11-25-2015

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, vs. ANA GISELLE HERREMAN-GARCIA, Defendant/Appellant.	)	S.Ct. Docket No. 42941 Ada Co. CR-FE-2014-5550

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District
of the State of Idaho In and For the County of Ada

HONORABLE DEBORAH A. BAIL
District Judge

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II. STATEMENT OF THE CASE

A. *Nature of the Case*

Appellant Ana Herreman-Garcia is appealing from convictions for grand theft and forgery following a jury trial. R 170-174, 180-184. Relief should be granted for these reasons: 1) structural error occurred when the State denied Ms. Herreman-Garcia her state and federal constitutional rights to due process by failing to provide her notice of the charge she would be facing sufficient so that she could prepare a defense; 2) constitutional error occurred when the Court failed to give specific unanimity instructions; and 3) evidentiary errors occurred, which the State cannot prove harmless beyond a reasonable doubt.

B. *Procedural History*

On April 11, 2014, the State filed a complaint alleging that Ms. Herreman-Garcia committed felony grand theft in violation of I.C. § 18-2403(1), 2407(1)(b), 2409 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 ($1000.00) lawful money of the United States from the owner, A&A Landscape, with the intent to appropriate to herself certain property of another.

R 7-8.

On the day of the preliminary hearing, the State amended the complaint to add a count of forgery, felony, I.C. § 18-3601, and a count of criminal possession of a financial transaction card, felony, I.C. § 18-3125, 3128. With regard to the forgery,

the State alleged:

> That the Defendant, ANA GISELLE HERREMAN GARCIA, on or between the 8th day of August, 2010 and the 3rd day of November, 2010, in the County of Ada, State of Idaho, did, falsely and with the intent to defraud another, forge a certain written instrument, to wit: check #5008 on the account of Mukesh Mittal and Manisha Mittal payable to A&A Landscape LLC in the amount of $652.01, and/or check #581 on the account of Terra Nativa Homeowners Association payable to A&A Landscape in the amount of $1375.00 by adding Ana Garcia to the 'Pay to the Order of" section of the check.

R 47-48.

At the preliminary hearing, the State offered testimony that Ms. Herreman-Garcia used an ATM card from A&A to make unauthorized purchases and cash withdrawals. Prelim. T. p. 8, ln. 5-p. 17, ln. 1. The State also offered testimony regarding the Mittal and Terra Nativa Homeowners Association (HOA) checks. Prelim. T. p. 17, ln. 11-p. 25, ln. 25.

At the close of the hearing, the Court dismissed Count III and bound over on Counts I (grand theft) and II (forgery). Prelim. T. p. 86, ln. 8-p. 89, ln. 9. The Court stated that its understanding was that Count I, grand theft, related to the alleged use of the ATM card including cash withdrawals and unauthorized purchases as well as the Mittal and HOA checks and that Count II referred simply to alleged forgeries on the two checks. Prelim. T. p. 89, ln. 10-p. 90, ln. 8. And, the State confirmed this. Prelim. T. p. 90, ln. 10-11. In response, defense counsel stated, "Okay. I wanted to make sure of that. Thank you, Your Honor." Prelim. T. p. 90, ln. 12-13.

The State filed the information using the same language as the amended complaint. R 52-53.

The case went to trial. R 100-113.

At trial, the State presented evidence, over objection, of not only cash transactions, but also of a variety of other alleged thefts, including theft of goods and services using the ATM card, falsification of payroll records, receipt of double pay and receipt of other checks.

Ms. Herreman-Garcia was convicted. R 134-35.

The Court denied Ms. Herreman-Garcia's motion for judgment notwithstanding the verdict and in the alternative for a new trial, Tr. p. 709, ln. 8-23, and sentenced her to concurrent terms of six months fixed followed by an indeterminate term of 5 and ½ years. The Court also imposed restitution in the amount of $34,569.96. R 164-166.

This appeal timely follows. R 170-174; 180-184.

C. *Statement of Facts*

The State opened its case with Mukesh Mittal's testimony that in 2010, he wrote a check for $652.01 to A&A for its services. Tr. p. 107, ln. 2-7. The check was withdrawn from his account. Tr. p. 108, ln. 2-5. The image of the check after it was negotiated showed that someone had added the name Ana Garcia to the "pay to the order of" section. State's Ex. 4, Ex. CD p. 141. Mr. Mittal did not write that name on the check, nor did he give anyone permission to alter the check. Tr. p. 111, ln. 3-

22.

The State also presented the testimony of Richard Pavelek, the secretary of Terra Nativa Homeowner's Association. Tr. p. 114, ln. 8-p. 115, ln. 3. On October 28, 2010, he wrote a check to A&A on behalf of the HOA for $1875.00. Tr. p. 117, ln. 17-21. Between the time he wrote it and the time it was negotiated, someone added the name "Ana Garcia" to the "pay to the order" section. State's Ex. 5, Ex. CD p. 142, 148. He did not give anyone permission to add that name to the check. Tr. p. 122, ln. 19-23.

The State then offered the testimony of Federico Munoz, an employee and cousin, of the owners of A&A. Tr. p. 127, ln. 7-p. 128, ln. 25. He took over Ms. Herreman-Garcia's job with A&A when she left the company. Tr. p. 128, ln. 7-p. 130, ln. 12.

Mr. Munoz testified that he investigated Mr. Mittal's check and found that rather than depositing the check, a credit had been applied to his account. Tr. p. 131, ln. 4-10.

As soon as it became apparent that the State intended to offer Mr. Munoz's testimony as to payroll records of and pay checks issued to Ms. Herreman-Garcia, she objected. Tr. p. 132, ln. 8-25. Counsel argued that the payroll records and checks were not relevant to the charges in the information. The Court responded that the evidence was relevant to Count I, grand theft. Counsel stated that Count I charged theft of cash and so payroll records and checks were not relevant. The

Court replied, "That's not how Count I is framed. It is framed as in excess of $1000, so the objection is overruled." Tr. p. 133, ln. 1-23.

Shortly later, outside the presence of the jury, defense counsel was allowed to add to the objection. He argued that the State was engaged in a "very big bait and switch." Specifically, the information charged that Ms. Herreman-Garcia "did wrongfully take cash" and at the preliminary hearing the State offered evidence of cash withdrawals made with an ATM card and the two checks which were alleged to be forged. Now at trial, the State was offering evidence of time cards and payroll checks, an entirely different mode of theft. Counsel asserted that this is was a complete surprise. Counsel argued that the evidence was irrelevant to the charge in the information and was also improper IRE 404(b) propensity evidence, and even if it was relevant and admissible under IRE 404(b), it should still be excluded under IRE 403 as it is extremely prejudicial. Tr. p. 137, ln. 16-p. 139, ln. 15.[1]

The State argued that the defense could not be surprised as the payroll records and checks had been provided in discovery. Tr. p. 141, ln. 1-10. Defense counsel responded that theft of cash using the ATM card is different than theft through false time cards. Defense counsel concluded with the argument that if the payroll records and checks were now to be used, his client was denied her right to a preliminary hearing. Tr. p. 142, ln. 16-p. 145, ln. 17.

