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Division II
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COA No. 52721-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARK MILLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY

The Honorable Gregory Gonzalez

REPLY BRIEF

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A. REPLY ARGUMENT

(1). TRIAL COUNSEL PROPERLY PRESERVED AND ARGUED THE IMPROPRIETY OF INCLUDING AN ACCOMPLICE LIABILITY INSTRUCTION AFTER THE DEFENSE HAD SPENT THE ENTIRE TRIAL SHOWING THAT ED BESAW PERPETRATED THE OFFENSE , AND WHERE SPECULATION THAT THE TWO WORKED TOGETHER IS NOT EVIDENCE.

As Mr. Miller argued in his opening brief, Ed Besaw claimed at Mr. Miller's trial that Miller tricked Besaw into escorting Lillian Meador to Chase Bank to withdraw \$50,000 from the branch in Vancouver -- but Miller denied that he had any knowledge of Besaw's conduct of taking Meador to the bank, much less had he cleverly arranged the theft by manipulating Besaw. AOB, at p. 1. Mr. Miller testified that he gave his former colleague Besaw's phone number to Ms. Meador because Besaw wanted to contact her regarding his Medicare benefits business. RP 1133-35. Miller was not aware at that time whether she called Besaw, and he was utterly unaware of Besaw's actions of taking Meador to the bank to withdraw money. RP 1133-35, 1210. He certainly had not "planned and arranged" Meador's trip to the bank, by allegedly telling Besaw that he was needed as an escort because Meador was elderly and for safety reasons, as the State accused him of. See SRB, at p. 13 n. 5; RP 1210.

More importantly, as defense counsel protested below, after

the defense had spent the entire evidence phase of trial portraying Besaw as a con artist who committed the theft of the \$50,000 from Meador, the trial court granted the State's motion to instruct the jury that it could find that Miller acted *together* with Besaw to commit that crime. AOB, at pp. 16-25; see RP 1269.

Respondent incorrectly argues that "it was plain as day that the State's theory of the case, and the way the crime was charged, was that Miller was guilty for his actions in orchestrating the plan to separate Meador from \$50,000 in cash irrespective of Besaw's state of mind." SRB, at pp. 16-17 (citing CP 7-9).

This is incorrect. The Respondent cites the affidavit of probable cause, which alleges that Mr. Miller "told his friend, Edwin" to escort the elderly Lillian Meador to the bank "to protect Lillian because she will have a large amount of cash." CP 8. The affidavit goes on to endorse Besaw's statement to the police that Besaw received this large payment, given to him at the Portland restaurant, for "helping out" in these circumstances, and recites that the police investigated "confirming Edwin's account of what occurred." CP 8. Mr. Miller argued that the State's theory and "everything they presented" was that Mr. Besaw was the fall guy, and everything the

defense did at trial was to show that Besaw in fact was a lying wrongdoer. RP 1269-70.

Thus, giving the jury instruction caused Mr. Miller to have unwittingly *helped the State's case* at trial. Where the defense spent the trial showing how likely it was that Mr. Besaw was a dishonest, criminal schemer, for the State to now announce that Mr. Miller could be guilty by working together with that wrongdoer, was extraordinarily prejudicial when it culminated in the instructional error.

Respondent cites State v. Trujillo, but that case does not involve a defendant charged as the sole actor, who spends his trial defense arguing that a State's witness was the person who committed the crime, followed by the State asking at the last minute to instruct the jury in a manner that undercuts the entire defense. Rather, it merely involves the general rule that accomplice liability is a mere aspect of criminal liability. State v. Trujillo, 112 Wn. App. 390, 49 P.3d 935 (2002) (and holding that instructional error was harmless).

Evidence that Mr. Miller attacked the State's prime witness as the true perpetrator is not evidence of complicity, and neither is the prosecutor's speculation that the jury might suspect cooperation

between two actors, where the State accused Mr. Miller, and the defense accused Mr. Besaw. The instruction was not warranted. For related reasons, where the State lay in wait, not alleging that Besaw was a bad actor, but instead asserting he was tricked and then at the close of evidence seeking to capitalize on the defense attack on Besaw, Due Process was violated when the State was allowed an instruction that undercut that entire defense Mr. Miller had advanced. AOB, at p. 19-23 (citing State v. Fair, 5 Wn. App. 2d 1034 (COA No. 77180-9-I) (October 8, 2018, at p. 2) (unpublished, cited pursuant to GR 14.1)).

(2). THERE WAS INSUFFICIENT EVIDENCE TO AFFIRM THE JURY'S VERDICT FOR CRIMINAL IMPERSONATION.

Mr. Miller relies on the arguments in his Appellant's Opening Brief. Mr. Miller did not assume a false identity. He truthfully stated his name as Mark Miller and gave Standard Insurance an email address that belonged to him, Mark Miller, he being Miller, and the email address being his. This is not assuming the identity of another, real or non-existent. In an equal protection case, the Court of Appeals has stated that the crime of impersonation does not require "use of a false name nor a false identity . . . assuming the identity of an actual person, which is necessary to commit identity theft." (Emphasis added.) State v. Presba, 131 Wn. App. 47, 55, 126

P.3d 1280 (2005) (addressing appellant's argument regarding equal protection and specific/concurrent statutes in charging). Mr. Miller gave neither a false, fictitious identity nor a true identity that was the name of another. He did not claim to be a person other than Mark Miller. He provided his actual identity. Describing oneself, while giving one's true name *and* identifying information, as having a relationship to another person such as "nephew" or "partner" - neither of which carries any legal authority as to the affairs of the other - does not fall within the language of the criminal impersonation statute. This stands in contrast to giving the false name of an actual person with authority such as the name of a parent as to a minor child, or giving a fictional name that represents oneself as having the power to speak for another or to secure benefits for another. The evidence was insufficient.

