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

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 THE
STATE OF WASHINGTON FOR BENTON COUNTY

OPENING BRIEF OF APPELLANT

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A. INTRODUCTION

Garrett Kim was working on a large house project with his family members and friends throughout the entire day that someone made two unauthorized debit card transactions on Alexa Proctor Sanders's debit card at Farmer's Feed Store and Baxter's Auto Parts.

Nevertheless, Mr. Kim was charged with these offenses. The State presented different identifying evidence about the person who used the debit card at Farmer's than about the person who used it at Baxter's. During deliberations, the jury asked the court whether it could rely on all the admitted evidence for both counts, reflecting the paucity of evidence in support of the individual counts. The court told the jury to refer to its instructions, but there was no instruction that the jury must unanimously find that the act charged in the Information was proven beyond a reasonable doubt, or that the jury may not convict Mr. Kim twice for the same act. These failures to instruct the jury violated Mr. Kim's constitutional right to a unanimous jury and right to be free from double jeopardy.

The trial court also imposed court costs of \$1331, even though Mr. Kim was indigent at sentencing, which should be stricken from his judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court's failure to instruct the jury that it must unanimously agree the State proved a particular act as to each count deprived Mr. Kim of his right to a unanimous jury under Article I, § 21 of the Washington State Constitution.

2. The trial court's failure to instruct the jury that each charged count required proof of a different act violated Mr. Kim's right to be free from double jeopardy under the Fifth Amendment of the United States Constitution, and Article I, § 9 of the Washington State Constitution.

3. The court erred in imposing over \$1331 dollars in legal financial obligations on Mr. Kim, who is indigent.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Article I, § 21 of the Washington Constitution requires a unanimous jury verdict. This means the jury must unanimously agree on which act constitutes the crime charged. Where the jury had questions about what evidence it could rely on in considering the two counts of identity theft, was Mr. Kim's right to a unanimous jury verdict violated by the court's failure to instruct the jury to

unanimously agree the State proved a particular act for each count charged beyond a reasonable doubt?

2. The federal and state constitutions protect persons from being twice put in jeopardy for the same offense. U.S. Const. amend. V; Const. art. 1 § 9. The jury's question to the court indicated that it sought to use all evidence presented at trial in considering both counts, but the jury was then not instructed that each count requires proof of a different act. Did this failure to instruct the jury that each count required proof beyond a reasonable doubt of a separate act for each count of identity theft violate Mr. Kim's protection against double jeopardy?

3. Does RCW 10.01.160(3) and RCW 36.18.020(2)(h) prohibit the court from imposing discretionary legal financial obligations on Mr. Kim, who is indigent?

D. STATEMENT OF THE CASE

1. Two unauthorized transactions on Ms. Proctor Sanders's lost debit card.

Alexa Proctor Sanders was at O'Reilly Auto Parts with her sister, who used Ms. Sanders's debit card to make a purchase while Ms. Sanders waited for her in the car. RP 88.

Ms. Sanders thought her sister had returned her card to her wallet, but the next day, her card was not there. RP 89. When Ms. Sanders went to the bank to get a new card, she discovered two unauthorized transactions on her card from March 21—one for a purchase at Baxter’s Auto Parts for \$66.62, and one at Farmer’s Exchange, for \$230.12. RP 89, 90, 93, 108, 110; Ex. 26, 2. These transactions took place around noon. RP 172; Ex. 26, 2. Her debit card could have fallen out of her sister’s pocket anytime between when they were at O’Reilly Auto Parts and when she phoned her sister asking about her card the next day. RP 94.

2. The weekend Ms. Sanders lost her debit card, Mr. Kim was working around the clock with his wife and father, getting his house ready for an upcoming wedding they were hosting.

The weekend Ms. Sanders lost her debit card, Garret Kim was working with his family and friends to replace the siding on his house for a wedding he was hosting in June. RP 238. Saturday and Sunday he had lots of people over to help, and they got close to finishing. RP 240.

On Monday, March 21, the date of the unauthorized transactions, Mr. Kim, his wife, and his father were working to get the last of the siding up. RP 241-42, 254. Mr. Kim took the children to

school that morning, then came home to start back to work, around 8:30 in the morning. RP 241-242.

Ms. Kim remembered Sunday March 20, because it was her mom's birthday, and they weren't able to attend her party because they were working on the house. RP 250-51. Ms. Kim did not remember Mr. Kim leaving the house Monday the 21st, other than to take the kids to school. RP 253, 255.

