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State v. Herreman-Garcia Respondent's Brief Dckt. 42941

IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO, Plaintiff-Respondent, vs. ANA GISELLE HERREMAN-GARCIA, Defendant-Appellant.	)	No. 42941 Ada Co. Case No. CR-2014-5550

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature Of The Case

Ana Giselle Herreman-Garcia appeals from her convictions for grand theft and forgery.

Statement Of The Facts And Course Of The Proceedings

Herreman-Garcia worked in the office of A&A Landscaping and managed several of the financial functions of the business including payroll, paying vendors, and recording payments on invoices. (Tr., p. 127, L. 10 – p. 130, L. 1; p. 173, L. 10 – p. 178, L. 11; p. 263, L. 14 – p. 264, L. 24.) Using that position she issued herself unauthorized checks, obtained duplicative paychecks or paychecks for hours not worked, and used a company financial card to pay private expenses and withdraw cash. (Tr., p. 134, L. 25 – p. 136, L. 22; p. 151, L. 20 – p. 159, L. 23; p. 182, L. 17 – p. 202, L. 10; p. 206, L. 24 – p. 214, L. 1; p. 264, L. 25 – p. 275, L. 2; p. 278, L. 2 – p. 286, L. 24; p. 354, L. 25 – p. 370, L. 20; p. 377, L. 17 – p. 421, L. 23; Exhibits 1 (Exhibits file, pp. 2-124), 2 (Exhibits file, pp. 125-34), 8 (Exhibits file, pp. 151-621), 9 (Exhibits file, pp. 622-1505), 10 (Exhibits file, p. 1506), 11 (Exhibits file, p. 1507), 12 (Exhibits file, p. 1508).) She also altered checks issued to the business from customers, making them payable to herself. (Tr., p. 101, L. 22 – p. 112, L. 1; p. 114, L. 8 – p. 123, L. 12; p. 202, L. 11 – p. 206, L. 23; p. 275, L. 3 – p. 278, L. 1; p. 287, Ls. 2-25; p. 421, L. 24 – p. 425, L. 16; Exhibits 3 (Exhibits file p. 135), 4 (Exhibits file, pp. 136-141), 5 (Exhibits file, p. 142), 6 (Exhibits file, pp. 143-148).) The state ultimately presented evidence that Herreman-Garcia stole from her employer employing

four different methods: misuse of a debit card; obtaining paychecks that were duplicative or for hours not worked; issuing company checks to herself; and altering and cashing checks submitted by the business's clients to pay for services by making them payable to her personally. (Tr., p. 389, Ls. 1-18.)

The state charged Herreman-Garcia with one count of grand theft for taking money from her employer between March 19, 2009 and October 31, 2011 and one count of forgery for adding her name to checks written by third parties to her employer. (R., pp. 52-53.) The case proceeded to jury trial. (R., pp. 100-13.) The jury found Herreman-Garcia guilty on both counts. (R., pp. 113, 134-35.) The court entered judgment, from which Herreman-Garcia timely appealed. (R., pp. 164-66, 170-74.) On appeal Herreman-Garcia asserts multiple trial errors, most of which were not preserved for appellate review. (Appellant's brief.)

ISSUES

Because Herreman-Garcia's statement of the issues sets forth as fact legal claims the state asserts are without merit, her statement of the issues is not set forth here. The state rephrases the issues as:

1. Has Herreman-Garcia failed to show fundamental error in the notice provided by the information regarding Count I?

2. Has Herreman-Garcia failed to show fundamental error in the absence of a special unanimity instruction?

3. Has Herreman-Garcia failed to show that the district court erred by holding irrelevant questions about whether an audit showed A&A owed additional taxes and regarding a witness's motive for committing an act he denied committing?

ARGUMENT

I.
Herreman-Garcia Has Failed To Show Fundamental Error In The Notice Provided By The Information Regarding Count I

A. Introduction

In Count I of the information the state charged Herreman-Garcia with "GRAND THEFT, FELONY, I.C. §[§] 18-2403(1), 2407(1)(b), 2409" committed as follows:

> That the Defendant, ANA GISELLE HERREMAN GARCIA, on or between the 9th day of March, 2009 and the 31st day of October, 2011, in the County of Ada, State of Idaho, did wrongfully take cash of a value in excess of One Thousand Dollars ($1,000.00) lawful money of the United States from the owner, A&A Landscape, with the intent to appropriate to herself certain property of another.

(R., pp. 52-53.) At trial, Herreman-Garcia objected, on relevance and I.R.E. 404(b) grounds, to admission of evidence that Herreman-Garcia had stolen money through checks (including paychecks), asserting the state's charge was limited to thefts of cash by use of a debit card. (Tr., p. 132, L. 17 – p. 133, L. 23; p. 136, L. 23 – p. 147, L. 12; p. 184, L. 11 – p. 185, L. 23; see also R., pp. 143-44 (further setting forth the defense theory that the state was limited to theft of "cash" and that creation of unauthorized checks on her own behalf was not theft of "cash").) The trial court held that the evidence was within the scope of the charge. (Tr., p. 147, L. 13 – p. 150, L. 19; p. 185, L. 24 – p. 186, L. 1.)

