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NO. 36028-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN HUDSON,

Appellant.

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

The Honorable Gregory P. Canova, Judge

REPLY BRIEF OF APPELLANT

JARED B. STEED
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ARGUMENT IN REPLY¹

1. THE JURY WAS IMPROPERLY INSTRUCTED ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING EACH COUNT OF SECOND DEGREE THEFT.

The State properly concedes that second degree theft is an alternative means crime and "that, as such, the current state of the law precludes instructing a jury on an uncharged alternative means of committing the crime of theft such as occurred herein." Brief of Respondent (BOR) at 10-11 (emphasis added); State v. Brewczynski, 173 Wn. App. 541, 549, 294 P.3d 825, rev. denied, 177 Wn.2d 1026, 309 P.3d 505 (2013); State v. Lineham, 147 Wn.2d 638, 647, 56 P.3d 542 (2002), cert. denied, 538 U.S. 945 (2003). The State also does not dispute that the erroneous to-convict instructions constitute constitutional error that may be raised for the first time on appeal.

a. Hudson did not invite the error.

The State nonetheless hopes this Court will not address the merits of Hudson's claim that the jury was improperly instructed on an uncharged alternative means of committing each count of second degree theft. That hope rests on the State's meritless claim that the instructional error was invited because Hudson did not object to the to-convict instructions below.

¹ Because the State concedes error regarding Hudson's arguments that the trial court improperly counted his out-of-state convictions without a comparability analysis and improperly imposed discretionary legal financial obligations, those arguments have been sufficiently addressed in the Brief of Appellant and need not be challenged further on reply. See Brief of Respondent at 20, 29-31.

BOR at 12-13. But, as discussed below, general agreement to the instructions as a whole does not constitute invited error. This Court should, therefore, consider Hudson's claim of manifest constitutional error on the merits. See State v. Chino, 117 Wn. App. 531, 538, 72 P.3d 256 (2003) (Recognizing that "because jury instructions omitting elements of the charged crime constitute 'a manifest error affecting a constitutional right,' this court may consider the issue for the first time on appeal." (quoting State v. Eastmond, 129 Wn.2d 497, 502, 919 P.2d 577 (1996))).

Under the invited error doctrine, "a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed to prevent parties from misleading trial courts and receiving a windfall by doing so." State v. Momah, 167 Wn.2d 140, 154, 217 P.3d 321 (2009), cert. denied, 562 U.S. 837 (2010). Hudson did not "set up" any error, but merely failed to object or take exception to the erroneous to-convict instructions. 2RP 147-151. "[F]ailing to except to an instruction does not constitute invited error." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).²

² Argument that counsel's acquiescence to an instruction is invited error may "blur the lines between the invited error doctrine and the waiver theory." Corn, 95 Wn. App. at 56. But if the error is one that may be raised for the first time on appeal, the issue is not waived by failing to object at trial. Instructions that misstate or shift the burden of proof are errors of constitutional magnitude that may be raised for the first time on appeal. State v. Kalebaugh, 183 Wn.2d 578, 584-85, 355 P.3d 253 (2015) (citing State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)).

Courts find invited error when the defense proposes an erroneous jury instruction and then challenges that instruction on appeal. See, e.g., State v. Studd, 137 Wn.2d 533, 547-48, 973 P.2d 1049 (1999) (holding defense counsel's proposed erroneous jury instruction was invited error); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990) (same); see also, State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (finding that defendant invited error where defense counsel did not propose the instruction ultimately given and challenged on appeal, but counsel did propose an instruction with language nearly identical to the language objected to on appeal). Unlike these cases, however, the State properly recognizes that Hudson did not propose the erroneous instructions or any other instruction with nearly identical wording. See BOR at 13 (citing 2RP 147-151). Rather, it was the State who proposed the erroneous instructions that were ultimately given to the jury. See Supp. CP ___ (sub no. 37, State's Proposed Jury Instructions, filed 3/12/18).

Similarly, Hudson did not invite the error by failing to propose to-convict instructions of his own, or by stipulating to, or joining, the State's proposed instructions. State v. Hood, 196 Wn. App. 127, 134-35, 382 P.3d 710 (2016), rev. denied, 187 Wn.2d 1023, 390 P.3d 331 (2017). "CrR 6.15(a) does not impose an obligation to propose jury instructions." Hood, 196 Wn. App. at 134. The State bears the burden of proposing an

appropriate and comprehensive set of jury instructions. "[A] defendant has no duty to propose the instructions that will enable the State to convict him." Id.

The State's theory of invited error is unsupported by authority and logic. Accordingly, it should be rejected, and this Court should consider Hudson's claim of manifest constitutional error on the merits.

- b. The defective second degree theft instructions were not harmless where it remains possible the jury convicted Hudson based on uncharged alternative means.

The State also contends the presumptively prejudicial instructional error was harmless beyond a reasonable doubt because, based on the evidence, the jury would have convicted Hudson regardless. BOR at 13-14. The State cites no authority for this proposition. Nor could it, because this is not the proper standard of review on appeal.

An erroneous instruction on an uncharged alternative means is not harmless where it remains possible that the jury convicted based on the uncharged alternative. Chino, 117 Wn. App. at 540-41. The jury clearly could have done so here, where the State's evidence supported both means. In attempting to circumvent the harmless error standard of review, the State all but acknowledges the possibility that the jury convicted Hudson on this uncharged alternative. See BOR at 14 ("Considering the

other overwhelming evidence of his participation and consciousness of guilt immediately after, it is clear that the results would have been the same, beyond a reasonable doubt.").

