Supreme Court No. 97376-8

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

GARRETT GUY KIM,
Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. ISSUES PRESENTED FOR REVIEW

A. Should this Court consider the merits of the defendant's arguments since the defendant did not propose a *Petrich* instruction at trial?

B. Is the decision of the Court of Appeals holding that a *Petrich* instruction was not needed in this case in conflict with any other decision of the Supreme Court, specifically the decision in *State v. Carson,* 184 Wn.2d 207, 357 P.3d 1064 (2015)?

C. Where the defendant is convicted of two counts of Identity Theft for two separate acts, is a significant question of constitutional law concerning double jeopardy or juror unanimity raised if the trial court does not give a *Petrich* instruction?

II. STATEMENT OF THE CASE

On March 20, 2016, Alexa Proctor went to O'Reilly Auto Parts with her sister and allowed her sister to use her credit card to make a purchase while Ms. Proctor waited in the car. RP at 88. This was the last time Ms. Proctor saw her card. RP at 89. On March 21, Ms. Proctor discovered her debit card was missing, reported it to her bank, and received a new card. *Id.* The next day, March 22, Ms. Proctor's card was declined for insufficient funds and she discovered that there had been unauthorized transactions on the card at Farmers Exchange and Baxter Auto Parts which she reported to the police. RP at 89-90.

Detective Daniel Todd of Kennewick Police Department investigated the transactions. RP at 117-18. Detective Todd first visited Farmers Exchange where he acquired a surveillance video which showed a suspect that could not be identified. RP at 119-22. Upon further investigation, Detective Todd identified the defendant as a suspect. RP at 125. Detective Todd then created a photo montage including the defendant which he showed to the O'Reilly Auto Parts employee who had helped Ms. Proctor's sister. RP at 128. The employee identified the defendant from the photo montage. RP at 130. Later, the manager at Baxter Auto narrowed the same photo montage down to the defendant and one other photo, and the employee who had conducted the transaction at Farmers Exchange also identified the defendant from the montage. RP at 131-33.

Detective Todd obtained a search warrant for the defendant's home and executed it on March 24. RP at 135. In the search, Detective Todd located a shirt, jacket, and wallet that matched those visible in the Farmers Exchange surveillance video. RP at 136, 142. After arresting the defendant and bringing him back to the police station, Detective Todd noticed that the shoes the defendant was wearing also matched those seen in the surveillance footage. RP at 143.

The State charged the defendant with two counts of Identity Theft in the Second Degree, one count for the purchase made at Farmers

Exchange and one count for the purchase at Baxter Auto Parts. CP 1-4. Upon the close of the defendant's case, the Court asked the State for proposed jury instructions which it provided. RP at 273. Defense counsel objected to one of the proposed jury instructions as irrelevant, the State and Court agreed with defense counsel's observation, and the instruction was removed. RP at 274. However, defense counsel did not propose any additional instructions. RP at 275. Instruction Seven listed the elements and information concerning the Baxter Auto Parts transaction which constituted Count I, and Instruction Eight listed the elements and information concerning the Farmers Exchange transaction which constituted Count II. CP 49-50. Instruction Nine told the jurors any guilty verdict must be unanimous. CP 52.

The trial court gave the unanimity instruction. *Id.* Additionally, the Court gave separate to-convict instructions for both counts. CP 49-50.

During deliberations, the jury "want[ed] to know whether all the evidence admitted can be used to consider both (each) counts (individually)?" CP 56. As suggested by defense counsel, the Court answered: "You must rely on the instructions regarding the evidence previously given, no further instruction may be given." *Id.*; RP at 321. The jury returned a guilty verdict to both counts. CP 57-58; RP at 323. Neither party wished to poll the jury. RP at 323-24. The defendant was sentenced

to thirteen months in prison on each count, to be served concurrently. CP 69.

III. ARGUMENT

A. This Court need not consider the merits of the defendant's argument because he did not propose a *Petrich* instruction at trial or claim a double jeopardy violation.

