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DIVISION II

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STATE OF WASHINGTON

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No. 39925-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lisa Knutz,

Appellant.

Lewis County Superior Court Cause No. 09-1-00011-0

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Ms. Knutz's conviction infringed her Fourteenth Amendment right to due process because the court's instructions relieved the state of its obligation to prove an essential element of theft by color or aid of deception.
2. The court's instructions relieved the state of its burden to prove that Mr. Von Gruenigen believed and relied upon Ms. Knutz's deceptions.
3. The trial court violated Ms. Knutz's right to a unanimous jury under Wash. Const. Article I, Section 21.
4. Ms. Knutz's state constitutional right to a unanimous jury was violated when the state failed to elect a single act (or combination of acts) as the basis for the charge and the judge failed to give a unanimity instruction.
5. The 60-month exceptional sentence was clearly excessive.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A trial court's instructions must inform the jury of the state's burden to prove every essential element of the charged crime. Here, the court's instructions relieved the state of its burden to show that Mr. Von Gruenigen believed and relied upon Ms. Knutz's deceptions. Did the trial court's instruction relieve the state of its burden of proof in violation of Ms. Knutz's Fourteenth Amendment right to due process?
2. When evidence of multiple criminal acts is introduced to support a single conviction, either the state must elect one act or the court must give the jury a unanimity instruction. Here, the state introduced evidence of multiple acts, but did not elect a single transaction (or combination of transactions) to support the charged crime, and the trial judge failed to give a unanimity instruction. Did the trial court's failure to give a unanimity instruction violate Ms. Knutz's state constitutional right to a unanimous verdict in light of the prosecutor's failure to make the required election?

3. An exceptional sentence may be reversed if it is “clearly excessive.” In this case, Ms. Knutz’s standard range was 2-6 months in custody, but the court imposed a 60-month exceptional sentence. Must her sentence be vacated and the case remanded for a new sentencing hearing?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Lisa Knutz developed a friendship with Robert Von Gruenigen starting in the summer of 2005. RP 131, 223. He was a retired professor who lived in an assisted care facility in Lewis County. RP 73, 75, 127. She asked him for money: for her bills, to assist her family, to pay court fees, for medical care and gas, for school expenses, and various other reasons. RP 77-78, 82-86, 92-95, 231-233. Mr. Von Gruenigen believed some of her reasons for needing the money, but not all. Even so, he kept giving her money. RP 143, 147-148, 244.

For the first three or four years they knew each other, he loaned Ms. Knutz a total of \$3500. RP 78-80; Exhibit 49, Supp. CP. During this time, she said she would pay him back and Mr. Von Gruenigen considered the transactions to be a series of loans. RP 77. Ms. Knutz provided rides and other assistance to Mr. Von Gruenigen, who could not drive or get around without assistance. RP 87, 117. Mr. Von Gruenigen credited these services against the money he gave to Ms. Knutz. RP 87, 90.

Over time, she asked for larger and larger amounts, continuing to lie to him about the reasons she needed the money. RP 92-122, 236, 239. She told him stories about repaying welfare benefits, fixing a telephone pole, and various thefts victimizing herself and family members. RP 94-

95, 101-104. More than once, she showed him documents to verify her explanation. RP 105-106, 160. He provided the money by writing a check to himself and cashing it in person at his bank, then giving the cash to Ms. Knutz. RP 97-100. He gave her cash when she asked for it voluntarily – she never made any threats to him. RP 127, 166, 246.

As this went on, Mr. Von Gruenigen realized that Ms. Knutz would not ever be able to pay him back. RP 96, 155. He had loaned \$3500 to another person over these years, and stopped loaning that person money as soon as he realized she could not pay it back. RP 140-141. With Ms. Knutz, however, Mr. VanGruenigen stopped expecting repayment, and kept giving her money when she asked. RP 151-152, 155, 165. He continued giving her money for a year and a half, knowing he would not be repaid and not expecting or demanding it. RP 155-156.

In March of 2008, Ms. Knutz was asking for \$10,000 at a time, telling Mr. Von Gruenigen that she had cancer and needed to advance a fee to her surgeon. RP 107-109.

Someone in Mr. Von Gruenigen's care facility called Adult Protective Services regarding Ms. Knutz. RP 163, 176. After an investigation, the state charged her with Theft in the First Degree. RP 177-218; CP 28. The prosecution also alleged three aggravating factors:

It is further alleged that at the time of the commission of said offense, the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable or[sic] resistance, thus adding to defendant's offender score pursuant to RCW 9.94.A.525(3)(b).

It is further alleged that the commission of said offense was a major economic offense or series of offenses in that the offense involved multiple victims or multiple incidents per victim, thus adding to defendant's offender score pursuant to RCW 9.94A.535(3)(d)(i).

