

FILED  
May 7, 2012  
Court of Appeals  
Division III  
State of Washington

No. 30311-0-III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

CYNTHIA L. RANGE,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT  
Honorable Salvatore F. Cozza, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENT OF ERROR**

The trial court erred in failing to give a jury unanimity instruction.

*Issue Pertaining to Assignment of Error*

Was Ms. Range denied her constitutional right to a unanimous jury verdict on Count II where the State relied on several criminal acts as a basis for conviction and a Petrich instruction on jury unanimity was not given?

**B. STATEMENT OF THE CASE**

Cynthia L. Range, the defendant, flew to Spokane in late November or early December 2008 using the first portion of a round trip ticket. 3 RP<sup>1</sup> 271, 273. She had planned to spend two weeks helping her father, Francis “Red” Larrouy, with a house problem he said he had. CP 1; 3 RP 269, 271, 379. Ms. Range’s plans changed almost immediately as she confronted and dealt with her father’s health and house problems, and she never used the return trip ticket. 3 RP 271–73. Within a short time of her arrival, Ms. Range had arranged much-needed dental, hearing and eye

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<sup>1</sup> The trial transcripts, contained in four volumes, are numbered sequentially but the title page to each volume does not disclose the page range within it. Therefore, citations to the trial record will include reference to the volume number, e.g. “1 RP \_\_\_\_”. The sentencing transcript is a separate volume, and will be referred to by its date, “9/30/11 RP \_\_\_\_”.

care for her father, and successfully helped him to gain weight and stop lifetime habits of drinking and smoking. 3 RP 271–72, 285–86, 289–93.

At the time of Ms. Range’s arrival, her step-mother Phyllis Larrouy continued to live in the Alderwood Manor nursing facility where Phyllis had been placed by her own sister Pat Valente in March 2008. CP 1; 1 RP 263 RP 272. In February 2008 Ms. Valente obtained a limited power of attorney over Mr. Larrouy’s financial affairs. 1 RP 21–22. Beginning in March 2008 Ms. Valente also held a full power of attorney as to her sister. 1 RP 21–22; 2 RP 191.

Phyllis went into the nursing home in March 2008, with Medicare expected to cover the first three months of care (approximately \$6,000 to \$8,000 per month). 1 RP 26. Ms. Valente closed out some of Phyllis’ accounts and paid about \$17,000 to the nursing home to cover roughly two-and-one-half months of care. 1 RP 26–28. To hopefully qualify Phyllis for Medicaid coverage thereafter, Ms. Valente split the couple’s joint asset of \$70,000 into two, each account having about \$35,000. She paid Phyllis’ portion to the nursing home. 1 RP 23–24, 28–30. Medicaid apparently needed more information before making a final determination as to what amount of money Phyllis needed to “pay down” in order to qualify for Medicaid coverage. 1 RP 29, 38–39.

Around February 2009, Ms. Valente partially completed requested information on - and then forwarded - five different Medicaid applications to Ms. Range. She apparently did not talk to Ms. Range about the applications or their significance, and instead learned from the nursing home and Medicare that the applications had not been received back. 1 RP 38–39, 56. The unpaid monthly bill at the nursing home continued to accrue. 1 RP 39.

Ms. Valente sought a full guardian for her sister, and Ms. Lin O’Dell was appointed on September 11, 2009. 1 RP 40, 65. Department of Social and Health Services had been unable to obtain the four latest bank statements from Ms. Range. 1 RP 72. Ms. O’Dell obtained the necessary financial information and by September 21, 2009 Medicaid agreed to accept as pay-down the monies already paid on Phyllis’ behalf and back-dated Medicaid coverage to May 2009. 1 RP 40, 72–73.