Here, someone used Ms. Proctor's credit card at two different businesses, Baxter Auto Parts and Farmers Exchange, thereby committing two crimes of Identity Theft. The defendant was charged with two counts of Identity Theft for using Ms. Proctor's means of identification or financial information, one for Baxter Auto Parts, the other for Farmers Exchange. The jury was instructed that it could only find the defendant guilty if it was satisfied beyond a reasonable doubt that he used Ms. Proctor's means of identification or financial information at Baxter Auto Parts in Count I and Farmers Exchange in Count II. The defendant did not propose a *Petrich* instruction.

RAP 2.5 (a) states "a party may raise the following claimed errors for the first time in the appellate court . . . (3) *manifest* error affecting a constitutional right." (Emphasis added). This requires a showing of actual prejudice—a plausible showing by the defendant that the asserted error

had practical and identifiable consequences in the trial of the case. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

The defendant cannot meet this burden. If the jury was not convinced beyond a reasonable doubt that he committed the crime at Baxter Auto, he would have been found not guilty. Likewise, if the jury thought there was a reasonable doubt that he was the perpetrator at Farmers Exchange, he would have been found not guilty. There is no way the claimed error is "manifest."

There was no prejudice to the defendant, much less a plausible showing that a *Petrich* instruction would have changed the outcome of the trial.

B. The Court of Appeals decision is consistent with other cases and is specifically consistent with *State v. Carson:* while a *Petrich* instruction may be necessary in some multicount cases it was not necessary in herein.

The Court of Appeals case is consistent with other cases, including *Carson.* In *Carson,* the defendant was charged with three counts of first-degree child molestation, all having the same charging period, all with the same victim, and all with the same charging language. *State v. Carson,* 184 Wn.2d 207, 212, 357 P.3d 1064 (2015). However, the victim described three specific acts and the prosecutor told the jury that those were the only acts the State wished to focus on. *Id.* at 213. The issue in

Carson was whether the defense attorney was ineffective for rejecting an offer of a *Petrich* instruction.

The *Carson* court held the attorney was not ineffective and that the defense attorney's objection to a *Petrich* instruction was not based on a misunderstanding of the law and was a tactical decision. *Id.* at 222-23.

The *Carson* court stated in response to a Concurring opinion,

> [W]e do not conclude that a unanimity instruction is never necessary in a multicount case . . . rather, we hold that it was not deficient performance for defense counsel to reject a *Petrich* instruction "in Carson's specific case" *in part* because the evidence showed "three separate and distinct incidents." And we do not hold that a *Petrich* instruction is "always unnecessary" when there is exact congruence between the acts alleged and the counts charged; rather, we simply note that we have never "specifically held" that a *Petrich* instruction must be read in such cases, thus adding credence to defense counsel's conclusion that it would be better to avoid such an instruction in Carson's specific case.

Id. at 222 n.8.

The Court further elaborated:

> The concurrence opines that we "specifically held that a *Petrich* instruction is constitutionally required in a case where there is exact congruence between the acts alleged and the counts charged," citing *State v. Vander Houwen*, 163 Wn.2d 25, 38-39, 117 P.3d 93 (2008). Concurrence (Gordon McCloud, J.) at 1079. The concurrence overlooks the important qualification in *Vander Houwen* that the *Petrich* instruction is unnecessary if the prosecution specifies the incidents supporting the charges: "The absence of a unanimity instruction, *along with the State's failure to identify specific acts on which to charge,* is fatal." 163 Wn.2d at 38, 177 P.3d 93 (emphasis added). It is this factor that distinguishes this case from *Vander Houwen.* As

> discussed supra in note 2, the evidence in this case points only to three separate and distinct incidents. The concurrence claims that our opinion makes a "sweeping general assertion that where the number of counts charged is the same as the number of acts alleged, that congruence makes *Petrich* inapplicable." Concurrence (Gordon McCloud, J.) at 1078. Once again, this misstates our actual holding and ignores the posture of this case. The Court of Appeals correctly rejected Carson's claim that the trial court erred in failing to provide a *Petrich* instruction claim under the doctrine of invited error, *see Carson*, 179 Wn. App. at 973-75, 320 P.3d 185, and Carson did not challenge that ruling in his petition for review. Consequently, the sole issue now before us is Carson's ineffective assistance claim. Given the limited scope of our review, we make no ruling on whether some variation of the *Petrich* instruction would have been necessary in this case had defense counsel requested one; rather, we simply hold that defense counsel's decision to object to the State's proposed *Petrich* instruction was reasonable under the circumstances of this case.