The Court overruled the objection, noting that there was a reference to

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[1] The State never gave IRE 404(b) notice of its intent to introduce other bad acts evidence. R 2-6.

double paychecks at the preliminary hearing. Tr. p. 148, ln. 1-4. That reference was as follows:

> Q [by Prosecutor]: Other than the fraudulent activity that you were alleging against Ms. Herreman, are you aware of any other problems with these checks?
>
> A [Martina Garcia-Caro, part owner of A&A]: The checks that have been presented so far [Mittal and Terra Nativa checks], or are you referring to other checks?
>
> Q: Just any of the checks that you provided to the police.
>
> A: I gave them more checks. There are payroll checks. There is double payroll checks in 2010.
>
> Q: Okay. You are saying Ms. Herreman did that?
>
> A: Yes.

Prelim. T. p. 45, ln. 4-16.

Mr. Munoz's trial testimony continued. He testified as to State's Exhibits 1 and 2, which included a number of time cards filled out for "Giselle" and paychecks for Ms. Herreman-Garcia and copies of 10 checks other than payroll drawn on A&A's account payable to Ms. Herreman-Garcia and signed by Antonia Ayon or Martina Garcia, owners of the company. Tr. p. 151, ln. 19-p. 158, ln. 25. State's Ex. 1 and 2.

Antonio Ayon testified that he is a part owner of A&A along with Martina Garcia and Alejandro Ayon. Alejandro and Martina are married. The business operates in Boise and in North Dakota. Tr. p. 171, ln. 23-p. 172, ln. 25. Ms. Herreman-Garcia is Martina Garcia's niece. Tr. p. 173, ln. 10-18.

Ms. Herreman-Garcia worked at A&A in Boise from the end of 2009 through October 2011. She was in charge of the office, payroll, time sheets, vendor payments, and invoicing. Mr. Ayon could not remember if anyone else helped her with those jobs. Tr. p. 175, ln.1-p. 176, ln. 7. Mr. Ayon, as part-owner, was responsible for signing the checks. Sometimes in emergencies, he would give her permission to sign on his behalf and then he would review the checks later. However, he also testified that he just signed checks and did not pay too much attention. Tr. p. 176, ln. 8-p. 178, ln. 20.

Mr. Ayon testified that Ms. Herreman-Garcia was never given authority to receive paychecks for hours she did not work nor to receive more than one paycheck per pay period. Tr. p. 179, ln. 1-8.

Mr. Ayon also testified that the business had multiple debit cards associated with its checking account at U.S. Bank. The bank account was to be used for business purposes only, but sometimes the owners used it for personal expenses. However, employees were never given authority to use the account for personal expenses. Some employees were allowed to use the debit cards for work related items. But, Ms. Herreman-Garcia was not given authority to use a debit card. Tr. p. 179, ln. 11-24.

Mr. Ayon testified that Ms. Herreman-Garcia was responsible for invoicing and entering payments in the books. However, she was never given authority to receive customer payments in her own name. Tr. p. 181, ln. 6-20.

In October 2011, Mr. Ayon deposited money in U.S. Bank and looked at his balance. He asked to see a statement, and he saw that there were some expenses that did not belong to A&A. Tr. p. 183, ln. 4-p. 12.

At this point, defense counsel again objected as the information referred to cash transactions and the State was now introducing evidence that did not involve cash but rather involved the purchase of goods and services using a card. Counsel also objected on IRE 404(b) grounds. Tr. p. 184, ln. 13-23; p. 185, ln. 20-23. The Court overruled, holding that the evidence was relevant on multiple grounds both as to the offense charged and as to the fact that Mr. Ayon discovered what was going on and made further inquiry. Tr. p. 185, ln. 10-16.

Mr. Ayon testified that he figured out that Ms. Herreman-Garcia was the one making the purchases and withdrawing money because some of the debits occurred in San Francisco, where she had gone on a trip. Tr. p. 186, ln. 6-p. 187, ln. 7.

Mr. Ayon had the bank cancel the card. Tr. p. 188, ln. 7-8.

Mr. Ayon thought that the card in question was intended for use by his brother Alejandro, but he was not sure. In June 2011, Alejandro began working in North Dakota and the card was simply to be kept in the desk Ms. Herreman-Garcia used in the Boise office. It was to be used only in an emergency with Mr. Ayon's permission. Between June and October 2011, it should not have been used. Tr. p. 189, ln. 20-p. 192, ln. 11.

Mr. Ayon asked Ms. Herreman-Garcia why she did this thing to him and she

told him she was sorry and she had taken money because she needed it because she had cancer. He told her that he would help her if she asked, but this was not the way to do it. She hugged him and he waited to discuss this with Martina Garcia. Tr. p. 194, ln. 11-p. 195, ln. 4.

Mr. Ayon asked Ms. Herreman-Garcia to leave the Boise job and "call it done." She told him that she was going to repay him everything and told him that he could take her cars. He told her, "No." Then she offered to pay him $3000 every three months, but he told her to pay $1000 every month. So they entered a written agreement which they had notarized on December 12, 2011. Tr. p. 195, ln. 8-p. 196, ln. 16.

The agreement states:

> I, Ana Giselle Herreman Garcia, agree that I owe Antonio Ayon for the sum of $18,056.44 with a 12% annual interest rate totaling to the amount of $21,306.70. If paid in full prior to October 2013 total amount may be less interest being paid and that I will pay the sum in accordance with the following terms:
>
> 1. I will pay and (sic) installment of $1000.00 each month.
>
> 2. The first installment must be made to Antonio Ayon no later than January 1, 2012.
>
> 3. Every following installment must be made to Antonio Ayon no later the (sic) 5th day of every month until it is paid in full.
>
> 4. Should three consecutive installments not be paid on time, Antonio Ayon, without any further notice may cancel this agreement and undertake legal action proceedings to recover the outstanding sum and all legal

costs.

5. I agree to notify Antonio Ayon immediately if I change my address or telephone number. I understand that if I do not notify Antonio Ayon of such changes, without any further notice he may cancel this agreement and undertake legal action for recovery of the sum and all legal costs.

State's Ex. 7.

On the second page of the agreement, the notary described it as an "Agreement to pay Debt." *Id.*

Mr. Ayon testified that he did not remember exactly what the sum in the agreement represented, and it might include items not related to the debit card, but primarily it referred to use of the debit card. Tr. p. 201, ln. 11-p. 202, ln. 10.

Mr. Ayon further testified that Ms. Herreman-Garcia made some payments, but not all. And, so he believed that he should make a police report. Tr. p. 200, ln. 11-p. 201, ln. 4.

After he made the agreement, he was contacted by Mr. Mittal and the HOA saying that they had paid bills that had not been recorded on A&A's books. When they sent him the cancelled checks he saw Ms. Herreman-Garcia's name on the pay to the order line and concluded she had cashed the checks. Tr. p. 202, ln. 25-p. 204, ln. 15. However, she did not have permission to do this. Tr. p. 206, ln. 12-19.