On appeal, Herreman-Garcia argues that Count I "does not meet the due process requirements of providing factual specificity" because it did not "inform [her] of the means of committing theft with which she was charged." (Appellant's brief, pp. 20-22.) This is a different issue than the one she raised at trial. She

has failed, however, to show fundamental error. Indeed, the issue Herreman-Garcia attempts to raise for the first time on appeal—that the notice was inadequate for not setting forth a specific method of theft—is an issue that was waived because it was not raised prior to trial.

B. Standard Of Review

Whether an information conforms to the requirements of law is "a question subject to free review." State v. Jones, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004).

Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). To show fundamental error the appellant must show that some action or inaction "(1) violates one or more of [her] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Id. at 228, 245 P.3d at 980.

C. Herreman-Garcia's Appellate Argument That The State Failed To Allege The Means By Which She Committed The Theft Is Not Preserved For Appellate Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). "For an objection to be preserved for appellate review, the specific ground for the

objection must be clearly stated." State v. Norton, 134 Idaho 875, 880, 11 P.3d 494, 499 (Ct. App. 2000) (citing I.R.E. 103(a)(1); State v. Gleason, 130 Idaho 586, 592, 944 P.2d 721, 727 (Ct. App. 1997)). Furthermore, to preserve an issue for appellate review, a party must obtain a ruling from the trial court. State v. Hester, 114 Idaho 688, 699, 760 P.2d 27, 38 (1988); State v. Pickens, 148 Idaho 554, 557, 224 P.3d 1143, 1146 (Ct. App. 2010) ("In order for an issue to be raised on appeal, the record must reveal an adverse ruling that forms the basis for the assignment of error."); see also State v. Wolfe, 158 Idaho 55, ___, 343 P.3d 497, 504 n.3 (2015) (burden is on movant to obtain ruling on motion, and failure to do so constitutes abandonment). Review of the record shows that Herreman-Garcia's appellate claim that Count I of the information was defective for failing to allege the means by which she accomplished the theft was not preserved for appellate review.

Below, Herreman-Garcia objected to the admission of evidence that she stole from her employer through improper checks, claiming she was charged only with stealing cash through unauthorized use of a financial transaction card, and therefore the evidence regarding theft by checks was inadmissible. (Tr., p. 132, L. 17 – p. 133, L. 23; p. 136, L. 23 – p. 147, L. 12; p. 184, L. 11 – p. 185, L. 23.) Specifically, counsel argued that the crime of getting cash out of an ATM with a debit card and issuing herself checks on her employer's account are "entirely different things." (Tr., p. 142, Ls. 4-17.) "These time cards are an entirely separate manner of theft," trial counsel argued, and therefore evidence of improperly issued paychecks was not relevant to the charge. (Tr., p. 138, Ls. 12-

15.) Because the checks related to an uncharged theft, according to trial counsel, evidence that Herreman-Garcia had stolen by use of checks was also inadmissible evidence of uncharged misconduct under I.R.E. 404(b). (Tr., p. 138, L. 22 – p. 139, L. 10.) Thus, although trial counsel claimed "surprise" that the state offered evidence of "an entirely different type of theft" than misuse of the debit card (Tr., p. 138, L. 22 – p. 139, L. 3) and claimed he was "under the understanding" that evidence of the theft would be limited to evidence of misuse of the debit card (Tr., p. 142, L. 25 – p. 143, L. 7), his theory was consistently that the state had limited itself to one method of theft (theft of cash by misuse of the debit card), which rendered inadmissible evidence of other methods of theft (issuing unauthorized checks and unearned paychecks to herself). In short, the claim below was that evidence of theft by checks was a variance from the charging document, which alleged only theft by debit card. See, e.g., State v. Johnson, 145 Idaho 970, 972-73, 188 P.3d 912, 914-15 (2008) (variance occurs when jury convicts on facts different than those pled in the charging document); State v. Gilman, 105 Idaho 891, 893, 673 P.2d 1085, 1087 (Ct. App. 1983) ("an accused person is denied due process by variance between the crime charged in a prosecutor's information and the crime upon which a judgment of conviction is entered").

On appeal, however, Herreman-Garcia does not claim a variance or that the trial court erred by allowing admission of evidence of a "different type of theft" than charged, but instead asserts that she lacked notice in Count I of any method of theft. (Appellant's brief, pp. 19-28.) Her claim is not that events at the trial

were a variance from the charge, but is rather a challenge to the language of the charge itself. (Id.) Herreman-Garcia's appellate claim that the charging document itself does not set forth sufficient facts to provide notice is therefore not preserved for appellate review because it is a different issue than raised by the objection below.

The distinction between the objection at trial and the argument raised on appeal is also important to the preservation question for a different reason. It is well established that "[d]efenses and objections based on defects in the ... information" must be "raised prior to trial." I.C.R. 12(b)(2). As noted above, trial counsel asserted that Count I of the information *did* provide adequate notice, but that the charge was limited to thefts of cash by the debit card and did not include theft by issuance of unauthorized checks; and therefore evidence of methods of theft other than misuse of the debit card were rendered inadmissible. Such a claim is not a claim of a "defect in the ... information," but is a claim that the charge is specific and that the error related to admission at trial of evidence unrelated to the charge creating a variance. Appellate counsel, however, contends Count I failed to provide notice of the method of theft. The appellate claim is therefore a claim of a "defect in the ... information" (lack of notice of the method of theft) that must be raised "prior to trial." I.C.R. 12(b)(2). Because Herreman-Garcia's appellate challenge "is one of due process," specifically "whether the charging document sufficiently advises the defendant of the nature of the charge," it is waived because "not raised prior to the commencement of trial." State v. Quintero, 141 Idaho 619, 622, 115 P.3d 710, 713 (2005).