And, though the State now appears to ignore its closing argument, at trial the State clearly pointed to both means as a basis to convict Hudson:

It says to convict of the crime of theft in the second degree as charged in count 1 -- 3 -- that on or about the 27th day of October 2016 the defendant or an accomplice -- talk about that again -- there's -- and then there's two alternatives -- wrongfully obtained or exerted unauthorized control over property of another, or appropriated lost or misdelivered property of another[.]

2RP 176 (emphasis added).

Moreover, as discussed fully in the opening brief, none of the remaining instructions limited the jury to considering only the charged alternative mean of committing second degree theft by "wrongfully obtained or exerted unauthorized control." Brief of Appellant (BOA) at 15 (citing CP 1-5, 27-28). The State's response brief fails to address any of these points. Accordingly, the State has conceded those arguments. See In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it.").

It remains possible the jury convicted based on the uncharged alternative means, making the error not harmless. Reversal of Hudson's two

second degree theft convictions is therefore required. Brewczynski, 173 Wn. App. at 550.

2. THE JURY INSTRUCTIONS FOR SECOND DEGREE IDENTITY THEFT FAILED TO PRESERVE JURY UNANIMITY AND PERMITTED A DOUBLE JEOPARDY VIOLATION.

The State correctly concedes that the to-convict instructions for each count of second degree identity theft lack the critical "separate and distinct" language. BOR at 16. In an effort to defeat the double jeopardy violation that occurred as a result, the State attempts to bootstrap the second degree identity theft instructions to the election the prosecutor made with respect to each of the second degree theft charges. This argument fails for several distinct reasons.

First, unlike the information for counts one and three, which clearly differentiate between Goddard and Medlock respectively, the charging information for counts two and four is identical, and fails to specify separate named victims, specific financial information, or separate charging dates. CP 1-5.

Second, during closing argument the prosecutor made a clear election as to which second degree theft charge applied to which complaining witness. As the prosecutor explained as to counts one and three:

Instruction 6 -- And I want you to look at Instruction 6, and then 14 sort, of in conjunction. Because we're basically talking about the same thing (inaudible). Right? Instruction 6 applies to Count 1. Count 1 is theft in second degree for theft of an access device. Which access device? Kim Goddard's -- card. Right? That's the Wells Fargo card. Two cards stolen. Catherine Medlock's card, -- Banner Bank card, and Kim Goddard's Wells Fargo card. So Count 3 -- which is Instruction 14, relates to that. So, -- make sure you're -- you're -- looking at those two -- two charges separately. That's how -- how -- Law applies to those.

2RP 176.

In contrast, the prosecutor discussed counts two and four together, without distinction, explaining only that:

Instruction 11 -- and Instruction 15 relate to that identity theft in the second degree charges. Again, what are we talking about? We're talking about Kim Goddard's card and Catherine Medlock -- . What does Instruction 11 say? Instruction 11 -- to convict the defendant of the crime of identity theft in the second degree as charged in Count 2 -- and again, --- Count 4 -- that on or about that same date defendant or an accomplice knowingly obtained or possessed -- or used -- a means of identification or financial information of another person, that the defendant did so with the intent to commit any crime, and that the defendant knew that the means of identification or financial information belonged to another person, -- these acts occurred -- Washington.

2RP 181. The prosecutor continued, "so again, identity theft in the second degree. Why -- why the two counts? Because of the use (inaudible) cards, -- use of the two different persons' identities." 2RP 184. Thus, as discussed in the opening brief, the prosecutor not only failed to specify which count

pertained to which complaining witness, but never told the jury it could not rely on the same act for either, or both, of the charges. BOA at 23.

The State places significance in the fact that Goddard testified that the Wells Fargo card was red and the Banner Bank card blue. BOR at 17. This distinction might have had some significance had the prosecutor clearly distinguished between a "red card" and "blue card" during argument, but he did not. As such, the color of the bank cards is nothing more than a red herring.

The State also cites to the prosecutor's opening statements to suggest an election was made at that point. BOR at 18 (citing SSRP 3-5). But the purpose of an opening statement is merely "to outline the material evidence the State intends to introduce." State v. Kroll, 87 Wn.2d 829, 834, 558 P.2d 173 (1976). In keeping with this purpose, the prosecutor merely summarized the charging language for each of the charges. See SSRP 3-5. Because, as discussed above, the charging information for counts two and four fails to differentiate between separate named victims, specific financial information, or separate charging dates, the prosecutor's opening statement likewise fails to remedy the error. Even assuming the prosecutor's opening statements clearly differentiated between the evidence for each charge, "charges frame the issues; statements of counsel do not." State v. Gallagher, 15 Wn. App. 267, 270-71, 549 P.2d 499 (1976). Where, as

here, “the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel,” an oral election does not by itself avert the double jeopardy problem. State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008); See CP 19-20.

Finally, the State also makes the same flawed invited error argument it does with respect to the erroneous second degree theft instructions. BOR at 15. For the same reasons discussed in argument one, infra, the State's invited error argument necessarily fails.

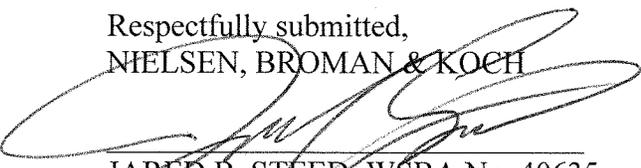
Because Hudson's convictions for second degree identity theft violation double jeopardy, one of the convictions must be vacated and the case must be remanded for resentencing.

B. CONCLUSION

For the reasons discussed above, and in the opening brief, this Court should reverse Hudson's convictions. Alternatively, remand for resentencing is required. At the very least, discretionary LFOs imposed in the judgment and sentence must be stricken based on indigency.

DATED this 9th day of July, 2019.

Respectfully submitted,
NIELSEN, BROMAN & KOCH



JARED B. STEED, WSBA No. 40635
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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