Ms. O’Dell testified that from August 5, 2008 to May 1, 2009, Phyllis was on “private pay” when she should have been on Medicaid—although she could not say that Phyllis would in fact have gotten on Medicaid in August 2008 because of how much money the couple had as community assets. 1 RP 74–75. The witness clarified that Phyllis’ care was covered by Tricare insurance from March to August 2008, the four to

five months thereafter were covered by monies paid over by Ms. Valente, and there was no coverage between January and May 2009 (the date when back-dated Medicaid coverage took effect). 1 RP 89, 100–01.

Ms. Range took over as her father's attorney in fact in January 2009, under a power of attorney, and served until September 2009. 2 RP 189–90; 3 RP 281. Ms. Range was unaware the joint accounts had already been split in an effort to qualify Phyllis for Medicaid by exhausting her assets and ensure her father 's own assets would not be drained, or that Phyllis' social security check was being sent directly to the nursing home, because Ms. Valente had not said anything about it. 3 RP 322–24, 328, 404–06. At some point Medicaid received the four bank statements from Ms. Range. 1 RP 72, 91. Ms. Range provided information that she was aware of to the Medicaid office, and indicated Ms. Valente had the information regarding the remaining requests. 3 RP 325–29, 383–84.

Marie Rice, a forensic accountant working with Adult Protective Services, testified about accounts and expenditures during the January 2009 to September 2009 time period. 2 RP 186–226. Ms. Valente appeared to have control of the couple's bank accounts as well as Phyllis' own accounts under her powers of attorney prior to that period. 1 RP 22–31; 2 RP 191–95. To replace her parents' aging car, Ms. Range purchased

a used 2005 Chrysler Sebring from an auto liquidator for \$10,594.81, including a warranty. 1 RP 65; 2 RP 201; 3 RP 306–10, 335–36. The car, later determined to be community property, was sold and the proceeds were split between the father and stepmother. 1 RP 94–96. From May 2009 to September 2009, during a time when the father was in a nursing facility, nearly \$5,700 in cash withdrawals were made from accounts which were in the names of Ms. Range and her father. In the accountant’s opinion, this was likely to have been clear financial exploitation. 2 RP 192–93, 196, 204–05, 214–17.

The accountant found no abuse by Pat Valente in her spending of nearly \$34,000 on behalf of Phyllis Larrouy. 2 RP 194–95, 207. In December 2009, Jim Spurgetis was appointed full guardian of Mr. Larrouy’s person and estate. 2 RP 115, 142.

Ms. Range was charged with first degree theft by obtaining control of money belonging to her father by deception (Count I) and by obtaining control of money belonging to her stepmother by deception (Count II). CP 1–2. As to her stepmother, the jury was instructed in pertinent part:

Instruction No. 6. To convict the defendant of the crime of theft in the first degree as charged in Count II (involving Phyllis Larrouy), each of the following four elements of the crime must be proved beyond a reasonable doubt:

1. That on or about between [sic] January 7, 2009 and September 3, 2009, the defendant by color or aid of deception, obtained control over property or services of another;
2. That the property or services exceeded \$5,000 in value;
3. That the defendant intended to deprive the other person of the property or services; and
4. That these acts occurred in the State of Washington.

If you find from the evidence that all elements have been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of the elements then it will be your duty to return a verdict of not guilty.

CP 80.

Instruction No. 7. Theft means by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

CP 81.

Instruction No. 8. By color or aid of deception means that the deception operated to bring about the obtaining of the property or services. It is not necessary that deception be the sole means of obtaining the property or services.

CP 82.

Instruction No. 9. Deception occurs when an actor knowingly creates or confirms another's false impression that the actor knows to be false or

fails to correct another's impression that the actor previously has created or confirmed or

prevents another from acquiring information material to the disposition of the property involved or

transfers or encumbers property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record or

promises performance which the actor does not intend to perform or knows will not be performed.

CP 83.

Instruction No. 10. A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 84.

Instruction No. 11. A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 85.