Id. at 223 n.10.

So, the *Carson* court stated that 1) it is incorrect to say that a past case has held that a *Petrich* instruction should be given where the criminal acts alleged equal the number of counts; 2) a *Petrich* instruction would be necessary in multicount case, where the number of alleged acts equals the number of counts, but the prosecution has failed to specifically link the alleged acts with specific counts; and 3) therefore, whether a *Petrich* instruction in a multicount case is necessary is case specific.

The argument that the Court of Appeals decision conflicts with *Carson* is incorrect. *Carson* noted that no decision of the Washington

State Supreme Court has addressed this exact issue, and that there is not a suggested *Petrich* instruction in the WPICs for multicount cases. *Id.* at 223-24. *Carson* did not hold that it was necessary to give a *Petrich* instruction in a multicount case. It may be necessary where the prosecution has not specified what allegation is tied with which count.

That is not the case here. The perpetrator used Ms. Proctor's means of identification or financial information at two different businesses, Baxter Auto Parts and Farmers Exchange, thereby committing two crimes of Identity Theft. It would not have been possible for the jury to conclude the defendant used the credit card only at Baxter Auto Parts, but not at Farmers Exchange, and to find him not guilty of the Farmers Exchange count.

The defendant points out the jury asked a question concerning whether all the evidence could be considered to evaluate both counts and he concludes "the question indicates it (the jury) had serious doubts about the evidence alleged in support of each charged crime." Pet. for Rev. at 6.

With all due respect to the defendant, he is unfairly assuming what the jury's deliberations were. There was independent evidence linking the defendant to the crimes at both Baxter Auto and Farmers Exchange. It did not matter if the proof that the defendant used Ms. Proctor's credit card at

Baxter Auto was stronger than the independent proof that he used the card at Farmers Exchange.

Beyond a reasonable doubt, the person using Ms. Proctor's credit card at Baxter Auto Parts was also the person using the card at the Farmers Exchange and vice versa. Both transactions occurred on the same day around noon, and it is not reasonable to believe that two different people used her card at roughly the same time. RP at 172-73. If the jurors were satisfied the evidence proved beyond a reasonable doubt that the defendant committed Count I at Baxter Auto, they could consider that evidence in deciding whether he also committed the crime at Farmers Exchange.

Rather than assuming the jury was struggling to make a decision, it is just as likely that the jury took its obligations seriously. A fair reading of the jury's question is that the jurors wanted to confirm that they can use all evidence to decide both counts.

The defendant is also incorrect in arguing that the trial judge answered the question incorrectly. The trial judge did the defendant a favor by giving a generic answer. The judge could have referred to Instruction No. 1, WPIC 1.01, which states in part, "In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is

entitled to the benefit of all of the evidence, whether or not that party introduced it." CP 41.

There was no need for a *Petrich* instruction and the Court of Appeals decision is not in conflict with any other case.

C. There is no significant constitutional issue regarding double jeopardy or juror unanimity.

The defendant's citation to *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417 (2007) is not on point. In *Borsheim,* all four of the counts charging Rape of a Child in the First Degree alleged the same charging period with the same victim. *Id.* at 363. The victim alleged multiple acts of vaginal or oral sex almost every weekday over two-and-a-half years. *Id.* Further, the to-convict instruction covered all four counts in one instruction, rather than four separate instructions. *Id.* at 368. The *Borsheim* court held that the jury could have convicted the defendant on four counts on a single act, since the instructions did not make it clear that the jurors needed to base each conviction on a different act.

Here, the "to convict" instructions are not the same. The two "to-convict" instructions specify different victims in Count I and Count II, Baxter Auto and Farmers Exchange. The defendant was punished for two acts of Identity Theft, one at Baxter Auto and the other at Farmers Exchange. There is no double jeopardy issue or juror unanimity issue.