Mr. Kim purchased supplies for the house project from his friend Casey Labeaf, who had also been helping him work on the house that weekend, supervising to make sure everything was done correctly. RP 265-68. Mr. Labeaf had to go to work on Monday the 21st, but on his lunch hour, Mr. Labeaf came by Mr. Kim's house around 11:30-12 to deliver the last of the supplies they needed and show him how to use the caulking gun. RP 242, 256, 262, 268. Mr. LaBeaf remembered Mr. Kim's wife and Mr. Kim's father being at the house along with Mr. Kim. RP 267.

Mr. Labeaf was sure that they were working together that weekend, because the windows he had ordered for Mr. Kim were sitting in his shop for weeks until they were able to schedule a time to install them. RP 268. It was especially hard to schedule on the

weekend, because Mr. Labeaf, like Mr. Kim, has children, and so they had to specifically coordinate to work on that weekend. RP 268. Mr. Kim worked for Amazon web services at the time, and he had to get the work in when he could. RP 240, 244.

When Mr. Labeaf came back on Wednesday to pick up his caulking gun from Mr. Kim, he learned that Mr. Kim had been arrested. RP 268.

3. Detective Todd's investigation is driven by a questionable initial identification of Mr. Kim.

Detective Daniel Todd reviewed video surveillance from Farmer's Exchange to try to identify the person associated with the unauthorized debit card transaction. RP 118-119. Detective Todd did not recognize the person associated with the transaction. RP 120-121. He could only identify in the video a white male wearing sunglasses, a hat with Chevrolet logo, a black jacket, a red shirt with Craftsman logo, blue jeans, and athletic shoes with orange stripes. RP 121.

Detective Todd took stills of the video to Baxter's Auto Parts and asked an employee to confirm that the person in the video still had been in the store. RP 123-124. Detective Todd claimed this employee confirmed that the person in the photo stills had been in his store the previous day. RP 125.

Detective Todd claimed the Baxter's Auto Parts employee identified Mr. Kim as the otherwise unidentifiable person in the photo still. RP 125-6. But at trial, Matt Barber, the Baxter's Auto Parts employee, did not recall telling Detective Todd that this person had been in Baxter's Auto Parts. RP 193-194. Mr. Barber testified that he could not identify the person associated with the credit card transaction then, and he could not do it now. RP 196.

From what Detective Todd claimed was Mr. Barber's identification of Mr. Kim, he pulled Mr. Kim's Department of Licensing photo and put together a photo montage that included Mr. Kim's picture, attempting to link him to the unauthorized use of Ms. Sanders's debit card. RP 126.

Detective Todd then took the lineup to O'Reilly Auto Parts, where Ms. Sanders said she last saw her debit card. RP 128. An O'Reilly's employee, Jose Fernandez, identified Mr. Kim from the lineup as a person who "comes to our store often." RP 129, 154. When Mr. Fernandez wrote his statement, he did not specify that Mr. Kim came to the store on March 20, the day Ms. Sanders' sister would have left her card there. RP 154.

At trial, Detective Todd testified that Mr. Fernandez told him that he saw that customer on March 20th. RP 129. But Mr. Fernandez testified he told Detective Todd the last time he saw the customer would have been March 21, which was contrary to Detective Todd's theory about when the card was taken from O'Reilly Auto Parts. RP 182. The prosecutor then asked Mr. Fernandez if he recalled telling the Detective he had seen that customer on March 20th, not the 21st. RP 182-183. Mr. Fernandez said "yeah." RP 183.

Detective Todd then went back to Baxter Auto parts, where a transaction on Ms. Sanders's card was made on March 21. RP 131. Detective Todd testified that Mr. Barber could only narrow the six photos down to two people, one of whom was Mr. Kim. RP 132.

The Detective next went to Farmer's Exchange to ask Iris Diaz, the employee who handled the debit transaction with Ms. Sanders's card, to identify the customer associated with the unauthorized debit transaction. RP 132. She identified Mr. Kim from a photo montage with 80% certainty. RP 133.

Detective Todd then got a search warrant for Mr. Kim's home, which he executed days later. RP 135. The Detective seized clothing from Mr. Kim's home that he believed matched the clothing of the

person in the video still, including a black jacket, shirt, and athletic shoes. RP 136-37. Detective Todd found a wallet inside the house that had Mr. Kim's identification in it. RP 140-41. This wallet had different features than the wallet in the Farmer's surveillance video. RP 164-66. The wallet in Mr. Kim's house did not contain Ms. Sanders's debit card. RP 141. Ms. Sanders's debit was not found inside Mr. Kim's wallet or his home. RP 141.

