

FILED

JUN 18 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30311-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CYNTHIA L. RANGE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court erroneously failed to instruct the jury that it must be unanimous in rendering its verdict.

II.

ISSUE PRESENTED

1. Did the trial court deprive defendant of a fair trial by not instructing the jury that a unanimous verdict was required based upon the evidence produced at trial?

III.

STATEMENT OF THE CASE

The respondent accepts appellant's statement of the case for purposes of this appeal only.

IV.

ARGUMENT

- A. DEFENDANT IS PRECLUDED FROM CLAIMING INSTRUCTIONAL ERROR BY COURT RULE AND CASE LAW.

Initially, it should be noted that the defendant neither objected to nor took exception to the instructions as proffered by the trial court. Rule of Appellate

Procedure (“RAP”) 2.5(a) provides that appellate courts will not entertain issues not raised before the trial court. The rule promotes the policy of encouraging the efficient use of judicial resources by Appellate Courts refusing to sanction a party’s failure to note an error at trial which the trial court, if afforded the chance, might have been able to correct. The timely objection to the trial court would thus avoid an appeal based upon said error and the possibility of a new trial. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Here, defendant made no such objection to the trial court, yet now seeks to avoid the consequences of her choice by claiming that the error is of constitutional magnitude. Defendant contends that the instructions permitted the jury to convict the defendant of theft without unanimity regarding the act that constituted the crime.

Defendant did not object to the court’s jury instructions because she believed that the jury would acquit her based upon her having acted in the best interests of her parents under the power of attorney granted to her by her Father, the Victim in Count I. It is noteworthy that defendant does not claim that the trial court committed instructional error with respect to Count I, yet it was the defendant’s abuse of her power of attorney to the detriment of her parents that was the criminal act at issue. Defendant’s tactical choice not to object to the trial court’s instructional error to afford the court the opportunity to address that concern does not elevate the claimed error to one of constitutional magnitude to thereby avoid the dictates of RAP 2.5. Defendant’s gamble that the jury would accept her claim that she legitimately used

her power of attorney to benefit, not exploit, her Father and Step-Mother does not justify relieving her of the consequences of her choice to commit these crimes against Phyllis and Francis Larrouy. Defendant's failed choices do not make the claimed instructional error of constitutional magnitude.

The very rules by which trial courts draw guidance with which to conduct error-free trials impose a specific, affirmative requirement upon the parties at trial with regard to jury instructions. CrR 6.15(c) mandates that timely and well stated objections be made to instructions given or refused to afford the trial court the opportunity to correct any error. Defendant's contention that the trial court committed an instructional error must first overcome the procedural barriers.

The Supreme Court has held that under RAP 2.5(a)(3) there are instructional errors which are of constitutional magnitude that may be raised for the first time on appeal to avoid serious injustice to the accused. *State v. Scott*, 110 Wn. 2d at 686. Defendant contends that the trial court committed such errors in its instructions to the jury. The State respectfully disagrees and asks the Court to find no such error occurred. The constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below. *Id.* at 687. Finally, the *Scott* Court noted that the exception does not help a defendant when the asserted error is harmless beyond a reasonable doubt. *Id.*, at 687, citing *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed 2d 705 (1967).

B. THE JURY WAS PROPERLY INSTRUCTED ON THE REQUIREMENT OF UNANIMITY.

The State submits the following response assuming, arguendo, that the Court considers defendant's instructional error arguments. Defendant contends that the State relied upon several different actions as the basis for the first degree theft charge charged in Count II concerning Phyllis Larrouy. Defendant argues that the State's reliance upon the several acts necessitated a jury instruction regarding unanimity and that the failure to so instruct the jury renders any verdict returned thereon a due process violation. The defendant was charged with first degree theft in Count II of the Information, in pertinent part, as follows:

COUNT II: FIRST DEGREE THEFT OTHER THAN A FIREARM, committed as follows: That the defendant...in the State of Washington, on or about between January 7, 2009 and September 3, 2009, did obtain control over property and services..., lawful U.S. currency belonging to PHYLLIS A. LARROUY, of a value exceeding...\$5,000, by color and aid of deception, by means of abusing power of attorney by using victim's funds for personal benefit, with intent to deprive PHYLLIS A LARROUY of such property and services; ...

CP 1-2. The definitional instruction for first degree theft, #4, defined the crime as committed "when...she commits theft of property or services exceeding \$5,000 in value." CP 74-96; RP 413. The elements instruction for Count II, first degree theft other than a firearm concerning Phyllis Larrouy, #5, provided, in pertinent part:

To convict the defendant of...theft in the first degree as charged in Count II (involving Phyllis Larrouy), each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about between January 7,...and September 3, 2009, the defendant, by color and aid of deception, obtained control over property or services of another;
- (2) That the property or services exceeded \$5,000 in value;
- (3) That the defendant intended to deprive the other person of the property or services; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that all 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 the elements, then it will be your duty to return a verdict of not guilty.

CP 74-96; RP 414-415. Defendant contends that the jury was incorrectly instructed on the requirement that it return a unanimous verdict. Clearly, Defendant's claim is unfounded. The jury was correctly instructed. There was no error.