Review of Herreman-Garcia's appellate claim of inadequate notice shows that it is raised for the first time on appeal and, more importantly, was a claim that was required to be raised prior to trial. Her appellate claim of inadequate notice must be deemed waived because not timely raised.

D. Even If The Argument Was Not Waived Because Not Raised Before Trial, Herreman-Garcia Has Failed To Show A Due Process Violation

"An information must be specific enough to advise a defendant as to the particular section of the statute he or she is being charged with having violated and, in addition, must set forth a concise statement of the facts constituting the alleged offense sufficient that the particular offense may be identified with certainty as to time, place and persons involved." State v. Dorsey, 139 Idaho 149, 151, 75 P.3d 203, 205 (Ct. App. 2003) (citing State v. Grady, 89 Idaho 204, 211, 404 P.2d 347, 351 (1965)). An information charging theft "is sufficient if it alleges that the defendant stole property of the nature or value required for the commission of the crime charged without designating the particular way or manner in which such property was stolen or the particular theory of theft involved." I.C. § 18-2409(1). A defendant is not entitled to "'notice of the evidence that the state plans to use to prove the charges.'" State v. Abdullah, 158 Idaho 386, ___, 348 P.3d 1, 75 (2015) (quoting Gray v. Netherland, 518 U.S. 152, 167-67 (1996)).

Review of Count I of the information shows it clearly meets these standards. The charge specifically cites the subsection under which Herreman-Garcia was charged (I.C. § 18-2403(1)), and explicitly sets forth the "time, place

and persons involved" ("between the 9th day of March, 2009 and the 31st day of October, 2011"; "in the County of Ada, State of Idaho"; and "ANA GISELLE HERREMAN GARCIA" and "A&A Landscape"). (R., pp. 52-53.) The lack of any mention of the debit card or the unauthorized checks as the mechanisms by which she accomplished the theft of cash was not a required part of the pleading. Dorsey, 139 Idaho 149, 151, 75 P.3d 203, 205 (information provides adequate notice if it identifies particular subsection was violated and identifies "time, place and persons involved"); I.C. § 18-2409(1) (information need not include "the particular way or manner in which such property was stolen or the particular theory of theft involved"). The charging document met the applicable legal standards.

Herreman-Garcia claims otherwise. First, she cites to State v. Owen, 129 Idaho 920, 928 n.8, 935 P.2d 183, 191 n.8 (Ct. App. 1997), for the proposition that I.C. § 18-2409(1) should be ignored by prosecutors because it may not meet due process requirements. (Appellant's brief, pp. 21-22.) This argument fails because Herreman-Garcia has not challenged, either below or on appeal, the constitutionality of that statute. The state specifically cited that statute as a basis for its pleading. (R., p. 52.) If the state's reliance on the statute—which specifically relieves the state of any duty to plead the method of theft—was misplaced, Herreman-Garcia had a duty to challenge that reliance before trial. Quintero, 141 Idaho at 622, 115 P.3d at 713 (claims of defects in the charging document such as alleged lack of notice must be raised prior to trial or are waived).

Moreover, Herreman-Garcia has failed to show that a charging document must specify "a particular method or way" that the theft was committed, such that it must allege that the cash was stolen by misuse of a credit card and issuing herself unauthorized checks. To the contrary, the charging document must specify what law was broken and allege the "time, place and persons involved." State v. Dorsey, 139 Idaho 149, 151, 75 P.3d 203, 205 (2003). See also Paterno v. Lyons, 334 U.S. 314, 320-21 (1948) (charge of receiving stolen property sufficient to provide notice of charge of larceny for purposes of guilty plea). Indeed, by rule the state may allege that the "means by which the defendant committed the offenses are unknown." I.C.R. 7(b). The "means by which" Herreman-Garcia accomplished the theft was not a requirement of an adequate pleading.

Finally, "a court can look to sources outside the charging document to determine whether a defendant had adequate notice of a *particular theory* of the case." Johnson, 145 Idaho at 975, 188 P.3d at 917 (emphasis added). Herreman-Garcia was notified as to the state's allegations of what she stole ("cash" as opposed to other personal property), when she stole it (between March 9, 2009 and October 31, 2011), from whom she stole it (A&A Landscaping), with what intent she stole (intent to appropriate), and what statute she violated (I.C. §§ 18-2403(1), 2407(1)(b)). (R., pp. 52-53.) As set forth below, theft by checks was specifically covered in the discovery and preliminary hearing.

Setting forth the exact means by which she stole the cash from A&A Landscaping was not a requirement for a proper pleading.[1] Review of the record shows no error, much less fundamental error.