IV. CONCLUSION

Accordingly, the petition for review should be denied.

RESPECTFULLY SUBMITTED this 30 day of July, 2019.

ANDY K. MILLER
Prosecutor

Terry J. Bloor,
Deputy Prosecuting Attorney
WSBA No. 9044
OFC ID NO. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Kate Benward
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101

☒ E-mail service by agreement was made to the following parties:
wapofficemail@washapp.org

Signed at Kennewick, Washington on July 30 2019.

Demetra Murphy
Appellate Secretary

APPENDICES

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Appendix B: CP 50 - To convict instruction for Count II
Appendix C: CP 56 - Inquiry from the Jury and Court's Response
Appendix D: CP 57 - Verdict on Count I
Appendix E: CP 58 - Verdict on Count II

Appendix A

CP 49 - To convict instruction for Count I

INSTRUCTION NO. 7

To convict the defendant of identity theft in the second degree, as charged in Count I, the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 21, 2016, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person;

(2) That the defendant acted with the intent to commit any crime;

(3) That the defendant obtained goods, or anything else having a value of $1500 or less from Baxter's Auto Parts, as a result of the acts described in element (1); and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Appendix B

CP 50 - To convict instruction for Count II

INSTRUCTION NO. 8

To convict the defendant of identity theft in the second degree, as charged in Count II, the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about March 21, 2016, the defendant knowingly obtained, possessed, or transferred or used a means of identification or financial information of another person;

(2) That the defendant acted with the intent to commit any crime;

(3) That the defendant obtained goods, or anything else having a value of $1500 or less from Farmer's Exchange, as a result of the acts described in element (1); and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Appendix C

CP 56 - Inquiry from the Jury and Court's Response

SUPERIOR COURT OF WASHINGTON
COUNTY OF BENTON

(Clerk's Date Stamp) JOSIE DELVIN BENTON COUNTY CLERK
JUL 26 2017
FILED

Plaintiff(s)

vs.

Kim
Defendant(s)

CASE NO. 16-1-00283-1

INQUIRY FROM THE JURY AND COURT'S RESPONSE

JURY INQUIRY

The jury wants to know wether all the evidence admitted can be used to consider both counts? each → individually

DATE AND TIME RECEIVED: 7/26/2017 1:51 p.m.

COURT'S RESPONSE:

You must rely on the instructions regarding the evidence previously given, no further instruction may be given.

JUDGE

DATE AND TIME RETURNED TO JURY: 07/26/2017 2:25 p.m.

*** DO NOT DESTROY ***

INQUIRY FROM THE JURY AND COURT'S RESPONSE SC FORM JURY

0-000000056

Appendix D

CP 57 - Verdict on Count I

JOSIE DELVIN
BENTON COUNTY CLERK
JUL 26 2017
FILED 01

IN THE SUPERIOR COURT OF
STATE OF WASHINGTON FOR BENTON COUNTY

JUDGMENT DOCKET
NO 17-9-02023-3

STATE OF WASHINGTON, Plaintiff,	)	No. 16-1-00283-1
vs.	)	VERDICT FORM - I
GARRETT GUY KIM, Defendant.	)	

We, the jury, find the defendant Garrett Guy Kim,

guilty
Write in "not guilty" or "guilty"

of the crime of

Identity Theft in the Second Degree as charged in Count I.

DATED this 26 day of July, 2017.

Presiding Juror

0-000000057

Appendix E

CP 58 - Verdict on Count II

IN THE SUPERIOR COURT OF
STATE OF WASHINGTON FOR BENTON COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 16-1-00283-1
vs.	)	VERDICT FORM - II
GARRETT GUY KIM, Defendant.	)	

We, the jury, find the defendant Garrett Guy Kim,

guilty of the crime of
Write in "not guilty" or "guilty"

Identity Theft in the Second Degree as charged in Count II.

DATED this 26 day of July, 2017.

Presiding Juror

BENTON COUNTY PROSECUTOR'S OFFICE

July 30, 2019 - 11:52 AM

Transmittal Information

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