A&A was audited by the government beginning in December 2012. Tr. p. 206, ln. 24-p. 207, ln. 2. In the audit, they learned that there were some "double checks" issued to Ms. Herreman-Garcia, including pay checks. Tr. p. 207, ln. 9-0.

208, ln. 3. State's Exhibit 2 includes those checks. Tr. p. 208, ln. 6-25.

Mr. Ayon does not know why the checks were issued to her. Two of them contain his authentic signature, but when he signs checks he does not pay attention to what he is signing. Tr. p. 209, ln. 7-p. 210, p. 21.

Mr. Ayon also testified that he does not know who signed his name on the checks that did not have his "authentic" signature. Tr. p. 222, ln. 19-p. 225, ln. 2. The checks which did not have his authentic signature had his name written in a variety of ways inconsistent with one another and with his actual signature. Tr. p. 226, ln. 13-p. 231, ln. 20. He had at times given Ms. Herreman-Garcia authority to sign checks in emergencies, but he had not given anyone else that authority. Tr. p. 235, ln. 22-p. 236, ln. 6. Of the inauthentic signatures, he believed one is possibly Ms. Herreman-Garcia's, but he could not testify that it was hers. Tr. p. 238, ln. 14-18. Mr. Ayon testified that probably the other owners had signed his name to checks. As for the "Ana Garcia" added to the Mittal and HOA checks, he did not think one of the other owners added the words, but that was "just my feelings." Tr. p. 242, ln. 1-13.

Mr. Ayon did not go to the police until 2013. By that time, Ms. Herreman-Garcia no longer worked for the Boise office. However, the other two owners of the company had hired her to work in the North Dakota office, despite knowing Mr. Ayon's allegations of theft. Tr. p. 250, ln. 9-252, ln. 18.

Martina Garcia, a co-owner of A&A and Ms. Herreman-Garcia's aunt,

testified that Ms. Herreman-Garcia ran everything in the office. Tr. p. 262, ln. 12-p. 264, ln. 19. She also testified that Ms. Herreman-Garcia was never given a debit card connected to A&A's account and that she was never authorized to use such a card. Tr. p. 267, ln. 2-8.

The card at issue in this case was, according to Ms. Garcia, primarily used by Alejandro Ayon who by June 2011 was in North Dakota. The card was to be kept in Ms. Herreman-Garcia's desk. Tr. p. 268, ln. 1-12.

Ms. Garcia testified as to State's Exhibit 8, bank statements for the account connected with the card. Over defense objections on the basis of IRE 404(b), 403, and 402, she was allowed to testify as to transactions in San Francisco in October 2011. These included an ATM withdrawal for $303. When she saw the California transactions, she knew that Ms. Herreman-Garcia was using the card because she had requested permission at the office to travel to San Francisco. Tr. p. 272, ln. 15-24. However, she did not have permission to use the card there. Tr. p. 273, ln. 6-7.

Ms. Garcia and Ms. Herreman-Garcia's mother met with Ms. Herreman-Garcia. Ms. Herreman-Garcia admitted that she had used the card and said that she was very sorry. Following this, Antonio fired her from the Boise office. Tr. p. 273, ln. 13-p. 274, ln. 7.

Later, over Antonio's objection, Ms. Garcia and her husband Alejandro hired Ms. Herreman-Garcia to work in the North Dakota office to give her a chance to repay what she owed on the card. Tr. p. 274, ln. 8-p. 275, ln. 2.

Ms. Garcia testified that they waited until October 2013 to report the alleged thefts to the police because it was only then, through A&A's IRS audit that they discovered that Ms. Herreman-Garcia had been paying herself for hours she had not worked. Tr. p. 278, ln. 2-p. 280, ln. 16. Unlike Mr. Ayon, Ms. Garcia testified that she recognized Ms. Herreman-Garcia's handwriting on several of the checks which bore his name but not his signature. She also recognized Ms. Herreman-Garcia's signature on the reverse side of the checks endorsing them. Ms. Garcia testified that Ms. Herreman-Garcia can imitate other's handwriting. Tr. p. 281, ln. 22-p. 287, ln. 25. She further testified that Alejandro has always had authority to sign Antonio Ayon's name on A&A checks. Tr. p. 293, ln. 9-10.

Ms. Garcia contacted the police in 2013, about a month or two after Ms. Herreman-Garcia and Ms. Garcia's brother, Hugo, opened their own landscape business in North Dakota in competition with A&A. Tr. p. 307, p. 15-p. 308, ln. 16.

With regard to the unauthorized transactions on the card, Ms. Garcia testified regarding several transactions for goods and services that she believed Ms. Herreman-Garcia had wrongfully made. Tr. p. 347, n. 7-p. 351, ln. 14.

Detective Wade Spain of the Boise Police Department testified that he obtained the records of Ms. Herreman-Garcia's account with Bank of America which were introduced as State's Exhibit 9. Tr. p. 383, ln. 1-p. 384, ln. 7. Again, defense counsel lodged an objection based upon IRE 404(b), 403, and 402 which was overruled. Tr. p. 385, ln. 11-17.

Detective Spain testified that he investigated four methods of theft in this case: 1) misuse of the debit card for personal purchases; 2) paychecks paid for time not worked and/or duplicate paychecks; 3) unauthorized checks coming from A&A to Ms. Herreman-Garcia for no explainable reason; and 4) misdirected checks – payment made to A&A but deposited in Ms. Herreman-Garcia's personal account. Tr. p. 389, ln. 1-18. State's Exhibit 10 is a summary by Detective Spain listing all duplicate and excessive paychecks to Ms. Herreman-Garcia and all unexplainable checks from A&A to her. It was admitted over the on-going defense objection per IRE 402, 403, and 404(b). Tr. p. 403, ln. 23-p. 404, ln. 4. Exhibit 11 is a comparison of ATM cash withdrawals from A&A's account with cash deposits into Ms. Herreman-Garcia's personal account. Detective Spain also discovered that the Mittal and HOA checks went into Ms. Herreman-Garcia's personal account. Tr. p. 424, ln. 7-14. However, Detective Spain also testified that there was never an identification of who had actually altered the Mittal and HOA checks. Tr. p. 459, ln. 4-7. Nor was there ever any evidence making the link between the handwriting on the Mittal and HOA checks pay to the order of additions and Ms. Herreman-Garcia's handwriting. Tr. p. 459, ln. 8-18.

Following this evidence, the State rested. Tr. p. 467, ln. 24-p. 468, ln. 2.

The defense presented the testimony of Ms. Herreman-Garcia's brother, Alfredo Herreman. Mr. Herreman testified that he had worked for A&A, first in Boise and then in North Dakota, from 2008 to 2013. Tr. p. 481, ln. 16-p. 483, ln. 23.

Mr. Herreman testified that Antonio Ayon gave several people, including the other owners, employees, and Mr. Herreman, permission to sign checks with his name. Tr. p. 486, ln. 20-p. 488, ln. 2. The entire time he worked for A&A he saw checks that were signed by others with Antonio Ayon's name. Tr. p. 489, ln. 14-p. 490, ln. 12. This was a common practice. Tr. p. 490, ln. 19-p. 491, ln. 2.