In closing, the prosecutor argued in pertinent part:

I want to go to Count II involving Phyllis Larrouy. That one is a bit more complicated. You have heard a lot of testimony about what they tried to do in this case. They really tried to split up the money, spend down half of it for Phyllis, because she is in Alderwood and to qualify her for Medicaid. Pat Valente, to the best of her ability, seems to have done that. She split up the money she knew existed at the time. She missed some. But she knew to divide what she had before her and documented every single penny of money spent at Alderwood Manor.

Now, in terms of Cyndee Range, I want to get through to Instruction 9 telling you what deception means in the context of a theft case. Deception is when you fail to correct another's impression that the actors previously created or confirmed. Like in [the father's] case using a power of attorney, saying that you are authorized to spend all this money when you are spending it excessively. Two, prevents another from acquiring information material to the disposition of the property involved. Like failing to provide Medicaid information. That cost Phyllis' estate thousands of dollars.

I have done some of the math, just a rough math calculation on some of this. I want to put it on the board.

What we know as far as dates, about March of 2008 Phyllis went to Alderwood Manor. Her M.S. is out of control. She needs skilled nursing care. She ends up staying there. She gets a couple months of insurance coverage. So March of 2008 to [August 5] of 2008 is covered by insurance: Tricare, the military insurance that [the father] had. After [August 5] of 2008 all the way to the money is all gone in January 2009, that is private pay. So the \$35,000 or so that Phyllis had, spent it all at Alderwood. I believe it was \$33,471.88.

Now, we know that until September 2009 Pat Valente is trying to get Phyllis qualified for Medicaid. She engages Ms. Range, tries to get the information. Tries one, two, three, four times; can't get the information. Every time the application is denied. Cyndee Range won't give the information.

It comes to a head in September of 2009 when a guardian is appointed. Lin O'Dell gets onboard, looks at this huge bill that Alderwood had been carrying for Phyllis - \$35,000 at that time and rising – and it looks like not only is she going to lose her place at Alderwood Manor but she is going to be taken off her medicine. She is on a dozen different medications for pain management and to control her M.S. The situation is very serious. How did it turn out that Lin O'Dell was able to get the records? She had to use a subpoena. She had to go to court, get a subpoena, send it to the institutions to get the records that she needed.

Medicaid cut Phyllis a break, got her qualified backdated [May 1, 2009]. So from January of 2009 when the money is all gone and she could have been on Medicaid to [May 1, 2009], four months times about \$7700 a month, \$30,800. \$30,800 by simply failing to provide information, preventing another from acquiring information material to the disposition of property.

Another method: Transfers or encumbers property without disclosing a lien, adverse claim or legal impediment. What we are talking about here is the car and the car's total value: \$10,594.81. Now, if it is really a community asset, we are probably talking about half of that or a little over \$5,000. How do we know that is a community asset? The money had already been split up. Cyndee Range had spent it.

Well, you have heard the testimony that, in this case, there was a court determination that, in fact, this was community property. Remember when that car was sold off Lin O'Dell said she had to go to court. She got the written instructions to have that car sold and split in terms of assets at that time. There is some argument ultimately. The Court approved the sale of that car and declaration or it as a community asset. \$5,000 there.

...In this case, ... Cyndee Range ... by her action and inaction and simple refusal to provide information, ... cost Phyllis Larrouy thousands of dollars through her action, tens of thousands. ...

...

It is not that she went and accumulated wealth for herself, but that she had control of [the father's] money, that she had control of Phyllis Larrouy's money, and she blew it, she blew it in a way that

was not just irresponsible but was criminal, and that she did so intentionally.

3 RP 428–34; 455.

The jury found Ms. Range guilty on both counts. CP 97, 99; 4 RP 463–64. As to both counts the jury also found aggravating factors of particular vulnerability and use of a position of trust, confidence or fiduciary responsibility to facilitate the commission of the crime. CP 98, 100; 4 RP 463–64.