4. The jury asks the court if it can use all evidence in consideration of both counts of identity theft.

The State charged Mr. Kim with two counts of identity theft for these two unauthorized transactions. CP 1-2. During jury deliberations, the jury asked the court whether "all the evidence admitted can be used to consider both (each) counts (individually)?" CP 56. The trial court instructed the jury to "rely on the instructions regarding the evidence previously given, no further instruction may be given." CP 56. However, the jury instructions did not inform jurors that in order to convict Mr. Kim on any count, they had to unanimously agree that the specific act as charged in the information was proved, or that each count requires proof of a different act. Washington Pattern Jury Instruction 4.25; CP 39-54. Nor did the court instruct the jury to decide each count separately. Washington Pattern Jury Instruction 3.01.

The court inquired into Mr. Kim’s employment at sentencing. RP 338. Mr. Kim lost his job at Amazon because of these convictions, and he was sentenced to serve 13 months in prison. CP 69; RP 338. Even though the court’s limited inquiry established he was indigent, the court imposed \$1331 in legal financial obligations. CP 67.

E. ARGUMENT

1. Mr. Kim was deprived of his right to a unanimous jury verdict by the court’s failure to instruct that the jury must unanimously agree on the conduct in support of the conviction.

a. The trial court must ensure the jury unanimously agrees on the conduct that supports the conviction.

Article I, § 21 of the Washington Constitution requires a unanimous jury verdict. The accused may only be convicted when a unanimous jury concludes the criminal act charged in the information has been committed. *State v. Watkins*, 136 Wn. App. 240, 243, 148 P.3d 1112 (2006). This means the jury “must be unanimous as to *which* act or incident constitutes a particular charged count of criminal conduct.” *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417 (2007)(citing *State v. Noltie*, 116 Wn.2d 831, 842–43, 809 P.2d 190 (1991))(emphasis in original). A court’s failure to supply a unanimity instruction is constitutional error that may be raised for the

first time on appeal when, as here, it has practical and identifiable consequences that affect the accused's trial rights, and resulted in actual prejudice. *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014); RAP 2.5(a)(3).

When the State presents evidence of multiple acts, any one of which could form the basis for conviction, jury unanimity must be protected. The prosecutor must either elect the act it will rely on for conviction, or alternatively, the court ensures this by instructing the jury that “that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” *State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015)(citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)). *See also State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)(Where a person is accused of multiple charges based on multiple acts, the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act).

This has come to be known as the *Petrich* rule, which has been incorporated into the Washington Pattern Jury Instructions. *Carson*, 184 Wn.2d at 217; Washington Pattern Jury Instruction 4.25, 4.26. The *Carson* court notes the WPIC that developed from this rule reflects the

“single-count roots of *Petrich*” which instructs the jury that it must find “one particular act” was proved beyond a reasonable doubt, and “must unanimously agree as to which act has been proved.” *Carson*, 184 Wn.2d at 217 (citing Washington Pattern Jury Instruction 4.25, at 110). But a unanimity instruction may be required in a multicount case just as in a single count case. The Court’s observation that “we have never specifically held that *Petrich* must be read in cases where there is exact congruence between the number of incidents described in the evidence and the number of criminal counts charged” does not mean that a unanimity instruction is never required in a multicount case. *Carson*, 184 Wn.2d at 222.

b. A unanimity instruction was required in response to the jury’s question about what evidence it could consider in relation to the two charged counts of identity theft.

Mr. Kim’s case is a multicount case where a unanimity instruction was necessary to ensure Mr. Kim’s right to a unanimous jury because without this instruction, the jury was permitted to convict Mr. Kim of the two charges without unanimously agreeing on the conduct in support of each charge.

The “to convict” instruction for count I stated that in order to convict Mr. Kim of identity theft, the jury was required to find, beyond

a reasonable doubt, that Mr. Kim obtained goods, or anything else having a value of \$1500 or less from Baxter's Auto Parts, through the knowing use of another's financial information. CP 49. The second "to convict" instruction for count II required the same elements, but for Farmer's Feed Store. CP 50.

The jury asked the court whether all the evidence admitted can be used to consider both (each) counts (individually). CP 56. The jury's question indicates it had serious doubts about the evidence alleged in support of each charged crime. The court did not instruct the jury to decide each count separately, or that the jury's verdict should not control its verdict on the other count. Washington Pattern Jury Instruction 3.01. Nor did the court instruct the jury had to unanimously agree as to which act has been proved. Washington Pattern Jury Instruction 4.25; *Watkins*, 136 Wn. App. 240 at 243 ("A defendant may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed"). Absent these instructions, the jury was impermissibly permitted to convict Mr. Kim without unanimously agreeing on the conduct in support of the jury verdict as to each count.

c. Mr. Kim was prejudiced by the trial court's failure to instruct the jury it must unanimously agree on the conduct underlying its verdict.