To avoid paying overtime, the company had employees record 40 hours even if they had worked 50 and then raised the wages to actually pay for the extra 10 hours. A&A would also bank the hours and then pay the employees who went home to Mexico over the holidays to cover the held hours. Tr. p. 492, ln. 2-13. This was done to avoid paying taxes. Tr. p. 493, ln. 18-20. In addition, A&A would often pay employees in cash. Tr. p. 496, ln. 12-16.

Mr. Herreman testified that A&A supplied several employees, including him, with debit cards. The cards were for business but could also be used for per diem items like lunches and traveling expenses. Also, employees could and did use the cards to withdraw cash to make payments to truckers moving materials in semis. Tr. p. 506, ln. 4-p. 507, ln. 18. These were all generally accepted practices at A&A. Tr. p. 508, ln. 2-11.

While working for A&A, Mr. Herreman saw Ms. Herreman-Garcia pay workers with cash from the business account. She got the cash from the ATM or by cashing checks. Tr. p. 508, ln. 12-21.

In June or July 2013, Mr. Herreman left A&A for several reasons including

the problems with the IRS. When he left, he, Ms. Herreman-Garcia, and Hugo Garcia (Martina Garcia's brother) started a new landscape business (Landscape Elements) in North Dakota. Tr. p. 513, ln. 14-p. 515, ln. 7. Landscape Elements offered basically the same services as A&A in the same town out of the same shop. In fact, they took many of A&A's customers Tr. p. 515, ln. 22-516, ln. 24. In the first four months, Landscape Elements had $1.3 million in receipts which was about 25% of A&A's prior receipts for a similar time period. Martina was very angry about this and threatened Mr. Herreman and called the police. Tr. p. 517, ln. 14-p. 518, ln. 16.

Ms. Herreman-Garcia testified that she began working for A&A in Boise in 2009. Then in 2011, she moved to North Dakota, living with Martina Garcia and Alejandro Ayon, and working at the North Dakota A&A. Tr. p. 534, ln. 1-24. She eventually left the company for a better paying job. Tr. p. 535, ln. 1-13.

Antonio Ayon permitted her to use the company debit card, giving her the PIN number for it. When she used the card, it was her understanding that she would have to pay Antonio back. The agreement they signed reflected that understanding. Tr. p. 536, ln. 13-p. 537, ln. 22.

Shortly after the agreement was signed, Antonio started asking Ms. Herreman-Garcia if she had friends she wanted to introduce to him, and once he showed her a flyer for a house for sale and told her that if she became his girlfriend, he would buy her the house. She laughed and said, "No." But, she also told her brother Alfredo and talked with Martina and Alejandro about it. Tr. p. 538, ln. 20-

p. 539, ln. 16.

With that evidence the defense rested. Tr. p. 554, ln. 3-4.

The defense also moved for a judgment of acquittal on both charges. Tr. p. 583, ln. 16-p. 586, ln. 17; Tr. p. 586, ln. 22-p. 587, ln. 14.

The Court denied the motions. Tr. p. 592, ln. 19-22.

In instructing the jury, the Court did not give a specific act unanimity instruction as to either count. R 114-133.

In its closing, the State argued that the case was about greed and that Ms. Herreman-Garcia repeatedly "followed through with a pattern and plan of stealing from her employer by stealing in a variety of ways, including the use of paychecks, writing herself extra paychecks, overpaying herself on paychecks, using her employer's debit card when that became available for her, and stealing money from the checks that she had forged." Tr. p. 614, ln. 1-13.

With regard to unanimity, the State told the jury in closing:

> You have many, many thousands of dollars in value that was stolen from A&A Landscape. There was a lot of separate individual transactions. Again, you are not being called upon, nor do you have to decide unanimously upon each and every single theft as far as the grand theft is concerned.
>
> What you have to be convinced of beyond a reasonable doubt is whether as part of that scheme or plan the aggregation of her conduct shows you beyond a reasonable doubt that she stole over $1000.
>
> Okay? So you don't have to find beyond a reasonable doubt whether, in fact, she was the one who purchased the food at the Boise Panda Express or whether she did that ATM withdrawal or that one. So long as you are convinced beyond a reasonable doubt that she at least stole

over $1,000 as part of that scheme or plan. Okay?

Tr. p. 631, ln. 25-p. 632, ln. 18.

The defense argued that there was no intent to defraud as demonstrated by the agreement Ms. Herreman-Garcia signed with Antonio. Tr. p. 639, ln. 8-16. Rather, A&A brought these false claims of theft as a retaliation for Ms. Herreman-Garcia and her partners forming Landscape Elements in North Dakota which in just the first three months of operations took over a million dollars worth of business from A&A. This was proven by the fact that there was an agreement for repayment, Ms. Herreman-Garcia remained in the employ of A&A, and the police were not called until Landscape Elements was formed. Tr. p. 640, ln. 1-p. 641, ln. 21. Counsel also discussed evidence that Antonio gave Ms. Herreman-Garcia permission to use the debit card and only got upset about it when she refused his advances. Tr. p. 654, ln. 11-p. 655, ln. 9. Further counsel noted that everything was out in the open - no effort was taken by Ms. Herreman-Garcia to hide anything from A&A and consistently with a debt and not with theft. Tr. p. 661, ln. 23-p. 663, ln. 5.

III. ISSUES PRESENTED ON APPEAL

A. In Count I, grand theft, the information failed to meet the state and federal constitutional due process requirements of factual specificity adequate to enable a person of common understanding to know what is intended and to shield against double jeopardy. U.S. Const. Amends. 5, 6, and 14; Idaho Const. Art. I, §

13. *See,* I.C. §§ 19-1303, 19-1418 and ICR 7(b). Is this failure structural error that requires vacation of the conviction and by extension the forgery conviction because the lack of notice led to a failure to defend which was prejudicial to both counts?

B. The jury was not instructed that it must unanimously agree as to which instances of theft were committed in Count I or as to which instance of forgery was committed in Count II. And, in closing the prosecutor instructed the jury that it did not need to unanimously agree as to what offenses were committed. Was the failure to instruct fundamental error that requires reversal of both convictions?

C. The District Court made objected to evidentiary errors, including admission of irrelevant IRE 404(b) evidence without proper notice and excluding relevant evidence needed to establish a defense. Do these errors require reversal of both convictions?

IV. ARGUMENT

A. *The Failure to Give Notice of the Charge of Theft Sufficient to Allow Ms. Herreman-Garcia to Prepare and Present a Defense Resulted in Structural Error that Requires Vacation of Both Convictions.*

Count I of the information accused Ms. Herreman-Garcia of "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, form the owner, A&A Landscape, with the intent to appropriate to herself certain property of another.

R 52-53.

This allegation does not meet the due process requirements of providing factual specificity sufficient to allow a person of common understanding to know what is intended and to shield from double jeopardy. This denial of due process created structural error which requires vacation of both convictions.