The court imposed concurrent high standard range sentences of six months' confinement on each count. CP 163–54; 9/30/11 RP 18. This appeal followed. CP 168–69.

### **C. ARGUMENT**

**Ms. Range was denied her constitutional right to a unanimous jury verdict on Count II because the State relied on several criminal acts as a basis for conviction and a Petrich instruction on jury unanimity was not given.**

"When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The State may, in its discretion,

elect the act upon which it will rely for conviction. Id. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. Id. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. Id. The failure to follow one of the above options violates the defendant's State constitutional right to a unanimous jury verdict and his United States constitutional right to a jury trial. State v. Beasley, 126 Wn. App. 670, 682, 109 P.3d 849 (2005), *citing* State v. Badda, 63 Wn.2d 176, 182, 385 P.2d 859 (1963); U.S. Const. amend. 6; Wash. Const. art. 1, § 22.

An alleged Petrich error may be raised for the first time on appeal. State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49, *rev. denied*, 127 Wn.2d 1008, 898 P.2d 308 (1995). When determining whether a unanimity instruction is required, the court must answer three inquiries: (1) what must be proved under the statute? (2) what does the evidence disclose? and (3) does the evidence disclose more than one violation? State v. Russell, 69 Wn. App. 237, 249, 848 P.2d 743 (1993).

In Holland, the defendant was charged with three separate counts of first degree child molestation, but convicted of only two. No unanimity

instruction was given. State v. Holland, 77 Wn. App. at 422, 424, 891 P.2d 49. The “to convict” instruction on each count was identical, i.e., same time period, same victim, and same general statutory description of the offense without any specific details. Id. at 423 (footnote 2). In reversing and remanding the case, the Court of Appeals held: “It is impossible, on this record, to conclude that all 12 jurors agreed on the same act to support convictions on each count. . . . There is no way given this verdict to assure that all the members of the jury were relying on the same incident when considering each count.” Id. at 425.

The circumstances in the present case are indistinguishable from Holland. The single “to convict” instruction given for Count II, the charged count of first degree theft concerning Phyllis Larrouy, did not describe specific conduct other than the general statutory language. CP 80. Yet the State presented evidence of two alleged thefts, and argued in closing that either one of them would fit the “to convict” instruction for first degree theft. No unanimity instruction given. As in Holland, *supra*, there is no way to assure that all the members of the jury were relying on the same act when voting to convict Ms. Range of first degree theft. Therefore, there was no assurance that the jury verdict was unanimous.

Failure to give a Petrich instruction under these circumstances is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 573.

Here, the prosecutor argued in closing that the act of failing to provide timely bank account information to Medicaid and the act of purchasing a replacement car with community funds were each a first degree theft from Phyllis Larrouy obtained by deception. 3 RP 428–34; 455. However, the evidence was insufficient to establish that the former act was first degree theft.

A person is guilty of theft in the first degree if she commits theft of property which exceeds \$5,000. RCW 9A.56.030(1)(a). In pertinent part, theft means “by color or aid of deception to obtain control over the property of [Phyllis Larrouy] or the value thereof, with intent to deprive her of such property.” RCW 9A.020(1)(b). “By color or aid of deception” means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services. RCW 9A.010(4). Deception occurs when an actor knowingly prevents another from acquiring information material to the disposition of the property involved. RCW 9A.010(5)(c). For the requisite fraudulent intent to exist, the defendant must know that

the representations are false. State v. Pettviel, 99 Wash. 434, 437–38, 169 P. 977 (1918) (“That guilty knowledge is implied in the words used in the statute and found in the instruction can hardly be denied save in an extremely hypercritical and far-fetched objection of the character no longer favored in the law. Intent is a mental condition. To intend to defraud by color or aid of false or fraudulent pretenses or representations includes knowledge and excludes mistakes. . . . Our statute does not make the obtaining of property by color or aid of false pretenses a crime unless the false pretenses are made 'with intent to deprive or defraud.' There could hardly be an intent to defraud by color or aid of false pretenses, unless the false pretense was made by one who knew the falsity thereof.”).