Herreman-Garcia next argues that the defense was "clearly" taken by surprise to learn that the checks (as opposed to the debit card) were part of this case, citing as evidence the absence of any mention of checks in the opening argument, the objections to admission of evidence regarding the checks as evidence, and trial counsel's request for a recess to discuss Exhibit 2 with the defendant. (Appellant's brief, pp. 22-25.) The claim of surprise is far from clear on this record, however, which is in fact more consistent with trial counsel making the tactical decision to try and exclude evidence at trial on a variance theory rather than challenging the adequacy of the notice provided in the information prior to trial.

It was undisputed that the prosecution, in discovery, provided trial counsel evidence regarding the unauthorized checks even prior to the preliminary hearing, including the police reports discussing the theft by checks. (Tr., p. 139, L. 21 – p. 140, L. 5; p. 142, L. 22 – p. 143, L. 1; p. 146, L. 13 – p. 147, L. 12; PSI, pp. 37-45.) As noted by the trial court (Tr., p. 147, Ls. 18-25), at the preliminary hearing Herreman-Garcia's counsel elicited testimony that the only victim to testify believed unauthorized checks were part of the theft (P.H. Tr., p. 44, L. 19 – p. 45, L. 20). Finally, as noted above, trial counsel's objection was that the theft

[1] And if it was a required part of the pleading such that the information was defective without it, that claim was required to be raised prior to trial. I.C.R. 12(b)(6); Quintero, 141 Idaho at 622, 115 P.3d at 713.

by unauthorized checks should have been a separate charge of theft, and was therefore irrelevant and excludable as uncharged misconduct. (See also Tr., p. 145, Ls. 14-17.) Because counsel knew that the state had provided in discovery evidence that Herreman-Garcia had stolen from the victim by means of unauthorized checks as well as by means of a debit card, knew the victim had testified at the preliminary hearing that part of the theft involved checks, and knew that the police believed checks were part of the theft, the record shows at least a likelihood that trial counsel made the tactical decision to try to get evidence regarding the unauthorized checks excluded on a variance theory instead of making a pre-trial objection that, even if granted, would amount to nothing more than an amendment of the charging document (and possibly a new preliminary hearing) with no long-term advantage to Herreman-Garcia.

Herreman-Garcia has failed to show the information was defective for failing to give her notice of the "particular method or way" that she stole money from her employer during her time there as an office worker. Moreover, she waived any objection to any alleged lack of allegations regarding the "particular method or way" she stole the cash in Count I. Herreman-Garcia has therefore failed to set forth a viable claim of error, much less shown prejudicial constitutional error that is clear on the record.

II.
Herreman-Garcia Has Failed To Show Fundamental Error In The Absence Of A "Special" Unanimity Instruction

A. Introduction

Herreman-Garcia claims for the first time on appeal that she was entitled to a special unanimity instruction. (Appellant's brief, pp. 29-33.) Review of applicable law, however, shows that the jury's unanimous finding that Herreman-Garcia committed grand theft and forgery met constitutional requirements. She has therefore failed to show fundamental error.

B. Standard Of Review

Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). To show fundamental error the appellant must show that some action or inaction "(1) violates one or more of [her] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Id. at 228, 245 P.3d at 980.

C. The Jury's Unanimous Finding Of The Taking Element Was Consistent With Relevant Constitutional Standards

1. Herreman-Garcia Has Shown None Of The Three Prongs Of A Fundamental Error Test In Relation To The Grand Theft Conviction

When there are competing theories on how a particular element is shown by the evidence, jury unanimity is not constitutionally required. Schad v. Arizona,

501 U.S. 624, 631-32 (1991); State v. Severson, 147 Idaho 694, 711-12, 215 P.3d 414, 431-32 (2009). For example, where the evidence shows the defendant both poisoned and suffocated the victim, the jury need not decide if the single crime of murder was accomplished by suffocation or poisoning. Severson, 147 Idaho at 712, 215 P.3d at 432 ("Absent evidence of more than one instance in which Severson engaged in the charged conduct, the jury was not required to unanimously agree on the facts giving rise to the offense."). Likewise, where a course of conduct constitutes a single taking, a unanimous finding of the crime is all that is required. State v. Nunez, 133 Idaho 13, 18-19, 981 P.2d 738, 743-44 (1999) (although there were several "incidents," Nunez not entitled to instruction requiring jury to "unanimously agree on the underlying act on which the misuse of public monies conviction was based").

In this case the state charged Herreman-Garcia with a single crime of theft for wrongfully taking cash.[2] (R., pp. 52-53.) An element of the theft she was charged with was that she "wrongfully [took], obtain[ed], or with[held] ... property." I.C. § 18-2403(1). The jury was instructed that to find her guilty, they had to unanimously find that she "wrongfully took cash." (R., p. 122.) The evidence showed that Herreman-Garcia wrongfully took cash several times over a period of months or years by either improperly using a debit card or issuing herself unauthorized checks or paychecks. (See generally Tr.,) "Idaho law allows the aggregation of values of stolen property where the property is taken as

[2] As will be set forth below, the second count alleging forgery was double-charged and therefore created an error of due process. The error was not, however, fundamental, and was waived by failing to object before trial.

part of a common scheme reflecting a single, continuing larcenous intent." State v. Morrison, 143 Idaho 459, 462, 147 P.3d 91, 94 (Ct. App. 2006); see also State v. Lloyd, 103 Idaho 382, 383, 647 P.2d 1254, 1255 (1982); I.C. § 18-2407(b)(8). Because there was only one charged crime of grand theft, and the jury was unanimous that Herreman-Garcia committed it, there was no requirement of any specific unanimity instruction.