It is further alleged that the commission of said offense was a major economic offense or series of offenses in that the offense involved attempted or actual monetary loss substantially greater than typical for the offense, thus adding to defendant's offender score pursuant to RCW 9.94A.535(3)(d)(ii).
CP 28-29.

The state alleged at trial that Ms. Knutz had stolen \$340,000. RP 159, 191.

Ms. Knutz testified that Mr. Von Gruenigen voluntarily gave her money. She described his hope that the relationship would become physically intimate, and said that he paid her for kisses and asked for more, including sex. RP 193, 241-243. She admitted during her interviews with police, as well as in the trial, that she lied to Mr. Von Gruenigen to get him to give her money. RP 190, 194, 250.

Mr. Von Gruenigen denied any expectation of sexual contact. RP 167.

The court defined first-degree theft for the jury as follows:

A person commits the crime of theft in the first degree when she commits theft of property or services exceeding \$1500 in value.

Instruction No. 3, Court's Instructions to the Jury, Supp. CP.

The court's "to convict" instruction included the following essential elements:

(1) That on or about and between January 1, 2005 and March 30, 2008 the defendant by color or aid of deception, obtained control over property or services of another, to wit: money belonging to Robert J. Von Gruenigen, or the value thereof; and:

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property; and

(4) That this act occurred in the State of Washington.

Instruction No. 4, Court's Instructions to the Jury, Supp. CP.

The court also defined the phrase "by color or aid of deception" for the jury:

By color or aid of deception means that the deception operated to bring about the obtaining of the property or services. It is not necessary that deception be the sole means of obtaining the property or services.

Instruction 6, Court's Instructions to the Jury, Supp. CP.

The instructions to the jury did not include a unanimity instruction.

Court's Instructions to the Jury, Supp. CP.

The jury convicted Ms. Knutz, and found all three of the aggravating factors. RP 314-316. At sentencing, based on her juvenile record, Ms. Knutz's standard range was determined to be 2-6 months incarceration. CP 18. Finding that the jury's verdict and the facts of the

case warranted an exceptional sentence, the court imposed a sentence of 60 months in prison. RP 327-328. This timely appeal followed. CP 3-15.

ARGUMENT

I. THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THEFT BY COLOR OR AID OF DECEPTION.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Detention of Martin*, 163 Wn.2d 501, 506, 182 P.3d 951 (2008). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant “must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant’s] rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed constitutional error to

determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).¹

Jury instructions are reviewed *de novo*. *State v. Hayward*, 152 Wn.App. 632, 641, 217 P.3d 354 (2009). Instructions must be manifestly clear because juries lack tools of statutory construction. *See, e.g., State v. Killo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

B. To obtain a conviction for theft by color or aid of deception, the prosecution was required to prove the nonstatutory element of “reliance.”

A trial court’s failure to instruct the jury as to every element of the crime charged violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). The jury has the right to regard the “to convict” instruction as a complete

¹ The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

Theft is defined (in relevant part) to mean “By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services...” RCW 9A.56.020(1)(a). Theft in the First Degree occurs when a person commits theft of property worth more than \$1500. RCW 9A.56.030(1)(a). In addition, conviction for theft by color or aid of deception requires proof of “reliance.”² *State v. Casey*, 81 Wn.App. 524, 527-528, 915 P.2d 587 (1996). Reliance is established by proof that the defrauded person “believed and relied upon” the deception, which “in some measure operated to induce him [or her] to part with his [or her] property.” *State v. Zorich*, 72 Wn.2d 31, 37, 431 P.2d 584 (1967) (discussing “reliance” for purposes of Larceny by False Pretenses.)

² The “reliance” element is derived from the precursor crime, which was known as Larceny by False Pretenses. *Casey*, at 528.

- C. The court's instructions relieved the state of its burden to prove that Mr. Von Gruenigen believed and relied upon Ms. Knutz's deception.

The trial court did not instruct the jury on the state's burden to prove reliance. Court's Instructions to the Jury, Supp. CP. Instead, the court's "to convict" instruction required only that the jury find that Ms. Knutz obtained control over Mr. Von Gruenigen's money "by color or aid of deception." Instruction No. 4, Court's Instructions to the Jury, Supp. CP. This phrase was defined to mean (in relevant part) "that the deception operated to bring about the obtaining of the property..." Instruction No. 6, Court's Instructions to the Jury, Supp. CP. Nothing in the instructions suggested that the state was required to prove that Mr. Von Gruenigen "believed and relied upon" Ms. Knutz's deceptions, as required under *Zorich, supra*. Court's Instructions to the Jury, Supp. CP.