Informations serve two purposes: 1) to establish the court's subject matter jurisdiction; and 2) to satisfy the constitutional due process requirements of adequate notice so as to allow the accused to prepare a meaningful defense and be protected against double jeopardy. *State v. Jones,* 140 Idaho 755, 757-58, 101 P.3d 699, 701-02; *State v. Banks,* 113 Idaho 54, 58, 740 P.2d 1039, 1043 (Ct.App. 1987).

An information establishes subject matter jurisdiction if it alleges that the offense was committed in Idaho and names the applicable code section. *State v. Jones,* 140 Idaho at 759, 101 P.3d at 703. In a theft case, the State's failure to specify the theories involved does not impair the establishment of subject matter jurisdiction. *State v. Owen,* 129 Idaho 920, 925-28, 935 P.2d 183, 188-91 (Ct.App. 1997).

However, to meet the due process requirements, an information must be specific enough to advise the accused as to particular section of the statute he or she is being charged with having violated and, further, 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).

Mere recitation of the statutory language is not necessarily sufficient to satisfy the due process requirements. The appellate courts have made it clear that in both manslaughter and theft cases, because the crime may be committed by a multitude of methods and conduct, mere repetition of the statutory language may not be sufficient. *Dorsey, supra.* Thus, *State v. McMahan,* 57 Idaho 240, 65 P.2d 156 (1937), held that an information charging a doctor with manslaughter was not sufficient when the prosecutor did not state how, or in what manner, or by what means the doctor committed the crime. And, in *State v. Owen, supra,* the Court held that informations charging Ms. Owens with grand theft by reference to I.C. §§ 18-2403(1) and 18-2407(1) without specifying a particular method or way that each theft was committed did not satisfy the due process requirements. However, in that case, because Ms. Owens had a preliminary hearing wherein the State disclosed the evidence demonstrating its theory with regard to the circumstances, method, manner, or way each charged theft was committed, she suffered no prejudice. 129 Idaho at 927-28, 935 P.2d at 190-91. In a footnote, the Court of Appeals cautioned that the due process argument raised by Ms. Owens may well be revived in a case wherein an accused waives the preliminary hearing, or wherein the prosecutor proceeds by way of a grand jury indictment without affording a preliminary hearing. The Court advised the State that to avoid a due process problem, it should ignore I.C. § 18-2409(1) and insert language similar to that used in *State v. Darbin,*

109 Idaho 516, 518-19, 708 P.2d 921, 923-24 (Ct. App. 1985), stating the way the defendant committed the theft. *State v. Owen,* 129 Idaho at 928, 935 P.2d at 191, ftnt. 8.

In this case, the State chose to rely upon I.C. § 18-2409(1) and did not inform Ms. Harreman-Garcia of the means of committing theft with which she was charged. And, then, even though there was a preliminary hearing, the State chose not to present evidence of all the means by which it intended to prove its case. Rather, it presented only evidence of theft by use of the ATM card to make cash withdrawals and purchases. Only at trial did the State reveal its intent to prove its case by not only the ATM charges and withdrawals, but also by proof of paychecks paid for time not worked and/or duplicate paychecks and unauthorized checks coming from A&A to Ms. Herreman-Garcia for no explainable reason. Tr. p. 389, ln. 1-18.

This expansion of the means of the theft clearly took the defense by surprise. In his opening statement, defense counsel outlined a defense to the ATM charges and withdrawals, stating that the Ayon brothers told Ms. Herreman-Garcia that she could use the card for personal needs with the intent that eventually it would all be repaid as evidenced by their notarized agreement for repayment. And, with regard to the two checks wherein her name was added to the pay to the order of line, counsel stated that Antonio Ayon had written her name in himself and told her to deposit the money in her account so as to help her out financially. Tr. p. 95, ln.

11-p. 96, ln. 23. Counsel offered no defense theory regarding unauthorized paychecks and the other unauthorized checks. Tr. p. 94, ln. 10-p. 101, ln. 9. Then, when the State began offering testimony of payroll irregularities, counsel immediately objected that this evidence was not relevant to the charge of theft. However, the District Court overruled the objection. Counsel replied, "Why is that? Maybe I'm misinterpreting." Tr. p. 132, ln. 24-p. 133, ln. 22. A few minutes later, counsel said, "I'm going to have a very big objection coming up." Tr. 134, ln. 20-21. As soon as a break was taken, counsel objected stating that the State appeared to be engaged in a "big bait and switch." Tr. p. 137, ln. 16-18. Counsel went on to point out that at the preliminary hearing, they were presented with only the ATM proof and the two allegedly forged checks. Now, the State was presenting an entirely different mode of theft. Counsel offered a relevance objection, an IRE 404(b) objection, and an IRE 403 objection. Counsel further argued that his client was entitled to notice of the charges that were to be faced so that she could rebut that and that when that was not provided through the information or the preliminary hearing, there was error. Tr. p. 137, ln. 16-p. 145, ln. 18. Counsel stated, " . . . it is a complete change of the charge, and she is being basically denied her right to confront this at preliminary." Tr. p. 145, ln. 10-13.

The State offered that it was not required to provide an accused with "an itemized notice of exactly how we intend to prove all of the charges" and that counsel knew through discovery that there were payroll and other check

irregularities. Tr. p. 143, ln. 22-p. 145, ln. 3.

The District Court denied the defense objection. After the Court's statement of the reason for denial, Tr. p. 147, ln. 13-p. 140, ln. 3, defense counsel stated that he had specifically asked the Judge at the preliminary hearing, "What exactly is being bound over?" to avoid this sort of surprise. Tr. p. 150, ln. 4-7. The Court replied, "The means is not required to be detailed in the Information. The only purpose of the preliminary hearing is to determine if there is probable cause to believe that a Defendant is the one who committed it." Tr. p. 147, ln. 13-p. 150, ln. 18.

The trial carried on. Defense counsel interposed unsuccessful IRE 402, 403, and 404(b) objections throughout to evidence other than the ATM transactions and the Mittal and HOA checks. And, the District Court denied the objections. Tr. p. 132, ln. 3-193, ln. 20; Tr. p. 156, ln. 7-13; p. 184, ln. 13-p. 185, ln. 25; p. 187, ln. 8-p. 188, ln. 14; p. 212, ln. 7-13; p. 270, ln. 22-24; p. 385, ln. 11-17; p. 403, ln.22-p. 404, ln. 4; p. 411, ln. 2-6; p. 418, ln. 3.

In support of his objections, defense counsel stated:

> Oh, certainly I had the information, Your Honor, but I have been under the understanding this entire time that what was going to be presented at trial was what was presented – would come under the plan that presented at the preliminary hearing, which is the use of the ATM card for cash, and the use of the – the forgery of the [Mittal and HOA] checks.

Tr. 142, ln. 25-p. 143, ln. 7.

