

No. 33599-2-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

FILED
OCT 01, 2015
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

RYAN ROBERT BRONOWSKI

Appellant.

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

The Honorable Judge John O. Cooney

APPELLANT'S OPENING BRIEF

KRISTINA M. NICHOLS
Nichols Law Firm, PLLC
Attorney for Appellant
P.O. Box 19203
Spokane, WA 99219
(509) 731-3279
Wa.Appeals@gmail.com

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A. SUMMARY OF ARGUMENT

Ryan Robert Bronowski was convicted of theft of a motor vehicle, second-degree possession of stolen property, and three counts of vehicle prowling based on events that took place during the night or early morning hours of March 1, 2015. But two of his convictions should now be reversed due to instructional errors.

First, the jury should have been instructed that it could instead find Mr. Bronowski guilty of taking a motor vehicle without permission, a lesser included offense of theft of a motor vehicle. Defense counsel was ineffective for not requesting this instruction.

Second, the jury was presented multiple acts that could have supported the second-degree possession of stolen property charge, including Mr. Bronowski's possession of one person's Visa and another person's Visa and checkbook. But the State did not elect between the Visa card (the only charged offense) and the checkbook when it argued that either one would support Mr. Bronowski's unlawful possession of a stolen access device. And, the court failed to give a unanimity instruction to ensure that Mr. Bronowski was convicted beyond a reasonable doubt by a unanimous jury of one charged act.

Finally, the court imposed a five-year no contact order as to the victim of one of the vehicle prowling incidences. But this crime carries a

maximum sentencing term of 364 days, so the no contact order must be stricken or reduced.

B. ASSIGNMENTS OF ERROR

1. The court erred by convicting Mr. Bronowski of theft of a motor vehicle where he did not receive effective assistance of counsel and the jury was never instructed on the lesser included offense of taking a motor vehicle without permission.
2. The court erred by failing to instruct the jury on the offense of taking a motor vehicle without permission, and defense counsel was ineffective for failing to request an instruction on the same.
3. The court erred by convicting Mr. Bronowski of second-degree possession of stolen property where there is no guarantee that the jury unanimously convicted him of this offense.
4. The court erred by failing to give a unanimity instruction on the charge of second-degree possession of stolen property.
5. The court erred by imposing a five-year no contact order on the gross misdemeanor offense that carries a maximum term of 364 days.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether Mr. Bronowski was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for second-degree taking a motor vehicle without permission, a lesser-included offense of theft of a motor vehicle.

Issue 2: Whether Mr. Bronowski's second-degree possession of stolen property conviction should be reversed, because the State failed to elect between the multiple acts that could result in conviction, and the court failed to provide a *Petrich* unanimity instruction.

- a. A unanimity instruction was required where the State alleged multiple acts that could result in a single conviction.

- b. The error in failing to elect between multiple acts or provide the jury with a unanimity instruction was not harmless.

Issue 3: Whether the court erred by imposing a five-year no contact order on a gross misdemeanor where the maximum sentencing term is 364 days.

D. STATEMENT OF THE CASE

Between 5:30 and 6:00 a.m. on the morning of March 1, 2015, Lonnie O'Bannan looked out the window of his home in Otis Orchards, Washington, and saw his business's vehicle backing out of the driveway. (RP 59-60, 62)¹ Mr. O'Bannan called 911, and officers responded to the area. (RP 121, 137) Minutes later, at about 6:00 a.m., Officer Mike Bogenreif noticed the reported vehicle parked alongside the road approximately one mile from its Mr. O'Bannan's home, and it looked like the occupant(s) of the vehicle were rummaging through it. (RP 61-63, 121, 129, 138-39) When the officer approached the vehicle, a man exited from the driver's side and ran into the backyard of a nearby property. (RP 123) Officer Bogenreif took a woman, Kayla Sporn, from the front seat of the vehicle and placed her in custody in the back of his patrol vehicle. (RP 124) When Deputy Thomas Edelbrock arrived shortly thereafter, he and Officer Bogenreiff located the man, later identified as the defendant Ryan Bronowki, in some bushes in the backyard of the property. (RP 125-26)

¹ No references are being made herein to the transcript prepared by Ms. Wilkins. All "RP" references are to the transcript prepared by Ms. Kerbs.