Because the "to convict" instruction omitted the state's burden to prove reliance, and because the deficiency was not corrected elsewhere in the instructions, the prosecution was relieved of its burden to prove the essential elements. *Casey, supra*. This created a manifest error affecting Ms. Knutz's Fourteenth Amendment right to due process, and thus can be argued for the first time on appeal, pursuant to RAP 2.5(a)(3). *Kirwin, supra*.

D. The error was prejudicial and requires reversal.

The omission of an essential element requires reversal. *Mills, supra*. Constitutional error is presumed prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). Reversal is required unless the state can prove that any reasonable fact-finder would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The error here is presumed prejudicial, and Respondent cannot meet its burden of establishing harmless error under the stringent test for constitutional error. *Toth*, at 615. The evidence that Mr. Von Gruenigen “believed and relied upon” Ms. Knutz’s deceptions was not overwhelming. First, Ms. Knutz testified that Mr. Von Gruenigen knew that she was fabricating the reasons she needed money. RP 244. Although he claimed that he believed her, he also testified that some of her explanations were not true, that he had suspicions, that he once thought

she was lying, and that he had doubts about what she told him. RP 143, 147, 148, 153. Third, the jury was entitled to disbelieve Mr. Von Gruenigen's explanations for why he chose to give money to Ms. Knutz. Jurors may have believed that he did not believe her stories, but that he pitied her, had paternal feelings, or hoped to induce her to perform favors for him.

Under the circumstances of this case, the error was not trivial, formal, or merely academic; it prejudiced Ms. Knutz and likely affected the final outcome of the case. *Lorang*, at 32. A reasonable jury could have decided that Mr. Von Gruenigen did not believe and rely upon Ms. Knutz's deceptions; with proper instructions, they would have voted to acquit. Because the error was not harmless, the conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE ABSENCE OF A UNANIMITY INSTRUCTION DENIED MS. KNUTZ HER RIGHT TO A UNANIMOUS JURY UNDER WASH. CONST. ARTICLE I, SECTION 21.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Martin*, 506. The erroneous failure to provide a unanimity instruction requires reversal, unless the error is harmless beyond a reasonable doubt. *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). The presumption

of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id.*

B. Where the prosecution presents evidence of multiple acts, the court must provide a unanimity instruction.

An accused person has a state constitutional right to a unanimous jury verdict.³ Wash. Const. Article I, Section 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a criminal defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *Coleman*, at 511. If the prosecution presents evidence of multiple acts to support a particular charge, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act to convict the accused person of that particular charge. *State v. York*, 152 Wn.App. 92, 216 P.3d 436 (2009); *Coleman*, at 511. Jurors have a constitutional “responsibility to connect the evidence to the respective counts.” *State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008).

In the absence of an election by the prosecution, failure to provide a unanimity instruction in a “multiple acts” case is presumed to be

³ The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

prejudicial.⁴ *Coleman*, at 512; *see also Vander Houwen*, at 38. Without the election or an appropriate unanimity instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman*, at 512.

C. The absence of a unanimity instruction prejudiced Ms. Knutz and requires reversal.

In this case, the state relied on multiple acts occurring over the course of three years to establish that Ms. Knutz committed Theft in the First Degree. CP 28; RP 61-123. Despite this, the trial court failed to provide a unanimity instruction. Court's Instructions to the Jury, Supp. CP. This created a manifest error affecting Ms. Knutz's constitutional right to juror unanimity, and thus can be raised for the first time on review. RAP 2.5(a)(3); *Kirwin, supra*.

Although the state pursued an aggregation theory, individual jurors may have voted guilty by selecting a single transaction that totaled more than \$1500, or by selecting various combinations of transactions and aggregating them. *See* Exhibits 49, 50, and 51, Supp. CP. In the absence of a unanimity instruction, there is no guarantee that all twelve jurors

⁴ Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wn.App. 889, 916, 56 P.3d 569 (2002).

voted to convict based on the same transaction or combination of transactions. *Coleman, supra*. Accordingly, Ms. Knutz's conviction violated her right to jury unanimity under Wash. Const. Article I, Section 21. *Id.*

The error is presumed prejudicial, and requires reversal unless the state can establish that no rational juror could have a reasonable doubt about any combination of transactions aggregating to more than \$1500. *Id.* The prosecutor cannot make this showing. First, the evidence suggested Ms. Knutz told the truth when asking for money on some occasions. RP 231-233, 249-257, 259. Second, there were times when Mr. Von Gruenigen apparently may have disbelieved Ms. Knutz, but gave her money nonetheless. RP 143, 147-148, 244. Given the evidence, a rational juror could have had a reasonable doubt that Ms. Knutz obtained some of the money "by color or aid of deception." Under these circumstances, it is impossible to say that the jury unanimously agreed that Ms. Knutz was guilty under all possible combinations of transactions totaling more than \$1500. *Coleman*. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

D. The Court should not follow Division I's decision in *Garman*.

A unanimity instruction is not required for "multiple acts" cases involving a "continuing course of conduct." *State v. Handran*, 113 Wn.2d

11, 17, 775 P.2d 453 (1989). The rationale for this exception to the general rule is that a “continuing course of conduct” constitutes a single act rather than multiple acts; accordingly, no unanimity instruction is required. However, where conduct occurs at different times and places, the evidence tends to show several distinct acts rather than a “continuing course of conduct.” *Id.*, at 17.

