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

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THE STATE OF WASHINGTON,

Respondent

v.

GARRETT GUY KIM,

Appellant

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

NO. 16-1-00283-1

BRIEF OF RESPONDENT

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CONSTITUTIONAL PROVISIONS

WASH. CONST. art. I, § 91
WASH. CONST. art. I, § 211

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. The trial court did not fail to adequately instruct the jury on the issue of unanimity, and the defendant was not denied any rights under Article I, § 21 of the Washington State Constitution.
- B. The trial court did not fail to adequately instruct the jury on the issue of proof supporting different acts, and the defendant was not denied any rights under Article I, § 9 of the Washington State Constitution.
- C. The State requests remand for resentencing on legal financial obligations.

II. STATEMENT OF FACTS

On March 20, 2016, Alexa Proctor went to O'Reilly Auto Parts with her sister and allowed her sister to use her credit card to make a purchase while Ms. Proctor waited in the car. RP at 88. This was the last time Ms. Proctor saw her card. RP at 89. On March 21, Ms. Proctor discovered her debit card was missing, reported it to her bank, and received a new card. *Id.* The next day, March 22, Ms. Proctor's card was declined for insufficient funds and she discovered that there had been unauthorized transactions on the card at Farmers Exchange and Baxter Auto Parts which she reported to the police. RP at 89-90.

Detective Daniel Todd of Kennewick Police Department investigated the transactions. RP at 117-18. Detective Todd first visited Farmers Exchange where he acquired surveillance video which showed a suspect that could not be identified. RP at 119-22. Upon further investigation, Detective Todd identified the

defendant as a suspect. RP at 125. Detective Todd then created a photo montage including the defendant which he showed to the O'Reilly Auto Parts employee who had helped Ms. Proctor's sister. RP at 128. The employee identified the defendant from the photo montage. RP at 130. Later, the manager at Baxter Auto narrowed the same photo montage down to the defendant and one other photo, and the employee who had conducted the transaction at Farmers Exchange also identified the defendant from the montage. RP at 131-33.

Detective Todd obtained a search warrant for the defendant's home and executed it on March 24. RP at 135. In the search, Detective Todd located a shirt, jacket, and wallet that matched those visible in the Farmers Exchange surveillance video. RP at 136, 142. After arresting the defendant and bringing him back to the police station, Detective Todd noticed that the shoes the defendant was wearing also matched those seen in the surveillance footage. RP at 143.

The State charged the defendant with two counts of Identity Theft in the Second Degree, one count for the purchase made at Farmers Exchange and one count for the purchase at Baxter Auto Parts. CP 1-4. Upon the close of the defendant's case, the Court asked the State for proposed jury instructions which it provided. RP at 273. Defense counsel objected to one of the proposed instructions as irrelevant, the State and Court agreed with defense counsel's observation, and the instruction was removed. RP at 274. However, defense counsel did not propose any additional instructions. RP at 275. Instruction Seven listed the

elements and information concerning the Baxter Auto Parts transaction which constituted Count I, and Instruction Eight listed the elements and information concerning the Farmers Exchange transaction which constituted Count II. CP 49-50. Instruction Nine told the jurors any guilty verdict must be unanimous. CP 52.

The trial court gave the unanimity instruction. *Id.* Additionally, the Court gave separate to-convict instructions for both counts. CP 49-50.

During deliberations, the jury “want[ed] to know whether all the evidence admitted can be used to consider both (each) counts (individually)?” CP 56. As suggested by defense counsel, the Court answered: “You must rely on the instructions regarding the evidence previously given, no further instruction may be given.” *Id.*; RP at 321. The jury returned a guilty verdict to both counts. CP 57-58; RP at 323. Neither party wished to poll the jury. RP at 323-24. The defendant was sentenced to thirteen months in prison on each count, to be served concurrently. CP 69.

III. ARGUMENT

A. The trial court did not fail to adequately instruct the jury on unanimity, and the defendant was not denied the right to a unanimous jury verdict.