Mr. Bronowski was taken into custody, at which time the officers searched a black backpack that was either on his person or on the ground nearby. (RP 133, 141-42) Officers found a glove, keys and a small amount of change that Mr. O'Bannan said had been in his vehicle (RP 62, 64), and officers found some items belonging to Mr. O'Bannan's neighbors (RP 81, 83). (RP 146; Exhibit P23) The neighbors' items included a Visa card in the name of Lila Zander; a checkbook and Banner Bank Visa debit card in the name of Alicia Aldendorf; and an IPOD, glass breaking tool, and Sacred Heart Medical Center (SHMC) parking garage access card that belonged to James "Mikey" Adams. (RP 54, 75, 83, 148, 160; Exhibit P23) Mr. Adams and Ms. Aldendorf testified that the items they were missing had been taken from their respective vehicles around that same night of March 1st. (RP 52-55, 73-75) Ms. Zander also testified that she was missing mail, and mail in her name was found in Mr. O'Bannan's vehicle or Ms. Sporn's bag after the defendant's arrest. (RP 46, 48-49, 148, 155)

Mr. Bronowski was charged with theft of Mr. O'Bannan's motor vehicle (count 1), second-degree possession of stolen property as to a Visa card (count 2), vehicle prowling as to Mr. O'Bannan's vehicle (count 3), vehicle prowling as to Ms. Aldendorf's vehicle (count 4), and vehicle prowling as to Mr. Adams' vehicle (count 5). (CP 46-47) The prosecutor

argued that proof of count two included evidence of Mr. Bronowski possessing Ms. Aldendorf’s “debit card from Banner Bank, blue in color, along with her checkbook...” (RP 191) The jury convicted Mr. Bronowski of all five counts. (CP 84-88)

Based on Mr. Bronowski’s stipulated criminal history, the court sentenced Mr. Bronowski to the top of the standard range. (RP 247; CP 113-14) The court imposed 57 months on count one, 22 months on count two, and 364 days on each of the vehicle prowling gross misdemeanors, all to run concurrent. (CP 123-30, 138) The court also imposed five-year no-contact-orders as to Mr. O’Bannan, Ms. Aldendorf, and Mr. Adams. (CP 132)

Mr. Bronowski filed a personal restraint petition, alleging sexual misconduct by his defense attorney.² (See COA No. 33608-5-II; *and see* RP 244) Mr. Bronowski also timely appealed his convictions to this Court. (CP143)

² This Court received Mr. Bronowski’s personal restraint petition, assigned it cause No. 33608-5-III, and consolidated the petition with this direct appeal by letter ruling dated August 17, 2015. Mr. Bronowski remains pro se on the personal restraint petition.

E. ARGUMENT

Issue 1: Whether Mr. Bronowski was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a jury instruction for second-degree taking a motor vehicle without permission, a lesser-included offense of theft of a motor vehicle.

Mr. Bronowski was charged with theft of Mr. O'Bannan's motor vehicle. The vehicle was found less than 30 minutes after it was taken, it was parked only one mile from Mr. O'Bannan's home, and Officer Bogenreif testified that the vehicle occupants were rummaging through it when he pulled up. There was also testimony that linked the defendant with several vehicle prowls and taking neighbors' mail during the previous night. Under these circumstances, a jury could very well have convicted Mr. Bronowski of taking a motor vehicle without permission as a continuation of his night of vehicle prowls, rather than theft of a motor vehicle (the latter of which implies a more substantial deprivation³). Mr. Bronowski was denied his right to effective assistance of counsel when his attorney failed to request a jury instruction for the lesser-included offense of taking a motor vehicle without permission; there was no tactical basis for failing to request the lesser included instruction in this case.

“[A] jury may find a defendant guilty of a crime not charged, if commission of that crime is necessarily included within the crime

³ *State v. Walker*, 75 Wn. App. 101, 107-08, 879 P.2d 957 (1994).

charged.” *State v. Crittenden*, 146 Wn. App. 361, 365-66, 189 P.3d 849 (2008), *review denied*, 165 Wn.2d 1042 (2009). “To find an accused guilty of a lesser included offense, the jury must be instructed on its elements.” *Id.* at 366. A defendant is entitled to a lesser-included offense jury instruction if two conditions are met. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382, 385 (1978). “First, each of the elements of the lesser offense must be a necessary element of the offense charged.” *Id.* “Second, the evidence in the case must support an inference that the lesser crime was committed.” *Id.* at 448; *State v. Sharkey*, 172 Wn. App. 386, 390-92, 289 P.3d 763 (2012). “Stated differently, if it is possible to commit the greater offense without committing the lesser offense, the latter is not a lesser included crime.” *Crittenden*, 146 Wn. App. at 366 (citing *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993)). An offense is a “lesser included offense only where the elements of the lesser offense are invariably inherent in the greater offense and were part of the same act.” *Id.* at 368.

A person is guilty of theft of a motor vehicle if he commits theft of a motor vehicle. RCW 9A.56.065. “Theft” is defined in pertinent part as “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a). A person is guilty

of second-degree taking a motor vehicle without permission if he “without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle...that is the property of another...” RCW 9A.56.075. “Deprive” is defined as “[t]o take something away from”, “to keep from having or enjoying”, or “[t]o take.” *State v. Komok*, 113 Wn.2d 810, 815n.4, 783 P.2d 1061 (1989) (internal citation omitted). Both statutes include the element “intent to deprive” the owner or person entitled to possession of the vehicle. *See e.g. Crittenden*, 146 Wn. App. at 370 (while intent to deprive is an element of theft, intent to “permanently” deprive is not an element; there is not necessarily a duration requirement for theft.) *C.f., State v. Williams*, 22 Wn. App. 197, 199, 588 P.2d 1201 (1978) (“joyriding merely requires an intent to temporarily deprive.”)

In *State v. Crittenden*, the Court was asked to determine whether second-degree taking a motor vehicle without permission is a lesser included offense to first-degree theft, “[both of which] require an unauthorized taking of property.” 146 Wn. App. at 367. The Court decided that taking a motor vehicle without permission was not a lesser included offense of theft, because the former specified the “taking of a particular type of property, a motor vehicle.” *Id.* The Court reasoned, “it is possible to commit theft without stealing an automobile. Because the

legal prong of the *Workman* test is not met, second degree TMV is not a lesser included offense of theft.” *Id.* Importantly, however, Mr. Crittenden’s offense was committed before the theft of a motor vehicle statute came into effect and he was charged under the general theft statutes. *Id.* at 364 (citing Laws of 2007, ch.199, §2, codified at RCW 9A.56.065, taking effect July 22, 2007). The Court did not reach the issue of whether taking a motor vehicle without permission would be a lesser included offense of theft of a motor vehicle pursuant to RCW 9A.56.065. The Court instead noted that RCW 9A.56.075 (taking a motor vehicle without permission statute) “unambiguously penalizes the unauthorized taking a specific type of property, a motor vehicle, while RCW 9A.56.020 and RCW 9A.56.030 [the theft statutes] do not.” *Id.*

Here, this case presents the question not reached in *State v. Crittenden*. Unlike in *Crittenden*, Mr. Bronowski was specifically charged with theft of a motor vehicle under RCW 9A.56.065, rather than charged under any of the general theft statutes. The Court acknowledged in *State v. Crittenden* that theft and taking a motor vehicle without permission both require an unauthorized taking of property. 146 Wn. App. at 367. The only distinction between the offenses, as noted in *Crittenden*, was that taking a motor vehicle without permission specified the property taken, a motor vehicle, whereas the general theft statutes did not. *Accord, Sharkey,*

172 Wn. App. at 391 (taking a motor vehicle without permission is not a lesser included of robbery, because it is possible to rob someone of personal property other than a vehicle).

Whereas here, RCW 9A.56.065 and RCW 9A.56.075 specify the exact same type of property that must be taken: a motor vehicle. Both statutes penalize the unauthorized taking of a motor vehicle. Additionally, at common law, the crime of theft required the element of intent to *permanently* deprive, but this element has “purposefully been omitted by the Legislation and is no longer required.” *Crittenden*, 146 Wn. App. at 370. Deprive, given its common meaning as set forth above, does not include any specific duration of time. Hence, even the temporary deprivation of another’s motor vehicle would constitute theft of a motor vehicle. *See id.* In sum, it is not possible to commit theft of a motor vehicle (i.e., intentionally depriving another of their vehicle) without also committing the lesser included offense of second-degree taking a motor vehicle without permission. The offenses are, therefore, the same in law; the legal prong of *Workman* is satisfied.

The factual prong of *Workman* is satisfied as well in this case; taking a motor vehicle without permission is, in fact, a lesser included offense of theft of a motor vehicle. The evidence herein specifically supports an inference that Mr. Bronowski committed the lesser offense of

taking a motor vehicle without permission. *Workman*, 90 Wn.2d at 448. Mr. O'Bannan was only temporarily deprived of his vehicle. The vehicle was found less than 30 minutes after it was taken. A jury could find that Mr. Bronowski did not intend to deprive Mr. O'Bannan of his vehicle for any substantial duration, because the vehicle was driven and parked in open view only about one mile from its owner's location. Mr. Bronowski did not drive the vehicle to a distant location, and he did not make any effort to hide the vehicle to maintain a more substantial taking. And, Officer Bogenreif testified that he pulled up and saw its occupants rummaging through the vehicle. (RP 129) The jury could very well have found that Mr. Bronowski only intended to temporarily deprive Mr. O'Bannan of his vehicle until he could accomplish the vehicle prowl, like he had apparently done with the other vehicles in Mr. O'Bannan's neighborhood that same night. Mr. Bronowski's actions were more akin to one who commits joyriding, or a temporary, albeit unauthorized, taking of another's property.

The facts suggest that Mr. Bronowski was only guilty of second-degree taking a motor vehicle without permission. It appears he did intend to deprive Mr. O'Bannan of his vehicle, but only in order to effectuate the relatively rapid removal of property from the vehicle. This type of deprivation satisfies the lesser included offense of taking a motor vehicle

without permission. The jury should have been instructed on this lesser included offense.

Finally, this error may be raised for the first time on appeal, because counsel's failure to request the lesser included instruction denied Mr. Bronowski his right to effective assistance of counsel. Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

When the failure to instruct the jury on a lesser-include offense is raised as an ineffective assistance of counsel claim, “[t]he salient question . . . is not whether [the defendant] is entitled to such instructions but, rather, whether defense counsel was ineffective in forgoing such instructions.” *State v. Grier*, 171 Wn. 2d 17, 42, 246 P.3d 1260 (2011). The decision to forgo an otherwise permissible instruction on a lesser included offense is not ineffective assistance if it can be characterized as part of a legitimate trial strategy to obtain an acquittal. *Id.* at 43; *see also State v. Hassan*, 151 Wn. App. 209, 218, 211 P.3d 441 (2009).

In *Grier*, our Supreme Court found the withdrawal of lesser-included jury instructions was not ineffective assistance of counsel. 171 Wn.2d at 42-45. The Court reasoned “[the defendant] and her defense counsel reasonably could have believed that an all or nothing strategy was the best approach to achieve an outright acquittal.” *Id.* at 43. But, “where there is overwhelming evidence that the defendant is guilty of some offense, such strategy may be unreasonably risky.” *State v. Breitung*, 155 Wn. App. 606, 620, 230 P.3d 614 (2010), *aff’d*, 173 Wn.2d 393 (2011), (citing *Grier*, 150 Wn. App. at 643). “Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.” *Grier*, 150 Wn. App. at 643

“We consider three factors ‘to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.’” *Breitung*, 155 Wn. App. at 619 (internal quotations omitted).

Here, defense counsel could not have reasonably believed that an “all or nothing” strategy was the best approach in this case. *See Grier*, 171 Wn.2d at 43. Given the evidence, the jury was likely to believe Mr. Bronowski had committed some unauthorized taking of Mr. O’Bannan’s motor vehicle. Counsel’s defense was a general denial and asking the jury to hold the State to its burden of proof (see RP 197-205), but this defense was just as viable for taking a motor vehicle without permission as for theft of a motor vehicle. Nothing would have been lost in presenting this defense strategy with the jury instructed on both offenses.

In addition, the disparity in offenses should have urged defense counsel to request the lesser included instruction. Mr. Bronowski faced a standard range of 22 to 29 months on the lesser included crime verses 43 to 57 months for theft of a motor vehicle. *See RCW 9.94A.515; RCW 9.94A.510*. A conviction on the lesser included offense, assuming the

same offender score and high-end standard range sentence was imposed, would have resulted in nearly half the term of confinement. There was no risk to the defendant from requesting the lesser included instruction. The jury was likely to convict him of some crime where the evidence showed that he temporarily took a motor vehicle without permission. It is at least reasonably probable that, given the evidence presented, the jury would have found Mr. Bronowski only committed a temporary deprivation of Mr. O'Bannan's motor vehicle. His actions were more in line with the joyriding statute than the more substantial deprivation that accompanies the theft of a motor vehicle statute. The lesser included instruction should have been requested and given.

In sum, counsel was ineffective for failing to ask for a lesser included instruction that would have given the jury the opportunity to convict Mr. Bronowski of the crime that matched the evidence presented in this case. Mr. Bronowski was prejudiced, since the results of the proceeding would likely have been different, and he suffers ongoing prejudice by serving nearly twice the term of confinement as compared to the high-end sentence for second-degree taking a motor vehicle without permission. Wherefore, Mr. Bronowski requests that this Court reverse his conviction and remand for a new trial. *State v. Henderson*, 180 Wn. App. 138, 143, 321 P.3d 298 (2014), *aff'd*, 182 Wn.2d 734 (2015) (citing

State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005)) (setting forth this remedy).

Issue 2: Whether Mr. Bronowski's second-degree possession of stolen property conviction should be reversed, because the State failed to elect between the multiple acts that could result in conviction, and the court failed to provide a *Petrich* unanimity instruction.

Mr. Bronowski was charged with second-degree possession of stolen property for allegedly possessing a stolen access device, to wit, a Visa debit card. (CP 146) At trial, evidence was introduced that Mr. Bronowski possessed Lila Zander's Visa access card (RP 146), Alicia Aldendorf's Banner bank debit card and Alicia Aldendorf's checkbook (RP 54, 160; Exhibit P23). In pertinent part, the jury was instructed that it could find Mr. Bronowski guilty of second-degree stolen property if he possessed an access device, which included any card or account number. (RP 182-83) In closing argument, the State argued that the jury could convict Mr. Bronowski based on his unlawful possession of Alicia Aldendorf's debit card and checkbook. (RP 191) Where evidence of multiple acts is introduced, any one of which could support the charge, the State is required to elect one particular act or the court is required to provide an instruction to ensure jury unanimity on which of the multiple acts resulted in conviction. The State failed to so elect, and the court failed to so instruct; therefore, Mr. Bronowski's conviction for second-degree possession of stolen property should be reversed.

a. A unanimity instruction was required where the State alleged multiple acts that could result in a single conviction.

“In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed.” *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), *holding modified by*, *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); U.S. Const. Amend. VI; Wash. Const. Art. I, §22. That is, 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).

“Where the State alleges multiple acts resulting in a single charge, either the State must elect which act it is relying on as the basis for the charge, or the court must instruct the jurors that they must unanimously agree that a single act has been proven beyond a reasonable doubt.” *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002) (internal citations omitted). “Where neither alternative is followed, a constitutional error arises stemming from the possibility that some jurors may have relied on one act while other jurors relied on another, resulting in a lack of unanimity on all elements necessary for a conviction.” *Id.* “An error for failing to give a unanimity instruction is of constitutional magnitude and can be raised for the first time on appeal.” *Id.*

In *State v. Sells*, an identity theft case, a unanimity instruction was given where a defendant was alleged to have committed multiple uses of various access devices. *State v. Sells*, 166 Wn. App. 918, 926-28, 271 P.3d 952 (2012). The following instruction was approved by the Court on review:

Evidence has been introduced alleging multiple uses of an access device in the name of Mr. Stanley Pinnick and the North Beach School District. In order to convict William Sells Jr., as charged in Count 1, you must unanimously agree that at least one particular act of identity theft has been proven beyond a reasonable doubt. You need not unanimously agree that Mr. Sells committed all of the alleged acts of identity theft.

Evidence of other alleged uses of the access device on July 15, 2010, may be considered by you only in so far as you believe they may bear on Mr. William Sells Jr.['s] knowing possession and use of a means of identification of Mr. Pinnick or as you believe it may bear upon Mr. Sells['] intent to commit the crime of theft and for no other purpose.

Sells, 166 Wn. App. at 928.

Here, no such unanimity instruction was given, as it was in *Sells*, *supra*, in order to guarantee a unanimous jury verdict on which of the possible possessed access devices proved the charge. The State herein did not elect that the jury needed to be unanimous on the charged crime: possession of a stolen Visa debit card. The State instead suggested that Mr. Bronowski could be found guilty of possession of a stolen access device for possessing Ms. Aldendorf's Visa card along with her

checkbook. (RP 191) And then no unanimity instruction was provided to accompany these multiple alleged culpable acts.

The jury was required to be unanimous in deciding whether Mr. Bronowski committed the “criminal act charged in the information...” *Petrich*, 101 Wn.2d at 569 (emphasis added). In other words, even though the State presented evidence that Mr. Bronowski possessed Ms. Zander’s Visa card, and even though the State presented evidence and argued that Mr. Bronowski could be convicted for possessing Ms. Aldendorf’s checkbook, the jury should have been instructed that it could only return a verdict of guilty if it unanimously believed that Mr. Bronowski unlawfully possessed Ms. Aldendorf’s Visa debit card.

The State did not elect between the multiple acts that could have supported count two in the to-convict instructions to the jury. (*See* CP 68-73) The State seems to have tried to elect during its closing argument between the multiple acts as to possession of Ms. Zander’s Visa verses Ms. Aldendorf’s Visa. In other words, the State did not appear to have been relying on Mr. Bronowski’s possession of Ms. Zander’s Visa card to obtain this conviction. However, the State neglected to elect between Mr. Bronowski’s possession of Ms. Aldendorf’s debit card and her checkbook. The State’s reliance on the checkbook to support this charge is misplaced; the jury was required to return a unanimous jury verdict as to the charged

crime (possession of a stolen Visa debit card). Due to the State's failure to elect between the multiple acts it alleged, and due to the absent unanimity instruction, Mr. Bronowski has been denied his constitutional right to a unanimous jury verdict. His conviction should be reversed.

b. The error in failing to elect between multiple acts or provide the jury with a unanimity instruction was not harmless.

Next, the State may argue that this error was harmless, but the State cannot overcome this Court's necessary presumption that the error was prejudicial.

"In reviewing a multiple acts case in which there has been no election by the State or unanimity instruction by the trial court, the proper standard for determining whether the error is harmless is...if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt." *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990) (citing *Kitchen*, 110 Wn.2d at 411; other citations omitted). "This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged." *Id.* "Thus in multiple acts cases the standard of review for harmless error is whether a 'rational trier of fact could find that each incident was proved beyond a reasonable doubt'... Errors of constitutional

proportions will not be held harmless unless ‘the appellate court is ‘able to declare a belief that it was harmless beyond a reasonable doubt.’” *Id.*

A person is guilty of possessing stolen property in the second degree if he possesses a stolen access device. RCW 9A.56.160(1)(c); CP 68-69. “‘Access device’ means any card..., account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds...” RCW 9A.56.010(1) (emphasis added); CP 73. “The phrase ‘can be used’ refers to the status of the access device when it was last in the possession of its lawful owner, regardless of its status as [sic] a later time.” CP 73. *Accord State v. Rose*, 175 Wn.2d 10, 16, 282 P.3d 1087 (2012).

In *State v. Rose*, the Court reversed, because there was no evidence that the stolen credit card could actually be used to obtain something of value when it was last in the possession of its lawful owner. 175 Wn.2d at 17-18. There was no evidence that the card was activated⁴ or any other evidence from which to conclude that the card could be used to obtain something of value. *Id.* The Court explained:

⁴ “[W]hether a card has been activated by its intended user may be relevant, [but...] is not dispositive in determining whether it ‘can be used.’” *Rose*, 175 Wn.2d at 15. “A credit card may be an access device regardless of whether the intended user has activated the card, if the evidence supports a finding that the card could be used in the manner described by RCW 9A.56.010(1).” *State v. Clay*, 144 Wn. App. 894, 899, 184 P.3d 674 (2008).

Although ‘all reasonable inferences from the evidence must be drawn in favor of the State [when reviewing for sufficient evidence]...’ only so much can be learned by simply looking at the card. It stretches the inference beyond the evidence to conclude that this card could be used to obtain something of value... The State bore the burden to prove that the card “can be used” to obtain something of value... We hold that there was insufficient evidence to convict Rose of second degree possession of stolen property because the evidence at trial did not show the card in question could be used to obtain something of value.

Rose, 175 Wn.2d at 17-18. *But see Clay*, 144 Wn. App. at 899 (“no evidence was offered that would prevent a rational juror from concluding that the [un-activated retail credit card] had been, or could be, activated by someone else or used without activation... there was ‘no testimony that any additional steps needed to be taken to activate that card.’”)

Here, there was no evidence that Ms. Aldendorf’s Banner Bank Visa debit card was activated, was connected to an active or open account, or could be used to obtain anything of value when it was last in Ms. Aldendorf’s possession.⁵ There was testimony that no charges were made to the card (RP 57), but there was no evidence presented that charges actually could be made to the card. There is simply no evidence the card could be used to access any account or obtain anything of value. The issue in this case is not whether the jury could infer or presume from the

⁵ Similarly, there was no evidence as to whether Ms. Aldendorf’s checkbook was connected to an active account or whether the account number could be used to obtain anything of value. However, because the jury was required to be unanimous on the charged crime – possession of a stolen Visa card – the following analysis focuses solely on the evidence supporting that charge.

testimony that Ms. Aldendorf's card could be used; this issue is not a review of the evidence in the light most favorable to the State to determine if there is the barest sufficiency of the evidence. *C.f.*, *Clay*, 144 Wn. App. at 899.

Instead, the State is required to overcome the presumption that the constitutional error in this case was prejudicial. But in this case, a rational juror could have a reasonable doubt about the elements being satisfied based on the evidence presented. Indeed, there was no evidence introduced regarding whether the Banner Bank card could be used when it was last in Ms. Aldendorf's possession, so a rational juror could have found that the elements were not all satisfied beyond a reasonable doubt. Like in *State v. Rose*, there was simply "no evidence on that precise point." 175 Wn.2d at 18. The unanimity error in this case was not harmless and should result in reversal.

Issue 3: Whether the court erred by imposing a five-year no contact order on a gross misdemeanor where the maximum sentencing term is 364 days.

Mr. Bronowski was charged and convicted of one crime involving Mr. James Adams: vehicle prowling, a gross misdemeanor. The court erred by imposing a five-year no-contact-order as to this individual, because it exceeded the maximum 364-day sentence for vehicle prowling.

A trial court's authority to impose conditions of a sentence is limited to the authority provided by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Sentencing errors can be addressed for the first time on appeal pursuant to RAP 2.5. *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996). In general, sentencing conditions, including the terms of a no contact order, cannot exceed the maximum term for the crime. *State v. Rodriguez*, 183 Wn. App. 947, 959, 335 P.3d 448 (2014), *review denied*, 182 Wn.2d 1022 (2015); *accord State v. Armendariz*, 160 Wn.2d 106, 120, 156 P.3d 201 (2007).

Mr. Bronowski was convicted of second-degree vehicle prowling, a gross misdemeanor. CP 138; RCW 9A.52.100(1), (2). This gross misdemeanor carried a maximum term sentence of 364 days plus fines. RCW 9.92.020. The five-year no-contact-order as to Mr. Adams clearly exceeded the maximum term for this gross misdemeanor conviction and should be stricken or reduced in the sentence.

F. CONCLUSION

Based on the foregoing, Mr. Bronowski respectfully requests that his convictions for theft of a motor vehicle and second-degree possession of stolen property be reversed. The jury should have been instructed on the lesser-included offense of taking a motor vehicle without permission,

and the jury should have received a unanimity instruction for the second-degree possession of stolen property charge. Finally, Mr. Bronowski's sentence should be corrected so that the five-year no-contact order as to Mr. Adams does not exceed the maximum 364-day sentencing term for the respective vehicle prowl conviction.

Respectfully submitted this 1st day of October, 2015.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 33599-2-III
vs.)
)
) PROOF OF SERVICE
RYAN R. BRONOWSKI)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 1, 2015, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Ryan Robert Bronowski, DOC #374086
Airway Heights Corrections Center
11919 W. Sprague Avenue
PO Box 1899
Airway Heights, WA 99001-1899

Having obtained prior permission, I also served a copy of the same by email on the Spokane County Prosecutor's Office at scaappeals@spokanecounty.org.

Dated this 1st day of October, 2015.

/s/ Kristina M. Nichols
Kristina M. Nichols, WSBA #35918
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219
Phone: (509) 731-3279
Wa.Appeals@gmail.com