Thus, for example, where a defendant provides a small sample of cocaine at a restaurant and then sells a larger quantity to the same buyer a few minutes later at a Safeway parking lot, the two transactions are part of the same continuing course of conduct. Under such circumstances, no unanimity instruction is required. *See State v. Fiallo-Lopez*, 78 Wn.App. 717, 899 P.2d 1294 (1995). On the other hand, multiple acts of possession occur where cocaine is discovered inside a Tylenol container found between the seats in a car occupied by more than one person, and more cocaine is found during an inventory search (conducted at a jail during booking) of the defendant’s fanny pack. Such evidence “tend[s] to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers—the Tylenol bottle and the fanny pack.” *State v. King*, 75 Wn.App. 899, 903, 878 P.2d 466 (1994).

Division I has expanded this exception. *State v. Garman*, 100 Wn.App. 307, 984 P.2d 453 (1999). In *Garman*, Division I held that “a unanimity instruction is not required where (1) a defendant is charged with a single count of theft based on a common scheme or plan, (2) the evidence indicates multiple incidents of theft from the same victim, (3) the multiple transactions are aggregated for charging purposes, (4) the jury is instructed on the law of aggregation, and (5) the to-convict instruction for the theft charge requires the jury to find that the multiple incidents are part of ‘a common scheme or plan, a continuing course of conduct, and a continuing criminal impulse.’” *Id.*, at 317.

The Court should not follow Division I’s expanded approach to the “continuing course of conduct” exception. *Garman* departs from the rationale for the exception, resulting in convictions that violate the unanimity requirement of Wash. Const. Article I, Section 21. The *Garman* rule is not based on a distinction between a single act and multiple acts. Instead, Division I appears to conflate two different concepts: a “continuing course of conduct” and a “common scheme or plan.” In doing so, Division I ignores the Supreme Court’s guidance that evidence of conduct occurring at different times and places establishes distinct acts rather than a “continuing course of conduct.” *Handran*, at 17. Under Division I’s approach, the danger remains that some jurors will

convict based on proof of one act (or combination of acts) while other jurors convict based on proof of other acts.

Garman is not supported by the reasoning set forth in *Handran*, and should not be followed. The exception for a “continuing course of conduct” applies only where the conduct can rationally be viewed as a single act, rather than multiple acts. Proof of multiple acts—even multiple acts that comprise a common scheme or plan—requires the court to provide a unanimity instruction. *Coleman, supra*.

III. MS. KNUTZ’S 60-MONTH EXCEPTIONAL SENTENCE WAS CLEARLY EXCESSIVE UNDER THE CIRCUMSTANCES OF THIS CASE.

Under RCW 9.94A.585, a reviewing court may reverse a sentence outside the standard range if “the sentence imposed was clearly excessive.” RCW 9.94A.585(4)(b). Ms. Knutz’s 60-month sentence meets this requirement.

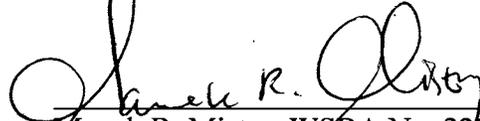
It was undisputed that Ms. Knutz had no adult felonies, and that her criminal history included only two juvenile felonies and a juvenile conviction for Theft in the Third Degree. Stipulation on Prior Record, Supp. CP. Her standard range was 2-6 months. CP 18. Under these circumstances, imposition of a 60-month sentence was clearly excessive, even in light of the jury’s findings on aggravating factors.

CONCLUSION

For the foregoing reasons, Ms. Knutz's conviction must be reversed and the case remanded for a new trial. In the alternative, her sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on April 2, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to: BY _____
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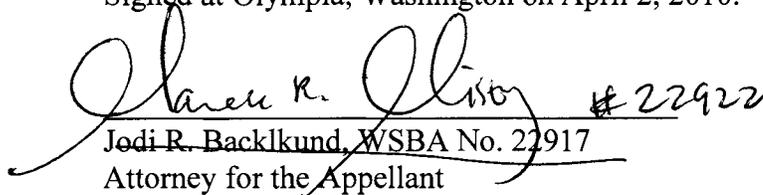
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on April 2, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 2, 2010.

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