The case of *State v. Mutch*, 171 Wn.2d 646, 663-64, 254 P.3d 803 (2011), dealt with a similar issue and held that even with an unanimity instruction, the jury should also be advised that they must unanimously agree that at least one particular act has to be proved beyond a reasonable doubt for each count. Jury

instructions that did not include distinct “to-convict” instructions, or instructions that failed to demand that each count be based on separate and distinct acts, were not sufficient to ensure that it was manifestly apparent to the jury that the State was seeking punishment for separate acts. *Id.* at 663. “A unanimity instruction is adequate if it complies with the *Petrich* mandate to ensure jury unanimity,” and the question is not whether there is a possible different interpretation of the instruction, “but whether the ordinary juror would so interpret it.” *State v. Moultrie*, 143 Wn. App. 387, 393-94, 177 P.3d 776 (2008) (citing to *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984)). Such a test is an objective analysis of the instructions and whether they could be understood by the average juror. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

Here, the jury instructions included separate to-convict instructions for each count and an instruction that stated that “each of you must agree for you to return a verdict.” CP 49-52.

B. The trial court did not fail to adequately instruct the jury on separate crimes, and the defendant was not subject to double jeopardy.

A defendant may not “remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.” *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967). Here, the instructions given to the jury were proposed by the State, and this was done without objection by the

defendant. RP at 275. In response to the inquiry from the jury, the defendant stated that the proposed response by the Court was “perfect.” RP at 319. If the instructions were deficient, or the court’s response to the inquiry was faulty, the error is invited.

Even if jury instructions are found to have been deficient, the reviewing court may look to the entire record, including the evidence, arguments, and verdict forms, to determine whether “it was ‘*manifestly apparent*’ to the jury that the State [was] not seeking to impose multiple punishments for the same offense and that each count was based on a separate act” in determining a double jeopardy violation. *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011) (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

Here, the evidence was that a single card was used on the same day in two different transactions which took place at two different locations and involved two different sets of witnesses to those transactions. It was manifestly apparent that the two counts were charging two separate acts at these locations. Given that the two criminal acts occurred on the same day, the evidence substantiating one conviction is not wholly separate from the evidence substantiating the other conviction; that there may be some overlap of evidence in support of those two separate acts is inevitable and not double jeopardy. Although there was a question early in deliberations specifically about how to handle identical counts, the instructions were nevertheless very clear, and it was manifestly apparent that

these were to be separate acts; therefore, it was proper to refer the jury back to the instructions rather than complicate them with additional instruction. Once the jury was directed to the instructions as given, they asked no further questions regarding the multiple counts and returned a unanimous verdict. Given the instructions, evidence, closing arguments, and verdict forms, it is clear the jury could only conclude that separate acts were charged in Counts I and II.

C. Legal financial obligations

The State concedes that the defendant was indigent at the time of sentencing. Pursuant to recent changes in the statutes governing legal financial obligations, courts may not impose discretionary LFOs on an indigent defendant. Because the defendant's case was on direct appeal at the time those statutory changes took effect, the statutory changes apply to the defendant's case. *State v. Ramirez*, No. 95249-3, 2018 WL 4499761, at 8 (Wash. Sept. 20, 2018). As such, this matter should be remanded for the limited purpose of striking the \$1,331.00 in discretionary LFOs. *Id.*

IV. CONCLUSION

Based on the foregoing, the State respectfully requests that this Court uphold the finding of guilt at the trial court, and remand for the purpose of striking discretionary legal financial obligations.

RESPECTFULLY SUBMITTED on October 4, 2018.

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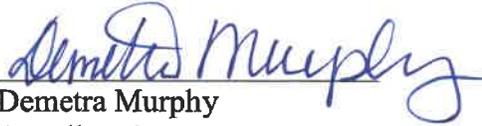
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BENTON COUNTY PROSECUTOR'S OFFICE

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