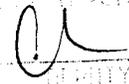


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STATE OF WASHINGTON

BY  CLERK

No. 39925-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Lisa Knutz,

Appellant.

Lewis County Superior Court Cause No. 09-1-00011-0

The Honorable Judge Nelson E. Hunt

Appellant's Reply Brief

(Corrected Copy)

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ARGUMENT

I. THE COURT’S INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF THEFT BY COLOR OR AID OF DECEPTION.

Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Conviction for theft “by color or aid of deception” requires proof of reliance: evidence that the defrauded person “believed and relied upon” the deception and that the deception “in some measure operated to induce him [or her] to part with his [or her] property.” *State v. Zorich*, 72 Wn.2d 31, 37, 431 P.2d 584 (1967); *State v. Casey*, 81 Wn.App. 524, 527-528, 915 P.2d 587 (1996).

The trial court’s instructions did not set forth the state’s obligation to prove reliance. None of the instructions mentioned reliance and none explained that conviction required proof that Mr. Von Gruenigen believed Ms. Knutz. *Zorich*, at 37; Court’s Instructions to the Jury, CP 31-52. Because of this, Ms. Knutz’s conviction must be reversed. *Smith, supra*.

Respondent concedes that the prosecution must prove reliance, but argues against reversal. Brief of Respondent, pp. 2-3. According to the state, the “to convict” instruction is complete, even though it makes no mention of reliance. Brief of Respondent, p. 3. But the instructions, even when taken as a whole, did not require a finding that Mr. Von Gruenigen

believed, relied upon, *and* was induced by the deception. Instead, the instructions only required proof of inducement—that the deception “operated to bring about” the theft—leaving out the requirements of belief and reliance. Instruction No. 6, CP 39. Respondent erroneously stakes its argument on the “inducement” language in Instruction 6. Brief of Respondent, pp. 3-7.

Inducement alone is insufficient to establish reliance. Ms. Knutz’s “obviously-bogus-sob-stories”¹ may have induced Mr. Von Gruenigen to feel compassion and part with his money, not because he believed her or relied upon her statements, but because he saw she was desperate enough to humiliate herself by fabricating such “obviously-bogus-sob-stories.” Such circumstances would establish inducement, but would be insufficient to prove theft by color or aid of deception because of the absence of belief.

Furthermore, jury instructions must make the relevant legal standard manifestly apparent to the average juror, because juries lack tools of statutory construction. *See State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009); *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004). Instruction No. 6 does not make the relevant legal standard manifestly

¹ Brief of Respondent, p. 7.

clear, even if it *could*, through a tortuous reading, be understood to require proof that Mr. Von Gruenigen believed Ms. Knutz. *Kyllo, supra*.

The instructions are deficient. The error is presumed prejudicial, and the conviction must be reversed unless the error is harmless beyond a reasonable doubt. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). Respondent fails to meet this standard. Brief of Respondent, pp. 7-9.

Respondent provides a litany of “obviously-bogus” and “bizarre” stories told by Ms. Knutz, but does not point to any evidence suggesting that Mr. Von Gruenigen believed and relied upon those farfetched stories. Brief of Respondent, pp. 7-9. Indeed, Mr. Von Gruenigen’s testimony on this point was inconsistent. He claimed that he believed her, but also testified at various times that her explanations were untrue, that he had suspicions, that he thought she was lying, and that he had doubts about her explanations. RP 143, 147, 148, 153. The jury was entitled to conclude that he did not believe Ms. Knutz’s stories, but that he pitied her, had paternal feelings toward her, or hoped to induce her to perform favors for him.

Accordingly, the omission of an element from the “to convict” instruction (and from the instructions as a whole) was not harmless beyond a reasonable doubt: the error was not trivial, formal, or merely

academic; it prejudiced Ms. Knutz and likely affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). A reasonable jury could have voted to acquit. The conviction must be reversed and the case remanded for a new trial. *Id.*

II. MS. KNUTZ WAS ENTITLED TO A UNANIMITY INSTRUCTION BECAUSE HER ACTS DID NOT CONSTITUTE A CONTINUING COURSE OF CONDUCT.

A trial court's failure to provide a unanimity instruction when required is presumed to be prejudicial. *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). The presumption is overcome only if no rational juror could have a reasonable doubt about any alleged criminal acts *Id.*

Here, a unanimity instruction was required because the prosecutor presented evidence of multiple acts of theft but did not elect to pursue a single act. *Id.* Respondent erroneously contends that Ms. Knutz's acts comprised a continuing course of conduct, and therefore no unanimity instruction was required. Brief of Respondent, p. 10. Respondent is incorrect for two reasons.

First, the evidence did not establish a "continuing course of conduct," because the alleged incidents occurred at different times and places. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). The "continuing course of conduct" exception applies only to a series of acts

occurring at the same time and place and with the same criminal purpose; where conduct occurs at different times and places, the evidence tends to show several distinct acts rather than a “continuing course of conduct.” *Id.*, at 17.

Second, even assuming the “continuing course of conduct” exception could properly be applied to these facts, the trial court did not follow the requirements for the exception in this case. A unanimity instruction may be dispensed with (in a prosecution such as this one) only when five conditions are met:

(1) [the] defendant is charged with a single count of theft based on a common scheme or plan, (2) the evidence indicates multiple incidents of theft from the same victim, (3) the multiple transactions are aggregated for charging purposes, (4) the jury is instructed on the law of aggregation, and (5) the “to-convict” instruction for the theft charge requires the jury to find that the multiple incidents are part of “a common scheme or plan, a continuing course of conduct, and a continuing criminal impulse.” In such a case, the multiple incidents of theft may be considered as part of a continuing course of conduct.

State v. Garman, 100 Wn.App. 307, 317, 984 P.2d 453 (1999). Here, requirements (1) through (4) were met; however, the “to-convict” instruction did not require the jury to find that the multiple incidents were part of “a common scheme or plan, a continuing course of conduct, and a continuing criminal impulse.” *Id.* In the absence of this language in the “to-convict” instruction, the court had an obligation to give a unanimity

instruction. It did not; accordingly, the jury's verdict violated Ms. Knutz's right to jury unanimity. Wash. Const. Article I, Section 21; *Coleman, supra*. The error is presumed prejudicial. *Id.* The conviction must be reversed and the case remanded for a new trial. *Id.*

III. MS. KNUTZ'S 60-MONTH EXCEPTIONAL SENTENCE WAS CLEARLY EXCESSIVE UNDER THE CIRCUMSTANCES OF THIS CASE.

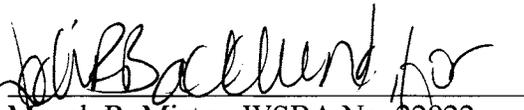
Ms. Knutz stands on the argument set forth in the Appellant's Opening Brief.

CONCLUSION

Ms. Knutz's conviction must be reversed and the case remanded for a new trial. In the alternative, her sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on June 29, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Appellant's Reply Brief (Corrected Copy) to:

Lewis County Prosecutor's Office
345 W Main St Fl 2
Chehalis WA 98532-4802

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June ³⁰29, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June ³⁰29, 2010.



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