Counsel asked for a recess when the State presented Exhibit 2, copies of 10

checks made out to Ms. Herreman-Garcia, to discuss the exhibit with his client. His request was made in the presence of the jury and it was clear that this discussion was necessary because the exhibit had not been anticipated in light of the State's information and preliminary hearing evidence and was not prepared to cross-examine on it. Tr. p. 160, ln. 2-16.

Defense counsel's objection to the lack of notice should have been sustained. As set out in *State v. Owen, supra,* a mere reference to the theft statute without any indication of the means of theft being alleged, does not satisfy constitutional due process requirements. And, while the lack of notice can be compensated for by presentation of the State's theory of the case at the preliminary hearing, in this case, the State did not present any theory other than theft by use of the ATM card and the Mittal and HOA checks in the preliminary hearing. Ms. Herreman-Garcia thus did not have adequate notice so that she could prepare a defense. Moreover, the lack of notice was prejudicial as evidenced by defense counsel's opening statement and objections and request for recess which indicated that counsel had only prepared a defense to theft by use of the ATM card and the Mittal and HOA checks. Counsel had not prepared a defense to any claims of theft by alteration of payroll records, taking unearned payroll checks, or taking other checks simply made out to Ms. Herreman-Garcia. On this basis, Ms. Herreman-Garcia's conviction for theft should be reversed.

Likewise, the State's actions in this case effectively denied due process by

denying Ms. Herreman-Garcia a preliminary hearing on the means of theft other than the ATM transactions and Mittal and HOA checks. As noted in *State v. Stewart-Meyers,* 145 Idaho 605, 607, 181 P.3d 531, 533, ftnt. 1, (Ct.App. 2008), defendants have a due process right to a preliminary hearing. *Id.,* citing *Goodwin v. Page,* 296 F.Supp. 1205, 1211 (E.D. Okla. 1969) (holding a preliminary hearing is a "vital process" such that the denial thereof violates due process); *Buckley v. Hall,* 215 Mo. 93, 114 S.W. 954, 955 (1908) (declaring that whether or not a defendant received a preliminary hearing goes to the regularity of the previous proceedings; *State v. O'Connor,* 31 N.C. App. 518, 229 S.E.2d 705 (1976) (analyzing the denial of a preliminary hearing as a question of due process); 22 C.J.S. Criminal Law § 456 (2006) (failure to give preliminary hearing may be cause for reversing or setting aside a conviction.); and *Gray v. Raines,* 662 F.2d 569, 572 (9th Cir. 1981) (right to notice of a charge is basic and the most clearly established due process right of an accused in a criminal proceeding and a denial of this right is a per se violation). *See also, State v. Woodmansee,* 124 Vt. 387, 205 A.2d 407 (1964)(an accused is entitled to have an information reasonably indicate the exact offense so as to enable the intelligent preparation of a defense).

The defense did object in this case to the lack of notice and to the lack of a preliminary hearing as soon as it was aware that the State intended to present evidence of means of theft other than those indicated by either the information or the preliminary hearing. While the District Court overruled the objection, in fact,

the error was, as well be explained, a structural error, which requires vacation and remand. *State v. Perry,* 150 Idaho 209, 227-228, 245 P.3d 961, 979-80 (2010).

The error was a structural error because it affected the basic structure of the trial to the point that the trial could not reliably serve its function as a vehicle for the determination of guilt or innocence. *Id.* As set out in *Arizona v. Fulminate,* 499 U.S. 279, 111 S.Ct. 1246 (1991), some errors are so basic to a fair trial that the violation requires an automatic reversal not subject to any harmless error analysis. These errors affect "the framework within which the trial proceeds, rather than simply an error in the trial process itself" and thus are so inherently unfair that they are not subject to a harmless error analysis. *Id.* at 307-08, 310, 111 S.Ct. at 1264, 1265. *See also, State v. Umphenour,* ___ Idaho ___, ___ P.3d ___, 2015 WL 1423789 *5 (March 30, 2015), *petition for review granted.*

A trial held without notice to the accused such that she could not develop and present a meaningful defense is infected with structural error. A trial without notice is inherently unfair. And, the error is an error "with consequences that are necessarily unquantifiable and indeterminate," *Sullivan v. Louisiana,* 508 U.S. 275, 282, 113 S.Ct. 2078 (1993), which must be remedied without a harmless error analysis. *United States v. Gonzalez-Lopez,* 548 U.S. 140, 149, 126 S.Ct. 2557, 2665 (2006). In *Gonzalez-Lopez,* the Court found structural error in the denial of the right to counsel of choice noting that it is impossible to know what different choices the rejected counsel would have made and then to quantify the impact of those

different choices on the outcome of the proceedings. "Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe." 548 U.S. at 150, 126 S.Ct. at 2565. Likewise here, it is impossible to know what defense would have been presented had Ms. Herreman-Garcia had notice of all of the methods of theft the State intended to prove. The error carried consequences unquantifiable and indeterminate. The error was a structural error that requires vacation of both the theft and forgery convictions because the lack of a prepared defense to all of the theft evidence was highly prejudicial to both charges in the same way irrelevant prior bad acts are highly prejudicial.[2]

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[2] Even if counsel had not objected, the due process violation was a fundamental error which requires vacation of the conviction. While ICR 12(b)(2) requires objections to defects in the information to be raised prior to trial, the defect here could not be raised prior to trial because it was not known prior to trial. The defect was not known until the State, at trial, presented evidence of means of theft other than those presented in the preliminary hearing. Moreover, even ICR 12(b) errors are subject to a fundamental error analysis. *State v. Morris,* 116 Idaho 834, 836, 780 P.2d 156, 158 (Ct. App. 1989). *State v. Perry,* 150 Idaho 209, 227-28, 245 P.3d 961, 979-80 (2010) (in the case of structural errors "the appellate court shall automatically vacate and remand"). *See also, State v. Umphenour, supra* at *5 (a constitutionally invalid waiver of a jury trial is a structural defect which requires automatic vacation under *Perry*).

The lack of due process in this case meets *Perry's* fundamental error requirements because it violated Ms. Herreman-Garcia's unwaived right to due process; it plainly exists without the need for any additional information not contained in the appellate record; and as structural error it was not harmless. *Perry, supra.*

B. *The District Court Committed Fundamental Error in Failing to Give Unanimity Instructions*

Both convictions must also be reversed because of the lack of a specific act unanimity instruction. A defendant's right to a unanimous jury is guaranteed in Idaho by Article 1, § 7 of the state constitution which requires that a verdict in a felony case be unanimous. Idaho Code § 19-2301 also requires the jurors to unanimously agree before a verdict may be returned and I.C. § 19-2316 requires that a jury must be sent out for further deliberations if a poll of the jurors shows a non-unanimous verdict. See also ICR 31(a).

However, the District Court did not give a specific act unanimity instruction as to either count in this case. R 114-33. This was fundamental error because the State presented evidence that Ms. Herreman-Garcia committed several temporally discrete acts of both theft (both grand and petit) and forgery which would independently support convictions of the charged crimes. *State v. Southwick,* 158 Idaho 173, 181-82, 345 P.3d 232, 240-41 (Ct. App. 2014). This error was compounded when the State argued in closing, "There was a lot of separate individual transactions. Again, you are not being called upon, nor do you have to decide unanimously upon each and every single theft as far as the grand theft is concerned." Tr. p. 632, ln. 2-6.