(3). DOUBLE JEOPARDY WAS VIOLATED.

The alleged criminal impersonation cannot stand where the State affirmatively and expressly proffered that act as the substantial step for the attempted theft.

In assessing double jeopardy, courts view the offenses as they were charged and proved. State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005); accord, In re Pers. Restraint of Orange,

152 Wn.2d 795, 817, 100 P.3d 291 (2004). Courts do not consider the statutory elements of the offenses in the abstract; that is, they do not consider all the ways in which the State could have charged an element of an offense, but rather how the State actually secured the convictions. Freeman, at 772.

Consistent with this principle, “[w]here one of the two crimes is an attempt crime, the test requires further refinement.” This is because, as our Supreme Court has explained, one of the elements of an attempt crime is that the defendant “ ‘does any act which is a substantial step toward the commission of that crime.’ “ In re Pers. Restraint of Borrero, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007) (quoting former RCW 9A.28.020(1) (1975)). Where one crime was also the substantial step element of an attempted greater offense, double jeopardy is generally violated. See, e.g., In re PRP of Francis, 170 Wn. 2d 517, 524, 242 P.3d 866, 869 (2010) (second degree assault was the substantial step towards attempted robbery). Importantly, the Court looks to the facts and the prosecutor’s closing argument to determine how the convictions were procured. In re Pers. Restraint of Borrero, 161 Wn.2d at 538-39.

In this case, the State proved that Mr. Miller secured annuity surrender forms for Ms. Meador by telephone, and that same

evidence was also the substantial step for the attempted first degree theft. Consistent with the affidavit of probable cause, the State made clear in closing argument that the charge of attempted first degree theft “has to do with the cashing out of the annuities”¹ allegedly attempted by Mr. Miller, which was proved by the substantial step of “the phone call pretending to be her nephew[.]” RP 1321-22. The State argued:

[W]ell, what is a substantial step? Is the phone call enough? A substantial step is defined for you. This is Instruction Number 18. It’s pretty brief. A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation. So he doesn’t have to complete the crime. He doesn’t really have to necessarily get close to completing the crime. There just has to be a substantial step done with the intent to commit the crime. And I would submit to you that the phone call pretending to be her nephew, asking how they’re going to cash these out, having them e-mail him the forms that are later within a week turned around and sent back for disbursement, that is, in fact, a substantial step.

All right. Final count, Count III, Instruction 21, this is Criminal Impersonation in the First Degree. Again, relating to the call to Standard Insurance. This is where he pretends to be her nephew. That’s what the allegation is here. To convict the defendant of the crime of Criminal Impersonation in the First Degree, each of these elements must be met: First, on or about September 1, 2016, the defendant

¹ As noted, it is clear that this statement in closing argument is not, in context, an argument that Miller cashed out the annuities. Attorney Jim David testified that checks for the annuity funds were written by Standard to Ms. Meador and deposited in her bank account. RP 1114-15.

assumed a false identity. It doesn't have to be a real person, it just a false identity. In this case, it was the identity of Lillian Meador's nephew that the defendant did an act in the assumed character with the intent to defraud another or for any other unlawful purpose and that the act occurred in the state of Washington or affected a person within the state of Washington.

(Emphasis added.) RP 1322-23. The Respondent is in error in arguing that the prosecutor relied, in closing argument, on a theory that Mr. Miller himself falsely filled out the annuity cash-in forms. See SRB, at p. 27. As the State itself noted in closing, the annuity surrender forms were signed and sent in by Ms. Meador. RP 1340 (State's closing argument); RP 1114-15 (testimony of attorney David); Exhibits 69, 70. The twin offenses violated double jeopardy. In re PRP of Francis, at 524; Borrero, at 538–39.

As argued, further support for finding a double jeopardy violation exists here, where these two crimes did not involve separate injury. Another Freeman consideration is whether the offenses committed had an independent purpose or effect. State v. Freeman, 153 Wn.2d at 778. “[O]ffenses may in fact be separate when there is a separate injury to the ‘the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.’ “ Freeman, at 778–79 (quoting State v. Frohs, 83 Wn. App. 803, 807, 924 P.2d 384

(1996)). Here, the criminal impersonation and securing of annuity forms sent by Standard Insurance as Ms. Meador's nephew caused no separate or distinct injury than the attempted theft.

Mr. Miller's constitutional guarantee against double jeopardy protects him from receiving multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). The double jeopardy violation requires that Mr. Miller's conviction for criminal impersonation must be vacated.

B. CONCLUSION

In all respects, Mr. Miller relies on his arguments in the Appellant's Opening Brief and maintains each assignment of error and the argument supporting each assignment. Mr. Miller asks that the Court of Appeals reverse his judgment and sentence.

DATED this 23rd day of September, 2019.

Respectfully submitted,

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v.)	NO. 52721-9-II
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MARK MILLER,)	
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