The trial court's failure to correctly instruct the jury on the limits of its consideration of the evidence in these two counts was certainly prejudicial, because there were profound evidentiary deficiencies in both identity theft charges.

Because a court's failure to instruct the jury on unanimity is a constitutional error, the State must prove this error was "harmless beyond a reasonable doubt" *Kitchen*, 110 Wn.2d at 412 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

Contrary to Detective Todd's testimony that Mr. Barber identified Mr. Kim, Mr. Barber testified that did not recall telling the detective that person had been in the store. RP 194, 200. Mr. Barber could not recognize the person in the photo lineup that Detective Todd had assembled either during the investigation or at trial. RP 196. There was no video evidence from Baxter's, so Mr. Barber's ability to identify Mr. Kim as the person in the store on the day in question was crucial evidence the jury needed to convict Mr. Kim for identity theft at Baxter's.

The video surveillance in support of the charge at Farmer's was equivocal because the person's face in the video was not visible and the Farmer's employee was only 80% sure of her ability to identify Mr. Kim as this person. RP 215. The evidentiary problems for each count prejudiced Mr. Kim because the jurors likely disagreed about what evidence to base its verdict in each count, making it very likely that Mr. Kim was convicted without the jury unanimously agreeing on the conduct it relied on in its guilty verdict for both counts. This error requires reversal of Mr. Kim's convictions for identity theft and remand for a new trial. *Kitchen*, 110 Wn.2d at 412.

2. The court's failure to instruct the jury that it could not convict Mr. Kim for the same act violated his right to be free from double jeopardy.

The trial court also failed to instruct the jury that each charge must be based on a different act, which violated Mr. Kim's right to be free from double jeopardy.

The constitutional guarantee against double jeopardy protects the accused against multiple punishments for the same offense. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011); U.S. Const. amend V; Const. art. I, § 9. Like jury unanimity, this constitutional argument may be raised for the first time on appeal, and challenges to jury

instructions are reviewed de novo. *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

The right to be free from double jeopardy may be violated when it is not manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense. *Borsheim*, 140 Wn. App. at 367.

In *Borsheim* the jury was instructed that “a separate crime is charged in each count.” *Borsheim*, 140 Wn. App. at 367. But neither this instruction, nor any other instruction informed the jury that “each ‘crime’ required proof of a different act.” *Id.* Absent an instruction that each crime required proof a different act, the instructions did not prevent the jury from convicting the accused for more than one identical count on a single underlying event, thereby exposing him to multiple punishments for a single offense in violation of double jeopardy. *Borsheim*, 140 Wn. App. at 366.

The same result must be true here, where Mr. Kim was charged with two separate acts, identity theft at Baxter’s and at Farmer’s, and the jury explicitly asked whether all the admitted evidence could be used to convict Mr. Kim of both counts. CP 56. The court’s failure to provide a “separate and distinct act” instruction or an instruction that

required the jury to base each charged count on a separate and distinct underlying event exposed Mr. Kim to double jeopardy.

A reviewing court may look to the entire record to determine whether it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. *Mutch*, 171 Wn.2d at 664. Here, the record firmly establishes that it was in no way manifestly apparent to the jury that they were prohibited from convicting Mr. Kim twice for the same offense. Although each “to-convict” instruction referenced a separate store, the proof was very different for each count, and the jurors specifically asked if they could rely on all the evidence admitted in considering both counts of identity theft, but were not told they could not convict Mr. Kim twice for the same conduct. CP 56. This meant the jury was permitted to convict Mr. Kim of the Baxter’s charge based on the same evidence used to convict Mr. Kim of the Farmer’s charge. The court’s failure to provide this instruction to the jury requires reversal and remand for one of the two identity theft convictions. *Berg*, 147 Wn. App. at 935.

3. The trial court erred in imposing \$1331 in court costs on Mr. Kim, who is indigent.

The trial court's inquiry into Mr. Kim's ability to pay legal financial obligations established that he was indigent; the court thus erred in imposing discretionary costs.

a. The legislature recently amended the legal financial obligation statute to prohibit a court from imposing costs on indigent persons, which would prohibit the court from imposing costs on Mr. Kim.