Herreman-Garcia asserts she was entitled to a special unanimity instruction because she "committed several temporally discrete acts of both theft ... and forgery which would independently support convictions of the charged crimes." (Appellant's brief, p. 29.) This argument misstates the relevant standards and fails to distinguish cases holding that such an instruction is not constitutionally required.

In Schad, 510 U.S. at 630, the petitioner claimed error because the jury was not required "to agree on one of the alternative theories of premeditated and felony murder." The claim of error "beg[ged] the question raised" because answering it would "fail to address the issue of what the jury must be unanimous about." Id. Because the state statute provided alternative means of proving the mental state element of the crime, "the State had proved what, under state law, it had to prove: that petitioner murdered either with premeditation or in the course of committing a robbery. The question still remains whether it was constitutionally acceptable to permit the jurors to reach one verdict based on any combination of the alternative findings." Id. Because of this, "petitioner's real challenge is to Arizona's characterization of first-degree murder as a single crime

as to which a verdict need not be limited to any one statutory alternative." Id. at 630-31. "The issue in this case, then, is one of the permissible limits in defining criminal conduct" and "not one of jury unanimity." Id. at 631.

The Court initially answered this question "by analogy" to the "long-established rule of the criminal law that an indictment need not specify which overt act, among several named, was the means by which a crime was committed." Id. The Court noted it had "never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone." Id.

The Court then discussed what due process limits apply to "a State's capacity to define different *courses of conduct*, or states of mind, as merely alternative means of committing a single offense, thereby permitting a defendant's conviction without jury agreement as to which *course* or state actually occurred." Id. at 632 (emphasis added). The ultimate determination is aimed at "differentiating what the Constitution requires to be treated as separate offenses." Id.

The grand theft was properly charged and tried as a single course of conduct offense. See I.C. § 18-2407(b)(8); Lloyd, 103 Idaho at 383, 647 P.2d at 1255; Morrison, 143 Idaho at 462, 147 P.3d at 94. Therefore there was in this case no due process error arising from charging or trying "separate offenses" in a single count because there was only one grand theft crime.

The "temporally discrete acts" test advocated by Herreman-Garcia was applied in a case addressing a charge of possession of methamphetamine. (Appellant's brief, p. 29 (citing State v. Southwick, 158 Idaho 173, 181-82, 345 P.3d 232, 240-41 (Ct. App. 2014)).) The full test is as follows: "Only when evidence is presented that the defendant has committed temporally discrete acts, *each of which would independently support a conviction for the crime charged*, should the trial court instruct the jury that it must unanimously agree on the specific incident constituting the offense ...." Southwick, 158 Idaho at 181-82, 345 P.3d at 240-41 (emphasis altered). Unlike in possession of methamphetamine cases, the legislature has determined that acts of theft committed in a course of conduct may be aggregated. I.C. § 18-2407(b)(8); Lloyd, 103 Idaho at 383, 647 P.2d at 1255; Morrison, 143 Idaho at 462, 147 P.3d at 94. Because the course of conduct in this case was aggregated, acts of theft within that course of conduct, even if temporally distinct, were no longer separate crimes that should have been charged and tried separately. Because the charge and the trial addressed only a single crime of grand theft, "the jury was not required to unanimously agree on the facts constituting the crime." Severson, 147 Idaho at 711, 215 P.3d at 431.[3] Herreman-Garcia has failed to demonstrate

[3] The state further notes that an alternate remedy to a special unanimity instruction is a prosecution election of which of several criminal acts is the subject of the charge. State v. Molen, 148 Idaho 950, 957-58, 231 P.3d 1047, 1054-55 (Ct. App. 2010); State v. Gain, 140 Idaho 170, 173, 90 P.3d 920, 923 (Ct. App. 2004). This is entirely consistent with the state's theory that the issue of unanimity is in question only where the separate acts are separate crimes, and not where the separate acts are part of the same crime.

that submitting the grand theft charge to the jury without requiring independent verdicts on each act of theft violated any constitutional right.

Herreman-Garcia has also failed to show clear error in the record. According to her appellate counsel she was effectively charged with and prosecuted for 59 theft counts, three grand and 56 petty. (Appellant's brief, p. 31.) If her counsel had argued that these were effectively separate charges, and the state must obtain verdicts on each, then the state would have no incentive to aggregate them. Herreman-Garcia could have been facing 59 counts of theft, three of them grand theft, instead of a single grand theft charge. Thus, trial counsel had an incentive to not raise this issue and instead face trial on a single count.

