

FILED
Court of Appeals
Division III
State of Washington
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No. 35594-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

GARRETT GUY KIM

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF BENTON

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **The deficient instructions are constitutional error entitled to review under RAP 2.5(a); Mr. Kim did not “invite” the error.**

The State confuses “invited error” with unpreserved, constitutional error in claiming that because the defense did not propose its own instructions or object to the prosecutor’s proposed instructions, Mr. Kim invited the instructional error that violated his constitutional right to a unanimous jury and right to be free from double jeopardy. Brief of Respondent a 4-5.

The doctrine of “invited error” applies to “a party who sets up an error at trial” and then complains about that very action as error on appeal. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). This would include proactively requesting an instruction and then complaining about that instruction on appeal. *Id.* Review in such cases is not permitted under RAP 2.5(a).

However, a defendant’s failure to file jury instructions does not mean he joins the State’s proposed instructions. *State v. Hood*, 196 Wn. App. 127, 134-135, 382 P.3d 710 (2016), *review denied*, 187 Wn.2d 1023, 390 P.3d 331 (2017). Like in *Hood*, Mr. Kim did not join with the prosecution’s proposed instruction; he simply did not propose its

own. Mr. Kim's failure to object is unpreserved error subject to RAP 2.5(a) review, but it is not invited error. Similarly, the fact that Mr. Kim did not propose a unanimity instruction in response to the jury's question does not mean he invited the error.

The court's failure to offer the necessary instruction to ensure Mr. Kim's constitutional right to a unanimous jury is manifest constitutional error subject to review under RAP 2.5(a). *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014) ("jury instructions that fail to require a unanimous verdict constitute manifest error affecting a constitutional right").

2. The court's failure to provide a unanimity instruction and a separate acts instructions was manifest constitutional error.

Because the jury was not provided a unanimity instruction, Mr. Kim could have been convicted of two counts when the jury did not unanimously agree on that the underlying act occurred. *See State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007). And the record is not sufficient to establish the jury's conviction on each charge was based on a separate and distinct act as necessary to ensure against a double jeopardy violation. *See State v. Mutch*, 171 Wn.2d 646, 662, 254 P.3d 803 (2011).

It cannot be true, as argued by the State, that the court's failure to provide the missing jury instructions that would have directly addressed the juror's question was proper because additional instruction would "complicate them." Brief of Respondent at 6. The jury's question to the court demonstrates that an "ordinary jury" did not understand several constitutional principles that required further instruction. Brief of Respondent at 4 (citing *State v. Moultrie*, 143 Wn. App. 387, 393-94, 177 P.3d 776 (2008)). Instruction Nine does not cure the problem, because it does not say, as described by the State, that the jury verdict must be unanimous. Brief of Respondent at 3. It states, "each of you must agree for you to return a verdict." CP 52. This does not expressly require the jury to unanimously agree on the conduct it relied on for a finding of guilt for each count. Brief of Appellant at 10-15.

The State also argues that it was "manifestly apparent" from the instructions, evidence, closing argument and verdict forms, that "it is clear the jury could only conclude the separate acts were charged in Counts I and II." Brief of Respondent at 6. This however misstates the central double jeopardy problem raised by Mr. Kim, which is that the

jury was not instructed that each charge must be based on a separate act. Opening Brief of Appellant at 15-22.

B. CONCLUSION

Mr. Kim is entitled to a new trial where the court's failure to include a unanimity instruction violated his constitutional right to jury unanimity. In the alternative, he is entitled to reversal for dismissal with prejudice of the one of the identity theft convictions on double jeopardy grounds.

DATED this 5th day of November, 2018.

Respectfully submitted,

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RESPONDENT,)	
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v.)	NO. 35594-2-III
)	
GARRETT KIM,)	
)	
APPELLANT.)	

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