Whether the jury has been properly instructed is a question of law subject to free review. *State v. Southwick,* 158 Idaho at 181, 345 P.3d at 240. When reviewing instructions, the appellate court considers whether the instructions as a

whole, and not individually, fairly and accurately reflect the applicable law. *Id.*

Even without a contemporaneous objection at trial, an appellate court may review instructional error under the fundamental error doctrine. *Id.* The appellant must show that 1) the alleged error violates one or more of her unwaived constitutional rights; 2) the alleged error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and 3) there is a reasonable possibility that the alleged error affected the outcome of the trial proceedings. *State v. Perry,* 150 Idaho at 226, 245 P.3d at 978.

A trial court is required to instruct a jury that, in order to convict, it must unanimously agree on the defendant's guilt. *State v. Adamcik,* 152 Idaho 445, 474, 272 P.3d 417, 446 (2012). However, in general, a court does not have to instruct that the jury must unanimously agree as to the underlying facts giving rise to the offense. *Adamcik, supra.* An exception to this general principle applies in cases where there is a genuine possibility of jury confusion or that a conviction may occur as a result of different jurors concluding that the defendant committed different criminal acts. *State v. Southwick,* 158 Idaho at 181, 345 P.3d at 240; *State v. Gain,* 140 Idaho 170, 172, 90 P.3d 920, 922 (Ct. App. 2004). When evidence is presented that the defendant has committed several temporally discrete acts, each of which would independently support a conviction for the crime charged, the court must instruct the jury that it must unanimously agree on the specific incident constituting the offense in each count, regardless of whether the defendant requests

such an instruction. *State v. Southwick, supra,* citing *State v. Severson,* 147 Idaho 694, 711, 215 P.3d 414, 431 (2008); *State v. Molen,* 148 Idaho 950, 957-58, 231 P.3d 1047, 1054-55 (Ct. App. 2010); *State v. Gain,* 140 Idaho 170, 172-73, 90 P.3d 920, 922-23 (Ct. App. 2004); *State v. Montoya,* 140 Idaho 160, 167-68, 90 P.3d 910, 917-18 (Ct. App. 2004); *Miller v. State,* 135 Idaho 261, 266-68, 16 P.3d 937, 942-44 (Ct. App. 2000). In the alternative, jury unanimity may be protected by the State electing the incident upon which it will rely for conviction. *State v. Southwick, supra,* citing *State v. Gain,* 140 Idaho at 172-73, 90 P.3d at 922-23.

In this case, the State presented evidence of many temporally discrete instances of theft - both grand theft and petit theft - against A&A. State's Exhibit 10 summarized its allegations of theft. It included 33 alleged temporarily discrete acts of petit theft by means of duplicate or unauthorized pay totaling $9,249.53; 10 alleged temporally discrete acts of theft (7 petit, 3 grand) in the form of checks made out to Giselle Herreman or Giselle Gonzalez totaling $7492.19; and 16 alleged temporally discrete petit theft instances of ATM withdrawals totaling $6205.50. In addition, the State presented evidence of alleged petit theft of the Mittal check totaling $652.01, State's Ex. 3, and alleged grand theft of the HOA check totaling $1875.00. State's Ex. 5. Furthermore, the State presented evidence of numerous separate debit card purchases which it alleged were theft. State's Ex. 8.

Given all these separate alleged instances of theft, and the two separate alleged incidents of forgery, a specific act unanimity instruction was required and

the failure to give it was fundamental error. The failure to instruct was a violation of Ms. Herreman-Garcia's unwaived constitutional rights to due process and a unanimous verdict. *See* Tr. p. 566, ln. 12-20, wherein defense counsel argues that the State should have selected a single incident rather than have been allowed to present evidence of multiple incidents. The error plainly exists without reference to information outside the appellate record. Nothing beyond the trial transcripts and the clerk's record is required to determine that a unanimity instruction was required and was not given. And, there is a reasonable probability that the error affected the outcome of the trial. With regard to the theft charge, Ms. Herreman-Garcia had a defense to several of the incidents of alleged theft – she was given access to the Mittal and HOA checks and the ATM/debit card with Antonio's knowledge that she was using the money for herself and indeed, she had no intent to appropriate the money as she signed a promissory note and made repayments. In fact, A&A hired her in the North Dakota office after she left Boise to allow her to continue to make her payments on the promissory note – an indication that the company did not consider her a thief. It defies all logic that if the company truly considered Ms. Herreman-Garcia a thief, it would hire her in North Dakota to manage its office with apparently unlimited and unmonitored access to opportunities to steal. With regard to the other checks, Antonio Ayon testified that he gave Ms. Herreman-Garcia permission to sign checks and he then reviewed them later. Tr. p. 176, ln. 21-p. 177, ln. 14. He further testified that when Ms.

Herreman-Garcia made out checks for him to sign he could inspect them, but did not do so closely. Tr. p. 177, ln. 15-p. 178, ln. 20. And, Alfredo Herreman testified that A&A typically allowed employees besides the owners to have ATM cards and use those cards for personal expenses and also to use the cards for cash withdrawals which were used to pay people like employees and truckers in cash. He testified that Ms. Herreman-Garcia paid employees in cash per these practices. Tr. p. 506, ln. 4-p. 508, ln. 21. In short, there were defenses to the charges.

Moreover, as to both counts, there are several other potential defenses. For example, that Ms. Herreman-Garcia was simply following A&A's business practices of paying people in cash so as to either avoid payroll taxes or problems with the hiring of undocumented workers and that the impetus to suddenly report these issues to the police after they had gone on for years and after A&A had actually hired Ms. Herreman-Garcia a second time to work in North Dakota was either as a punishment for not accepting the sexual advances of Mr. Ayon, a scapegoating of Ms. Herreman-Garcia to attempt to avoid tax or other legal problems as a result of the IRS audit, or as retribution for opening a new business which decreased the profitability of A&A in North Dakota.

In any event, there is a reasonable probability that not all the jurors agreed on any one instance of either theft or forgery and that had the jury been properly instructed as to unanimity the outcome of the trial would have been different.

C. *Objected to Evidentiary Errors Also Require Reversal*

This Court should vacate the convictions because of the due process error. It should reverse also because of the fundamental error in failing to give unanimity instructions. Further, both convictions should be reversed because of objected to erroneous evidentiary rulings by the District Court which the State cannot now prove harmless beyond a reasonable doubt. *State v. Perry, supra.*

1. Admission of Irrelevant Inadmissible Other Bad Acts Evidence

Should this Court find that Ms. Herreman-Garcia was not given proper notice of the any allegations of theft other than the ATM cash withdrawals, but that the error was not structural, and engages in a harmless error analysis, it will have to find that the State can prove that the error was harmless beyond a reasonable doubt because the defense did object to the lack of notice. *State v. Perry, supra.*

The State cannot prove the error harmless beyond a reasonable doubt. One reason that the State cannot carry its burden, is that as a result of the due process violation it was allowed to present evidence of all the other improperly charged means of theft over defense relevancy, IRE 404(b) and 403 objections. As set out below, these objections would have been sustained but for the due process violations.