More importantly, however, Herreman-Garcia has shown only that the need to either limit the acts the jury can consider or require that they decide which act was committed arises only where evidence of distinct acts that would be separately chargeable is presented at trial. She has not shown that multiple acts in a course of conduct require such steps. For example, in Severson the acts in question were overdosing the victim with sleeping pills and smothering her. 147 Idaho at 700-701, 215 P.2d at 420-21. Although each of these acts was necessarily done within sufficient proximity to the victim's death to be considered a cause of death, they could very easily have been separated by several hours. The temporal proximity of the acts was not a relevant consideration in the case because there was only a single death, and therefore a single crime. Id. at 711-12, 215 P.3d at 431-32; Nunez, 133 Idaho at 18-19, 981

P.2d at 743-44 (no requirement of special unanimity instruction on which of several acts constituted crime of misuse of public funds). Although the temporal test she advocates for has been used when such would differentiate between acts that are independent crimes, it is not applicable where, as here, it would not show that the separate acts constitute separate crimes.

Finally, Herreman-Garcia has failed to show prejudice. The jury unanimously convicted her of grand theft, so any prejudice analysis must start from the premise that each and every juror thought she was guilty of grand theft. The only question is whether they would have been unable to unanimously decide how she was guilty of grand theft.

The evidence presented by the state showed that Herreman-Garcia used the company debit card in an unauthorized fashion 17 times over slightly more than four months for a total theft of $6,205.50, averaging $365 per transaction. (Exhibit 12 (Exhibits file, p. 1508).) Over two years she issued herself 16 duplicate paychecks and 17 paychecks including payment for hours not worked. (Exhibit 10 (Exhibits file, p. 1506).) The unauthorized paychecks totaled $9,249.53, and averaged $280.29 stolen per check. (Id.) She also issued 10 checks directly to herself over 17 months totaling $7,492.19, the value of the checks averaging $749.22 per check. (Exhibit 11 (Exhibits file, p. 1507).) Three of the checks individually were for $1,000 or more each. (Id.) In total, the evidence showed that over 22 months Herreman-Garcia stole $22,947.22. The odds that the jury could not have unanimously agreed on an act or acts constituting a single count of grand theft are vanishingly small.

On appeal Herreman-Garcia claims she had viable defenses. These defenses center on claims that she had permission to do what she did. (Appellant's brief, pp. 32-33.) The flaw in her argument is that the jury necessarily rejected these claims when it found her guilty of grand theft beyond a reasonable doubt. She also claims "there is a reasonable probability that not all the jurors agreed on any one instance of ... theft." (Appellant's brief, p. 33.) This is merely wishful thinking, not a showing from the record. The evidence shows she stole over $20,000. (Exhibits 10-12 (Exhibits file, pp. 1506-08).) The possibility that 12 jurors already convinced beyond a reasonable doubt that she was guilty of grand theft could not unanimously agree on a single theft or course of conduct by which she stole over $1000 is, at best, unlikely.

Herreman-Garcia has failed to show fundamental error. Because there was only one crime of grand theft charged and proved at trial, she was not entitled to any remedy such as a state election of which crime was charged or a special unanimity instruction. Her claim of error is not clear on the record because there was little to no tactical advantage to be gained by requesting a special unanimity instruction in this case and because Herreman-Garcia has been unable to cite any case actually holding that a special unanimity instruction is constitutionally required where only one crime is charged in a single count and the evidence at trial proves only that one crime. Finally, she has failed to show prejudice because the evidence is overwhelming and the jury necessarily rejected her defenses and claims of innocence when it convicted her beyond a reasonable doubt at trial.

2. Herreman-Garcia Has Shown None Of The Three Prongs Of A Fundamental Error Test In Relation To The Forgery Conviction

The analysis on the forgery count is different because the state charged two crimes in a single count. "Whether a course of criminal conduct should be divided or aggregated depends on whether or not the conduct constituted 'separate, distinct and independent crimes.'" State v. Major, 111 Idaho 410, 414, 725 P.2d 115, 119 (1986) (quoting State v. Hall, 86 Idaho 63, 69, 383 P.2d 602, 606 (1963)). The forgery statute defines the applicable crime as "falsely ... alter[ing] ... any ... check." I.C. § 18-3601. Unlike the grand theft statute, which aggregates multiple thefts committed as part of a single common scheme or plan, there is nothing in the forgery statute aggregating multiple acts of forgery into a single crime. Id. Thus, the state's charge that Herreman-Garcia committed a crime of forgery by forging "check #5008 ... and/or check #581" (R., p. 53) clearly combined two separate forgeries into a single count.

The Idaho Court of Appeals has set forth the law applicable to duplicitous charges:

> Duplicity refers to the charging of more than one offense in a single count of the charging document. A duplicitous charge can prejudice the defendant in the shaping of evidentiary rulings, in producing a conviction on less than a unanimous verdict as to each separate offense, in sentencing, in limiting review on appeal, and in exposing the defendant to double jeopardy. One instance of duplicity occurs when the prosecution fails to recognize that each repetition of an act constitutes a separate offense and therefore includes a series of acts in one count.