The legislature recently amended the legal financial obligation statutes. Laws of 2018, ch. 269, § 6. Because the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) are remedial and clarifying, they should be applied retroactively to Mr. Kim, who is indigent. This would require striking \$831.13 in court costs, which included \$200 filing fee, \$60.00 Sherriff's service fee, witness fees of \$171.13, and a jury demand fee of \$400.00, for a total of \$831.13. CP 67, 76.

The legislature recently amended the statutory scheme governing when legal financial obligations may be imposed on an indigent person. While courts must still consider whether a person "is or will be able to pay" legal financial obligations before they are imposed, the new statute clarifies what "able to pay" means. RCW 10.01.160(3); Laws of 2018, ch. 269, § 6.

Under the revised statute, the court “shall not order a defendant to pay costs” if “the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).” Laws of 2018, ch. 269, § 6. If a person is indigent, the court does not further examine the person’s financial resources or the nature of the burden payment of costs would impose. *Id.*

Mr. Kim informed the court that he had about \$10,000 debt remaining from his prior convictions from ten years prior. RP 339. He was ordered to pay nearly \$300 in restitution in this case. CP 67. Mr. Kim’s declaration for appointment of counsel on appeal established that he had no income and had no other assets. CP 79. Mr. Kim informed the court that he lost his job due to these convictions. These criminal convictions would also limit him to a minimum wage job at best once he was done serving his prison term. RP 339. He has five children, three of whom are under age 18. RP 331.

The court nevertheless imposed \$1331 in court costs, \$831.13 of which were discretionary fees. Because Mr. Kim is indigent, these costs should not have been imposed.

b. The amendments prohibiting court costs on the indigent are remedial and clarifying, and should apply retroactively to Mr. Kim.

If an amendment is clearly curative or remedial, it will be applied retroactively even though it is completely silent as to legislative intent for retroactive application. *State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000). The changes to the legal financial obligation statutory scheme are remedial and should be applied retroactively because they provide guidance on how to apply existing liabilities. The language of RCW 10.01.160(3) previously directed the court should not order an individual to pay costs unless he “is or will be able to pay them.” *See* Laws of 2018, ch. 269, § 6. The amendments eliminated this imprecise language and instruct no costs shall be ordered against any individuals found indigent pursuant to RCW 10.101.010(3).

Similarly, the legislature’s directive not to recoup the \$200 filing fee from indigent individuals under RCW 36.18.020(2)(h) is also remedial. In fact, although the Court of Appeals has said the \$200 filing fee is mandatory in some cases, the changes to RCW 36.18.020(2)(h) reflect the practice of some trial courts, which regularly waive the \$200 filing fee for indigent individuals. *See, e.g., State v. Mathers*, 193 Wn.

App. 913, 917, 376 P.3d 1163 (2016) (finding the DNA fee and Victim Penalty Assessment fee mandatory but noting the trial court “waived all other LFOs” because the individual was indigent); *but see State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (construing criminal filing fee as mandatory). This Court may apply the amendments to RCW 10.01.160(3) retroactively here, striking the \$200 filing fee, \$60.00 Sheriff’s fee, \$400 jury demand fee, and \$171.13 in witness fees. CP 76.

c. Even if the amendments do not apply retroactively, the newly amended statute applies to Mr. Kim because his case is still pending on direct appeal.

Under the common law, pending cases are decided according to the law in effect at the time of the decision. *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015). This rule applies when a case is pending on appeal. If “a controlling law changes” during the pendency of the case, “the appellate court should apply the new or altered law, especially where no vested rights are involved, and the Legislature intended retroactive application.” *Marine Power & Equip. Co. v. Wash. State Human Rights Comm’n Hearing Tribunal*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985). Mr. Kim’s case is pending on appeal, and thus even if this Court does not find the legislature’s changes to require

retroactive application, the changes would still apply to Mr. Kim's case pending on direct appeal.

The legislature's recent amendments prohibit the imposition of costs on Mr. Kim whether applied retroactively or prospectively.

Reversal to strike Mr. Kim's costs is required.

F. CONCLUSION

The trial court's failure to instruct the jury that it could not convict Mr. Kim unless it unanimously agreed on the conduct in support of each charge violated his right to a unanimous jury verdict, requiring reversal and remand for a new trial. The court further erred in failing to instruct the jury that each charge required proof of a different act in order to convict Mr. Kim, in violation of his right against double jeopardy, which provides a separate grounds for reversal and dismissal with prejudice of the one of the identity theft convictions. Finally, the court was prohibited from imposing the discretionary legal financial obligations on Mr. Kim, who was indigent at the time of sentencing.

DATED this 5th day of July 2018.

Respectfully submitted,

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

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

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