Thus, in State v. Monk, an employee's action in obtaining services from her employer by concealing an existing debt constituted theft by deception. 42 Wn. App. 320, 711 P.2d 365 (1985). Monk was having financial problems preventing her from paying utility bills. She used her knowledge as an employee of the utility company to transfer her account into an “inactive” status, which would only be reviewed annually and with no delinquent notices being sent. The court disagreed with Monk’s argument that the State failed to prove she obtained control over any

property or services or that the City otherwise relied on the alleged deception.

By transferring her account to inactive status, Ms. Monk prevented the City from acquiring information that she was seriously delinquent. The City relied on the transfer: (1) she received utility services at her new residence when the City might otherwise have taken action because of the large arrearage; and (2) she effectively obtained control over the City's right to payment by “hiding” her account.

State v. Monk, 42 Wn. App. at 322. The court further disagreed with Monk’s argument that there had been no “taking” because as an employee she had lawful access to the account.

[W]e reject Ms. Monk's theory that her acts, if anything, constituted embezzlement rather than theft by deception. She cites State v. Smith, 2 Wn.2d 118, 121, 98 P.2d 647, 648 (1939), where the court noted the distinction between larceny and embezzlement:

In embezzlement, the property comes lawfully into the possession of the taker and is fraudulently or unlawfully appropriated by him; in larceny, there is a trespass in the unlawful taking of the property.

The property here—the account receivable—was not lawfully in Ms. Monk's possession. In order to transfer her account, office procedure required her to secure the signed approval of one of her supervisors. She did not do so. These circumstances are sufficient to constitute a trespass or a taking as proof of theft by deception.

State v. Monk, 42 Wn. App. at 323. The court held that the State had proved the elements of theft by deception. Id. at 322.

Unlike in Monk, the property here—community asset information in some bank statements—was apparently lawfully in Ms. Range’s possession as well as in Ms. Valente’s possession. Ms. Valente had control over the couple’s finances for some time, and thereafter she retained power of attorney over her sister’s accounts while Ms. Range worked with her father’s finances. The record contains no details as to when bank statements were requested by Medicaid or for what periods of time. Ultimately Phyllis’ appointed guardian was able to obtain the necessary financial information, and there is no explanation in the record why Ms. Valente could not have earlier obtained the same information on Phyllis’ behalf for Medicaid purposes.

Equally important, there is no evidence in the record that Ms. Range had the necessary intent to defraud and guilty knowledge that might otherwise support a theft by “knowingly preventing another from acquiring information material to the disposition of the property involved.” Ms. Valente never discussed with Ms. Range her efforts to enable Phyllis to become qualified for Medicaid coverage or explained the possible significance of bank statements or the analysis used by Medicaid in determining what a patient’s “spend-down” requirement should be. The State entered no letters of request from Medicaid to Ms. Range or even to

Ms. Valente into the record. Ms. Range testified she had no idea that coverage was or had been an issue until the time of trial. Even if one assumes a proper request was made that only Ms. Range could fulfill, a simple mistake made by the failure to supply information does not constitute the “intent to deprive or defraud” that underlies the crime first degree theft by color or aid of deception. *See Pettviel*, 99 Wash. at 437–38.

Since Ms. Range’s act in this regard does not satisfy the “to convict” instruction for first degree assault, a rational trier of fact could not have found this alleged act proved beyond a reasonable doubt. It is impossible to know which of the two alleged acts the jury relied upon in convicting Ms. Range of first degree theft from Phyllis Larrouy by deception. The failure to give a unanimity instruction was not harmless and the conviction must be reversed.

**D. CONCLUSION**

For the reasons stated, this Court should reverse and dismiss the conviction of Count II - first degree theft regarding Phyllis Larrouy.

Respectfully submitted on May 7, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 7, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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