State v. Jones, 140 Idaho 41, 48-49, 89 P.3d 881, 888-89 (Ct. App. 2003) (internal citations and quotations omitted). Because a duplicitous charge is a problem contained within the charging document, it must be addressed prior to

trial. I.C.R. 12(b)(2) ("objections based on defects" in the charging document "must be raised prior to trial").[4]

In this case the state charged two different forgeries in a single forgery count. (R., p. 53.) The jury instruction on the elements of forgery, to which trial counsel did not object, simply repeated the "and/or" language from the information. (R., p. 127.) Because the state put Herreman-Garcia on notice that it was including two different check forgeries in its forgery count, and Herreman-Garcia had a procedural obligation to raise her objection to proceeding to trial on such an allegation, her failure to raise this issue before trial constitutes implicit consent to be tried as charged. She has failed to show that being tried for two forgeries on an "and/or" basis was a violation of an "unwaived" constitutional right.

Moreover, she has failed to show that such a violation was clear in the law because she has failed to show that she may elect a remedy of a "special unanimity instruction" to a problem that was curable (and indeed, required to be cured) before trial. Additionally, because the state did charge two felonies in one count it is entirely reasonable for counsel to elect to proceed to trial on one count rather than raise the issue of the duplicitous charge. Although the duplicitous charge created a risk of a less than a unanimous verdict on a single forgery

[4] A very similar due process problem that may produce a less than unanimous verdict is variance, where the state's evidence presents two crimes where only one is charged. See State v. Johnson, 145 Idaho 970, 188 P.3d 912 (2008); Heilman v. State, 158 Idaho 139, 344 P.3d 919 (2015); State v. Montoya, 140 Idaho 160, 90 P.3d 910 (Ct. App. 2004). Unlike a duplicitous charge, this issue may not be addressable until trial.

charge, such risk was entirely tolerable given that objecting to the duplicity might easily result in two separate felony charges.

Finally, there was no prejudice. The jury found her guilty of forgery beyond a reasonable doubt. She has presented no cogent theory based on the evidence as to why some jurors would have believed she forged one check but not the other, much less why jurors would have differed as to which check was forged and which was not.

Although the forgery charge was duplicitous because it included two crimes of forgery within a single count, Herreman-Garcia has shown no violation of an unwaived constitutional right in the failure to remedy the duplicity with a special unanimity instruction because I.C.R. 12(b)(2) required her to seek a pre-trial remedy. Moreover, the error she claims is not clear as a matter of law because no cases hold that a duplicitous charge in an information should be addressed through a special unanimity instruction, and there is nothing in the record suggesting counsel did not make a tactical decision to not challenge the duplicity. Finally, Herreman-Garcia has shown no prejudice.

III.
Herreman-Garcia Has Failed To Show Error In The Court's Rulings On Questions Regarding Tax Fraud

A. Introduction

Antonio Ayon, one of the owners of A&A Landscaping, testified that the thefts committed by means of false paychecks came to light as a result of an audit of A&A's books. (Tr., p. 206, L. 24 – p. 208, L. 3.) In cross-examination trial counsel asked Antonio about that 2012 audit and a prior audit. (Tr., p. 215,

L. 8 – p. 218, L. 13.) Counsel asked, in reference to the audit that disclosed the paycheck discrepancies, whether Antonio "owed any money to the government as a result of that?" (Tr., p. 218, Ls. 14-15.) The prosecution objected on relevance grounds. (Tr., p. 218, Ls. 16-17.) The court, after entertaining an argument from trial counsel, sustained the objection. (Tr., p. 218, L. 18 – p. 219, L. 19.) Later in cross-examination regarding the altered checks trial counsel asked, "Isn't it true that by writing the check to Giselle [Herreman-Garcia] or by adding Giselle's name to the pay line, excuse me, that you are avoiding tax liability for the income—" (Tr., p. 255, Ls. 2-5.) The district court interjected itself into this bit of defense counsel misconduct, reaffirmed its prior relevance ruling, and instructed the jury that questions were not evidence. (Tr., p. 255, Ls. 6-13.)

On appeal Herreman-Garcia claims the district court erred by excluding questions regarding whether the victim was engaged in tax fraud by giving the defendant money. (Appellant's brief, pp. 37-39.[5]) Review shows this claim is meritless.

B. Standard Of Review

Relevance of evidence is reviewed de novo, but other questions of admissibility of evidence are reviewed for an abuse of discretion. State v.

[5] She also challenges the rulings on her I.R.E. 403 and 404(b) objections, made in the context of trying to exclude evidence of the grand theft that did not relate to the debit card. (Appellant's brief, pp. 34-36.) This argument is premised on the validity of her due process challenge to the information. (Id.) Because the due process challenge is meritless, as shown above, the state does not intend to further address this claim of error.

Zichko, 129 Idaho 259, 264, 923 P.2d 966, 971 (1996); State v. Lamphere, 130 Idaho 630, 632, 945 P.2d 1, 3 (1997).

C. The Questions At Issue Were Not Reasonably Likely To Elicit Relevant Information

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." I.R.E. 401; State v. Hocker, 115 Idaho 544, 768 P.2d 807 (Ct. App. 1989). The first question at issue was, "Do you know if you owed any money to the government as a result of [the 2012 audit]?" (Tr., p. 218, Ls. 14-15.) Antonio's knowledge of whether the audit resulted in him owing additional taxes was not shown by any evidence to be relevant to the thefts or forgery. The second question, *asked after the witness denied adding Herreman-Garcia's name to the pay line of a check* (Tr., p. 254, L. 16 – p. 255, L. 1), was, "Isn't it true that ... by adding [Herreman-Garcia]'s name to the pay line ... you are avoiding tax liability for the income[?]" (Tr., p. 255, Ls. 2-5). The question about the witness's motive was irrelevant because he had already denied doing the act. The record thus establishes that, without evidence, trial counsel attempted to interject an inference that Antonio or A&A was engaged in tax fraud. This improper tactic was correctly rejected by the trial court.