Defense counsel objected repeatedly throughout the trial to the admission of evidence of means of theft not properly charged because the defense was not given the notice required by the constitutional due process protections. He objected

because the evidence was not relevant, it was impermissible IRE 404(b) evidence and it was inadmissible under IRE 403. Specifically, counsel made the following objections:

1. During Federico Munoz's testimony, at the first mention of payroll records and checks, Tr. p. 132, ln. 8-24, defense counsel objected on the basis of relevance. Tr. p. 133, ln. 4-p. 134, ln. 24. Counsel elaborated that the time cards were an entirely separate manner of theft from that charged and thus evidence about them was irrelevant. Tr. p. 137, ln. 16-p. 138, ln. 16. Counsel further objected that the evidence was evidence of propensity which was not allowed under IRE 404(b). And, lastly, that even if it was allowed under IRE 404(b), it was precluded by IRE 403 as it is extremely prejudicial. Tr. p. 139, ln. 4-20.

2. Counsel raised the same objection to the admission of Exhibit 2, copies of checks made out to Ms. Herreman-Garcia. Tr. p. 156, ln. 7-13.

3. Counsel raised the same objections to Antonio Ayon's testimony about debit card purchases of goods and services which did not involve cash. Tr. p. 184, ln. 13-p. 185, ln. 25.

4. Counsel raised the same objections to Mr. Ayon's testimony about transactions on the ATM card that occurred in California. Tr. p. 187, ln. 8-p. 188, ln. 14.

5. Counsel raised the same objections to the admission of Exhibit 8, the bank statements. Tr. p. 212, ln. 7-13.

6. Counsel raised the same objections to admission of testimony about transactions on the ATM card completed in San Francisco. Tr. p. 270, ln. 22-24.

7. Counsel raised the same objections to Detective Spain's testimony and Exhibit 9, copies of bank records, having to do with transactions other than ATM withdrawals. Tr. p. 385, ln. 11-17.

8. Counsel raised the same objections to Exhibit 10, Detective Spain's summary of the financial records evidence. Tr. p. 403, ln. 22-p. 404, ln. 4.

9. Counsel raised the same objections to Exhibit 11, another summary of financial records evidence by Detective Spain. Tr. p. 411, ln. 2-6.

10. Counsel raised the same objections to Exhibit 12, another summary by Detective Spain. Tr. p. 418, ln. 3.

The structural due process error with regard to Count I, theft, requires vacation of that charge. Moreover, Court II, forgery, must also be reversed, because as evidenced by all these objections the jury heard evidence of all the other means of theft that the State decided to try to prove at trial, including theft through payroll record falsification, double payroll checks, checks made out to Ms. Herreman-Garcia for no identified reason, and ATM purchases of goods and services. This evidence was not relevant to the charge of forgery, nor to the theft charge based upon ATM cash withdrawals. IRE 401. *State v. Johnson,* 148 Idaho 664, 667, 227 P.3d 918, 921 (2010) (appellate court freely reviews the question of relevancy as an issue of law; evidence that Johnson had molested his sister when he was a teen irrelevant to

prove lewd conduct with his daughter.) Further, the State gave no IRE 404(b) notice, so the evidence was absolutely inadmissible as evidence of other bad acts. *State v. Sheldon,* 145 Idaho 225, 230, 178 P.3d 28, 33 (2008) (failure to give IRE 404(b) notice renders other bad acts evidence inadmissible). Moreover, the error in admitting the evidence was not harmless beyond a reasonable doubt. *Id.,* citing *Baldwin v. State,* 145 Idaho 148, 156, 177 P.3d 362, 371 (2008), requiring that hold the error harmless, the Court must declare a belief, beyond a reasonable doubt, that there was no reasonable possibility that the evidence omplained of contributed to the conviction. As in *Sheldon,* the evidence of the huge number of other supposed thefts was highly prejudicial, it caught defense counsel off guard, and thus was not effectively countered and consequently requires reversal of both the theft and the forgery charges.

2. Exclusion of Evidence Needed to Establish a Defense

In addition to the above evidentiary errors, the District Court improperly disallowed evidence needed to establish Ms. Herreman-Garcia's defense.

An accused has a constitutional right to present a defense, which is rooted in the Compulsory Process or Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, and includes the right to offer testimony of witnesses, to compel their attendance, and to present the defense version of the facts. *State v. Molen,* 148 Idaho 950, 955, 231 P.3d 1047, 1052 (Ct.App. 2010). *See also,* Idaho Const. Art. I, § 13.

In this case, the District Court violated that right. The Court sustained the State's relevancy objection to questioning of Mr. Antonio Ayon about the IRS audit of A&A. Tr. p. 218, ln. 10-p. 219, ln. 19. However, this testimony was relevant to establish that A&A was engaged in hiding income and that the checks diverted to Ms. Herreman-Garcia may have been part of that hiding. Tr. p. 219, ln. 6-9. Later, when counsel again tried to obtain Mr. Ayon's testimony about efforts to avoid tax liability by diverting the Mittal and HOA checks directly into Ms. Herreman-Garcia's account, the Court interposed its own apparent relevancy objection and disallowed the testimony. Tr. p. 255, ln. 6-13.

This Court freely reviews relevancy determinations by the District Court. *State v. Johnson,* 148 Idaho at 667, 227 P.3d at 921. Obviously, this evidence was relevant to establishing the defense that A&A had authorized the transfers of checks to Ms. Herreman-Garcia to avoid tax liability. Further, the State cannot prove that the error was not harmless beyond a reasonable doubt. *Perry, supra.* Had the jury heard this evidence, there is a clear possibility that it would have not convicted Ms. Herreman-Garcia. With regard to the forgery charges the lack of the defense evidence was clearly not harmless. *See* I.C. § 28-3-203 allowing transfer of a negotiable instrument and provides that it vests in the transferee any right of the transferor to enforce the instrument. Likewise, since no unanimity instruction was given as to theft, it may be that the jury convicted Ms. Herreman-Garcia based upon the Mittal and HOA checks - in which case, the failure to allow testimony of

her defense was not harmless beyond a reasonable doubt as to theft as well as forgery.

Based on these evidentiary errors, both convictions must be reversed.

IV. CONCLUSION

Both convictions must be vacated for structural error in failing to give required due process notice of the charge against Ms. Herreman-Garcia. They must also be reversed because of fundamental error in failing to give unanimity instructions. And, further, they must be reversed because of objected to evidentiary errors. Ms. Herreman-Garcia respectfully requests that this Court grant the required relief.

Submitted this 25th day of November, 2015.

Dennis Benjamin

Deborah Whipple

Attorneys for Ana Herreman-Garcia

CERTIFICATE OF SERVICE

I CERTIFY that on November 25, 2015, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Office of the Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin