions, but it provided a lengthy explanation about all the challenges raised in Shelton's motion. The

court explained (1) why the bank records alone were a sufficient basis for probable cause, (2) why West reporting the loan as theft did not damage her credibility, and (3) why the minimum payments to the account and West's drunken messages were not relevant to establish probable cause. By doing this, the court explicitly addressed each of the four reasons given by the defense as to why the evidence should be suppressed. In addition, the court asked whether it had failed to address any part of the motion, to which Shelton's attorney replied "no" before moving on.

In response to Shelton's motion to suppress her telephone conversation with Officer Shackatano, the trial court said: "In this hearing, I am going to find that there were—Ms. Shelton was not in custody . . . [a]nd, because of that, *Miranda* was not required, and there was nothing that would—of a constitutional magnitude that would call for the suppression of any of the alleged statements of Ms. Shelton." The trial court clearly stated its findings and decisions and provided a detailed explanation. And again, Shelton's attorney said "no" when the trial court asked if it had failed to address any part of the motion.

Lastly, the motions were heard August 25 and 30, 2021 and arguments and testimony were fully transcribed into the verbatim record. Because of this, we have all the information necessary for review and a clear understanding of the trial court's rulings. A lack of written findings absent prejudice is not grounds for reversal. Thompson, 73 Wn. App. at 130 (holding that there were no grounds for reversal when appellant did not explain how he was prejudiced by the late entry

of the written findings). For us to reverse, Shelton would need to demonstrate that she was prejudiced by findings inadequate to support review. But Shelton did not even attempt to establish prejudice, and so did not meet her burden.[5] Nor has she been prejudiced.

We conclude that the lack of written findings required by CrR 3.5 and 3.6 was harmless error. The trial court made clear and comprehensive oral findings and the entire hearing for both motions was transcribed and provided to this court, thereby creating a complete record with all the information necessary for adequate review.

We affirm.

Smith, C.J.

WE CONCUR:

Brennan, J.

Mann, J.

[5] Shelton may not have raised the issue of prejudice because no indication exists that the lack of written findings of fact and conclusions of law prejudiced Shelton in any way on appeal. Furthermore, Shelton utilized the testimony of Officer Shackatano to support her case in closing: "officer Shackatano said, 'well, yeah. She said that she had permission to use this card and it was to be used for emergency purposes.' " Given that, it might be contradictory to assert that the ruling was prejudicial.

NIELSEN KOCH & GRANNIS P.L.L.C.

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