The entirety of Herreman-Garcia's argument is as follows: "Obviously, this evidence was relevant to establishing the defense that A&A had authorized the

transfer of checks to Ms. Herreman-Garcia to avoid tax liability." (Appellant's brief, p. 38.) Not only is this theory of relevance not "obvious," it is meritless.

Antonio repeatedly testified that Herreman-Garcia did not have authorization to use the debit card, write herself personal checks, or issue herself paychecks that were either duplicates or for hours not worked. (Tr., p. 175, L. 14 – p. 177, L. 14; p. 179, Ls. 1-10; p. 180, Ls. 8-24; p. 181, Ls. 18-21; p. 192, Ls. 1-11; p. 213, Ls. 7-18; p. 214, L. 25 – p. 215, L. 7.) In regard to the altered checks under the forgery count, he testified that he re-sent the bills to the customers and they claimed to have paid. (Tr., p. 202, L. 15 – p. 203, L. 8.) The customers produced copies of the cancelled checks. (Tr., p. 203, L. 9 – p. 204, L. 9.) The cancelled checks provided by the customers was what revealed that the defendant's name had been added to the payee line. (Tr., p. 204, L. 8 – p. 206, L. 23; Exhibits 4 (Exhibits file, pp. 141-42), 6 (Exhibits file, p. 148).) The two customers confirmed these events. (Tr., p. 102, L. 25 – p. 112, L. 1; p. 114, L. 16 – p. 123, L. 12.) Because the only evidence was that the witness did not authorize the acts constituting the forgery and theft, questions about whether the witness was motivated by a desire to commit tax fraud were irrelevant and misconduct.

Moreover, Herreman-Garcia has presented no cogent legal theory explaining how the transactions underlying the charges in this case could have constituted tax fraud. Even accepting her defense theory that Antonio gave permission for her to do these things and that they constituted loans (see, e.g., Tr., p. 536, L. 13 – p. 537, L. 22), Herreman-Garcia has completely failed to

articulate how these loans constituted tax fraud. Herreman-Garcia has failed to show how questions regarding taxes owed after the audit or motive to commit tax fraud would have elicited relevant evidence.[6]

Finally, an error is harmless "if a reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of the challenged evidence." State v. Vondenkamp, 141 Idaho 878, 887, 119 P.3d 653, 662 (Ct. App. 2005). Any error was necessarily harmless because, even if the questions were properly designed to elicit relevant evidence, the record shows that they would not have elicited evidence favorable to the defense. As shown above, the questions were whether the 2012 audit showed that A&A Landscaping owed money on taxes and the second was whether Antonio added Herreman-Garcia's name to the forged checks to reduce tax liability. The answer to the first ("Yes, we owed additional taxes" or "No, we owed no additional taxes") would not have reasonably changed the outcome of the trial. As to the second question, we know the answer—Antonio testified he did not alter the checks, so he necessarily did not do so to commit tax fraud.[7]

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[6] The questions were also objectionable under I.R.E. 403 because inserting tax fraud allegations without any good faith basis for doing so was highly prejudicial. The state requests this Court to consider this as an alternative ground for affirming the district court. See Total Success Investments, LLC v. Ada County Highway Dist., 148 Idaho 688, 696, 227 P.3d 942, 950 (Ct. App. 2010) ("an appellate court may affirm the district court's decision if an alternative legal basis supports it").

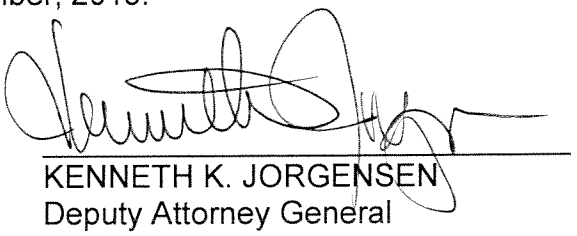
[7] Herreman-Garcia ultimately presented no evidence of tax fraud. (See generally Tr.)

Beyond a reasonable doubt, allowing the defense to question Antonio about tax fraud would have produced no evidence even marginally helpful to the defense, much less the type of evidence that would have called the overwhelming evidence of grand theft and forgery into doubt. The district court properly prevented questioning about tax liability and fraud, but even if the questions had been proper any error was harmless.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 18th day of December, 2015.



KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of December, 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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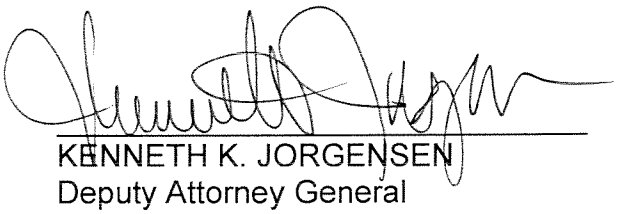

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KKJ/dd