The necessity for a unanimity instruction arises when the evidence establishes that a defendant committed more crimes than were charged. In such cases, the trial court must insure that all twelve members of the jury were unanimous as to what crime the defendant committed. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). This is achieved *either* by expressly instructing the jury that all twelve must agree on the same act, *or* by the prosecutor electing which behavior the State is relying upon to support the conviction. *Id.*

The concern of *Petrich* does not apply to defendant's case because the State charged defendant with only the one means of committing the offense as reflected in the elements instruction and based upon the evidence admitted before the jury. There is no need of unanimity when there is no alternate means alleged or proved and the elements instruction requires the jury to be unanimous in agreeing that the one crime occurred. Here, the elements instruction for Count II - first degree theft instructed that the jury had to find that the defendant had committed the elements of the charged theft beyond a reasonable doubt. CP 74-96; RP 414-415. The defendant was only entitled to jury unanimity with regard to the charged elements, including that defendant had committed the theft "by color or aid of deception by use of power of attorney." No alternative means of committing the alleged offense were charged nor proved, so there was no necessity of an additional unanimity instruction to the jury. Accordingly, there could be no error since the jury was properly instructed.

More fundamentally, though, defendant's argument misconstrues this case. It was a single act prosecution. The State showed that defendant acquired the power of attorney and abused that power to thereby deprive the victims of their property or services. It is the abuse of power of attorney by defendant that is the means by which she obtained control over Ms. Larrouy's property or services and manifested her intent to deprive Ms. Larrouy of same. Hence, under *Petrich* the jury was required to be instructed that all twelve had to agree on the particular act. The trial

court did so instruct the jury. As noted, this was not an alternate means case. In addition to elements (2), (3) and (4), WPIC 70.02 lists only one other element of this crime (1) (“by color or aid of deception, obtained control over property or services of another”) that even applies to this case based upon the charging language and evidence admitted herein. Defendant contends that the elements instruction (instruction 5) required an additional unanimity instruction to narrow the jury’s focus to the acts whereby defendant obtained control over Ms. Larrouy’s property. Such an instructional requirement would have been confusing for the jury, at best, since the defendant was charged with only obtaining control over the property or services of Ms. Larrouy by abusing the power of attorney granted to her by Mr. Larrouy. Defendant’s claim misconstrues how the elements instruction operates herein. The court was legally bound to provide an elements instruction for the first degree theft charge which matched the language of the charging language of the Information. The jury was required to find beyond a reasonable doubt that defendant committed the theft charged in Count II by color or aid of deception before a guilty verdict could be returned. As noted, this was not an alternative means of commission case, so there simply was no error.

C. ASSUMING, *ARGUENDO*, THAT IT WAS ERROR TO FAIL TO INSTRUCT THE JURY ON THE REQUIREMENT OF UNANIMITY, THE ERROR WAS HARMLESS.

Defendant claims the trial court committed reversible error by failing to instruct the jury that it must unanimously agree on the act underlying the charge in Count II. When there is evidence of more distinct criminal acts than have been charged in the information, the jury must be instructed that as to each offense all 12 jurors must agree that the same underlying act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d at 572. Failure to give the instruction is harmless “if a rational trier of fact could have found each incident proved beyond reasonable doubt.” *Petrich*, at 573.

Defendant testified to obtaining the power of attorney from her Father, the victim of Count I (Francis Larrouy), and using it to obtain power and control over the property of the community property of Francis and Phyllis Larrouy. RP 281-284, 287, 314-315, 317-324, 327, 333-334, 335, 339-340, 383-385, 390, 394, 397-399, 405-407. The question for the jury was whether defendant used that power of attorney to obtain the control over Phyllis Larrouy’s property. The evidence before the jury clearly established that the defendant exercised the power of attorney and thereby obtained control over Ms. Larrouy’s portion of the community property. When the defendant exercised any control over Ms. Larrouy’s property by virtue of that power of attorney, the crime was committed

regardless of whether defendant used the power of attorney once or several times. It is the act of using the power of attorney to obtain the control over Phyllis Larrouy's property that was the sole means of committing the first degree theft.

Defendant admitted engaging in the use of the power of attorney. RP 281-284, 287, 314-315, 317-324, 327, 333-334, 335, 339-340, 383-385, 390, 394, 397-399, 405-407. She admitted using the power of attorney to remove Phyllis Larrouy's name from several bank accounts that she held in community with Francis Larrouy and replace Ms. Larrouy with herself. RP 282-284, 287-288, 314. She admitted using the power of attorney to transfer monies from community accounts to accounts held jointly by defendant and Mr. Larrouy. RP 282-284, 287-288, 358. She admitted using the power of attorney to then utilize those very same monies to fix Mr. Larrouy's teeth (\$10,000), buy a car (\$10,000), and clean up his home (\$16,000). RP 295-313, 335-336, 354-356, 375-376. Finally she admitted to not promptly responding to inquires regarding Mr. Larrouy's financial status which was vital to qualifying Ms. Larrouy for public coverage of her required assisted living costs. RP 322-326, 383-385. Accordingly, any rational trier of fact could have found that defendant obtained control over Phyllis Larrouy's property by color or aid of deception through abuse of the power of attorney beyond a reasonable doubt. The court's failure to give a unanimity instruction, as required by *Petrich*, if such was legally required, was harmless.

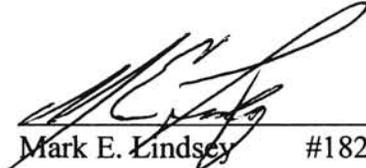
V.

CONCLUSION

For the reasons stated above the defendant's convictions should be affirmed.

Dated this 17th day of June, 2012.

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