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

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>CYNTHIA L. RANGE,<br><br>Appellant. | ) | No. 30311-0-III<br><br><br><br><br><br>UNPUBLISHED OPINION |

Brown, J. • Cynthia L. Range appeals her two convictions for second degree theft by color or aid of deception, but limits her error contention to whether the trial court committed reversible error by failing to instruct the jury it must unanimously agree on which act supported count II. Because Ms. Range abandoned her appeal of count I, we affirm count I. Considering the State's closing argument describing multiple acts and the trial court's failure to provide a unanimity instruction for count II, we reverse count II.

## FACTS

The facts are undisputed. Around December 2008, Ms. Range traveled to Spokane to temporarily assist her elderly father, Francis Larrouy, with home care but

she stayed on to assist him with his health problems. Her elderly stepmother, Phyllis Larrouy, then resided in Alderwood Manor, a nursing facility. Mrs. Larrouy's sister, Pat Valente, then held power of attorney over Mr. and Mrs. Larrouy's affairs. Ms. Valente previously split the couple's assets into two accounts to qualify Mrs. Larrouy for Medicaid assistance. Ms. Valente paid Mrs. Larrouy's nursing facility bills out of Mrs. Larrouy's assets.

In January 2009, Ms. Range gained power of attorney over Mr. Larrouy's affairs. She then added herself to Mr. Larrouy's account, transferred the funds in Mrs. Larrouy's account, and diverted Mrs. Larrouy's other assets. Around February 2009, Ms. Valente partially completed five Medicaid applications for her sister's care and forwarded them to Ms. Range for final processing. Ms. Range did not provide all required information. As a result, Mrs. Larrouy did not obtain Medicaid assistance for five months, accruing a large debt for her unpaid nursing facility bills. In February 2009, Ms. Range bought a used car for about $10,500 using the couple's assets. Around May 2009, Mr. Larrouy moved into a nursing facility. Ms. Range then made numerous cash withdrawals from the account in her and Mr. Larrouy's names. Ms. Range released her power of attorney in September 2009.

The State charged Ms. Range with two counts of first degree theft by color or aid of deception, alleging she abused her power of attorney between January 7, 2009 and September 3, 2009 by using Mr. and Mrs. Larrouy's money for personal benefit and with intent to deprive the victims. The State named Mr. Larrouy as the victim in count I,

and named Mrs. Larrouy as the victim in count II. The trial court instructed the jury it must unanimously agree on each count. But the court did not instruct the jury it must unanimously agree on which acts support which count. Further, Ms. Range did not ask the court to do so. During closing arguments concerning count II, the State argued Ms. Range's guilt could stem from either failing to provide the Medicaid information, which cost Mrs. Larrouy about $30,800 in nursing facility bills, or buying the automobile, which cost Mrs. Larrouy just over $5,000 of her one-half interest in community property funds. The State did not argue a continuous abuse of Ms. Range's power of attorney. The jury found Ms. Range guilty of both counts. She appealed but limits her error claim solely to count II.

## ANALYSIS

### A. Unanimity Instruction

The issue is whether the trial court violated Ms. Range's constitutional rights by failing to instruct the jury it must unanimously agree on which act supported count II. She contends the court was required to instruct the jury in this way because the State offered evidence of multiple acts, any of those acts could have fit count II, and the State did not designate which acts it would rely upon to prove its case. The State responds she waived the issue because she failed to request a jury unanimity instruction at trial, and, even so, the court was not required to instruct the jury on unanimity because the State offered evidence of merely one act.

We review alleged constitutional violations de novo. *State v. Siers*, 174 Wn.2d

269, 274, 274 P.3d 358 (2012). If the trial court fails to give a jury unanimity instruction when required, it "violates the defendant's state constitutional right to a unanimous jury verdict and his or her federal constitutional right to trial by jury." *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009). While the State correctly notes Ms. Range did not request a jury unanimity instruction at trial, she may claim this constitutional error for the first time on appeal. *See* RAP 2.5(a)(3); *State v. Bobenhouse*, 166 Wn.2d 881, 892 n.4, 214 P.3d 907 (2009).

When the State offers evidence of multiple acts, and any of those acts could fit one count, either "the State must designate the acts upon which it relies to prove its case" or "the court may instruct the jury to agree unanimously as to which acts support a specific count." *Fisher*, 165 Wn.2d at 755 (citing *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984), *modified on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988)); *see State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). But a jury unanimity instruction is not required when the State offers evidence of multiple acts indicating a "continuing course of conduct." *State v. Crane*, 116 Wn.2d 315, 326, 804 P.2d 10 (1991). "A continuing course of conduct requires an ongoing enterprise with a single objective." *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996). This requires a commonsense evaluation of the facts. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). "Where evidence involves conduct at different times and places, or different victims, then the evidence tends to show several distinct acts." *Love*, 80 Wn. App. at 361.

A person commits theft if he or she "obtain[s] control over the property or services of another" "[b]y color or aid of deception" and "with intent to deprive." RCW 9A.56.020(1)(b). First degree theft applies if the value exceeds $5,000. Former RCW 9A.56.030(1)(a) (Supp. 2009). A person commits theft by color or aid of deception if "the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means." Former RCW 9A.56.010(4) (2008). A person might deceive another by knowingly "[p]revent[ing] another from acquiring information material to the disposition of the property involved" or "[t]ransfer[ring] or encumber[ing] property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property." Former RCW 9A.56.010(5)(c)-(d).

In count II, the State alleged that between January 7, 2009 and September 3, 2009, Ms. Range committed first degree theft by color or aid of deception, by abusing her power of attorney and using Mrs. Larrouy's money for personal benefit. During closing argument, however, the State told the jury it could find Ms. Range committed the deception charged in count II either by failing to provide bank account information required to qualify Mrs. Larrouy for Medicaid assistance, or by "[a]nother method" of buying the automobile with Mrs. Larrouy's one-half interest in community property funds. Report of Proceedings (RP) at 431. Specifically, the State argued the first act prevented Mrs. Larrouy from acquiring information material to the disposition of her money and the second act involved transferring property without disclosing an adverse claim. *See* former RCW 9A.56.010(5)(c)-(d). The State offered evidence of both acts.

Finally, the State noted while count II was "a bit more complicated," its underlying theory alleged Ms. Range cost Mrs. Larrouy tens of thousands of dollars "by her action and inaction and simple refusal to provide information." RP at 428, 433-34.

While Ms. Range's conduct arguably indicates a single objective, it involved vastly different behavior at different times and places, not an ongoing enterprise of the same behavior continuing in nature. The State offered evidence of multiple acts and argued multiple acts to the jury. Because the State did not designate which act it would rely upon to prove its case, the trial court was required to instruct the jury it must unanimously agree on which act supported count II. The court violated Ms. Range's constitutional rights by failing to do so.

B. Constitutional Harmless Error

The issue is whether the trial court's failure to give a jury unanimity instruction was prejudicial or harmless beyond a reasonable doubt. Ms. Range contends the error was prejudicial because insufficient evidence supports finding she acted knowingly or with intent to deprive Mrs. Larrouy, and a rational jury could have entertained reasonable doubts on those grounds. Applying the standard in *Petrich*, 101 Wn.2d at 573, but ignoring the modification in *Kitchen*, 110 Wn.2d 403, the State responds the error was harmless because a rational jury could have found Ms. Range committed each act beyond a reasonable doubt.

The standard of review remains de novo. *Siers*, 174 Wn.2d at 274. If the trial court fails to give a jury unanimity instruction when required, we presume the

constitutional error was prejudicial and will reverse it "unless it was harmless beyond a reasonable doubt." *State v. Vander Houwen*, 163 Wn.2d 25, 39, 177 P.3d 93 (2008); *Coleman*, 159 Wn.2d at 512. To meet this constitutional harmless error standard, the State must show "no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." *Kitchen*, 110 Wn.2d at 405-06, *modifying Petrich*, 101 Wn.2d at 573.

The State fails to argue how each act separately could have established the crime beyond a reasonable doubt. Given the complexities of the State's evidence and the plansibility of Ms. Range's contention, we cannot conclude "no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." *Id*. Thus, the State fails to overcome the presumption of prejudice. Therefore, the trial court's failure to give a jury unanimity instruction was prejudicial.

Affirmed in part, reversed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Siddoway, A.C.J. Sweeney, J.