70261-1

70261-1

No. 70261-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

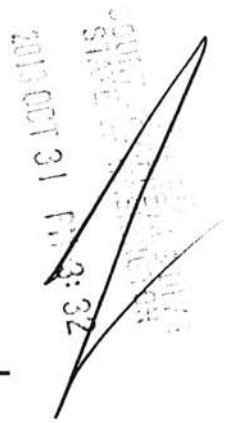
STATE OF WASHINGTON,

Respondent,

v.

DANIEL BATEMAN,

Appellant.



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

The Honorable Jean Rietschel

BRIEF OF APPELLANT

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WASHINGTON CASES

A. ASSIGNMENTS OF ERROR

1. The admission of the recordings of jail telephone calls between Mr. Bateman and his family members and friends violated Article I, § 7 of the Washington Constitution, requiring reversal of the defendant's convictions.

2. The defendant's right to jury unanimity was violated on counts 2 and 3, charges of identity theft, requiring reversal.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Washington Constitution art. I, § 7 protects against governmental invasion into a person's private affairs without authority of law. In this case, under the best analysis of the right to hold private affairs private, did the admission of the jail telephone call recordings violate the Washington Constitution, requiring reversal of Mr. Bateman's convictions?

2. The identity theft statute, RCW 9.35.020, indicates that there are alternative means of committing identity theft. Where none of these alternatives were removed from the to-convict instructions, and there was not substantial evidence that Mr. Bateman used or obtained the financial information, in count 2 and count 3, must those convictions be reversed?

C. STATEMENT OF THE CASE

1. Charging. The King County prosecutor charged Daniel Bateman with possession of stolen property in the second degree. CP 1-2, 20-26. This count was based on Mr. Bateman's girlfriend Melissa Matera's 2012 purchase of Pomeranian puppies from Florida, allegedly using Bank of America credit card information that was sent via mail to, but not received by, Kirkland resident Sophia Tuan. CP 24-26.

Mr. Bateman was also charged with three counts of identity theft in the second degree based on store purchases, two made by Ms. Matera and one by Mr. Bateman, in the north Seattle area on August 4 and 5, 2012, allegedly with several credit cards that had been taken in a burglary of the Ballard home of C. Nevins and A. Snover on August 4. CP 5-9.

There was no actual evidence that Mr. Bateman or Ms. Matera had been involved in any theft of Ms. Tuan's mail, or the burglary of the Nevins/Snover home, from which credit cards were taken, along with a computer. Police investigating the burglary, and later the financial information usage, made Mr. Bateman a person of interest when he and Ms. Matera were seen in internet photographs that appeared to have been uploaded using the

computer. They were carrying dogs. CP 6-7; 3/14/13RP at 151-174, 179-83.

On October 8, 2012, Mr. Bateman was arrested by Renton Police officer Mario Magnotti when the officer stopped the vehicle he was driving, based on an erroneous report that there might be a woman in distress. 3/14/13RP at 195-97. Mr. Bateman told the officer there was no one in the car but him and the puppies; however, Ms. Matera was secreting herself in the trunk. 3/14/13RP at 196-200.

Ms. Matera explained at trial that she had squeezed into the trunk through the back seat of the car, because she knew she had a warrant; Mr. Bateman tried to tell her not to do this, but she did anyway. 3/20/13RP at 613-16.

Following his arrest by Officer Magnotti, Mr. Bateman was also charged with possession of a controlled substance based on small fragments of alprozalam ("Xanax") pills in his pants pocket in the jail property room. CP 8, 20-22. The fragments were discovered by Seattle Detective George Davisson, who was investigating the use of the credit card information. 3/19/13RP at 443-46.

2. Defense. Just prior to trial, Melissa Matera pled guilty to several counts of using credit card information at different locations in the Seattle area. See CP 48; 3/19/13RP at 556-58.

At trial she testified that Mr. Bateman was never an accomplice and had no knowledge that her purchases in question in the case, which she made with him accompanying her, had employed improper credit card information. Ms. Matera explained that she had obtained electronic credit card information from an associate, who re-magnetized or "cloned" Ms. Matera's own Bank of America and Wells Fargo credit cards with encoded stripping of stolen card numbers. 3/19/13RP at 542-44. Mr. Bateman was simply with Ms. Matera at the A-1 Mart where she purchased make-up and socks, and he drove her to, or was in the car that took her to, Walgreens where she bought toiletries. 3/19/13RP at 543-51.

The purchase made by Mr. Bateman himself at a Nordstrom store was made using one of Ms. Matera's "cloned" cards, that she had allowed him to use. 3/19/13RP at 554-56. Mr. Bateman had no idea there was improper financial information on that card, and certainly would not have used it if he did. 3/19/13RP at 554-56.

As with the purchases, Ms. Matera also used "cloned" credit card information and numbers to purchase the Pomeranian puppies

by FAX from Florida; Mr. Bateman loved the dogs but had no idea they had been purchased using illegal financial information. 3/19/13RP at 557-60, 564; 3/20/13RP at 610-11. In fact, Ms. Matera told him the puppies had been purchased for her by her mother. 3/19/13RP at 560-61.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING THE RECORDINGS OF MR. BATEMAN'S TELEPHONE CALLS MADE FROM JAIL IN VIOLATION OF ART. I, § 7 OF THE WASHINGTON CONSTITUTION.

a. Admission of the jail calls was manifest constitutional error. The general rule in Washington is that an appellate court will not consider an issue on appeal which was not first presented to the trial court. RAP 2.5(a). However, RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of "manifest error affecting a constitutional right." The error must be both (1) manifest and (2) be truly of constitutional magnitude. State v. Scott, 110 Wn.2d 682, 685, 688, 757 P.2d 492 (1988).

In this case, the prosecutor employed the jail calls in trial and in closing argument to the jury to urge Mr. Bateman's guilt – which he disputes vigorously – on every count of conviction. The error is "manifest" because it both (1) resulted in actual prejudice to him,

and (2) he can, at a minimum, make a credible showing that the error had practical and identifiable consequences to his multi-count trial. State v. WWJ Corp., 138 Wn.2d 595, 602–03, 980 P.2d 1257 (1999).[1]

b. For related reasons, the jail calls were reversibly prejudicial. The error was reversibly harmful, a separate showing. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). Here, the admission of the recorded calls cannot be shown to be harmless beyond a reasonable doubt. The State used an October 21, 2012 call recorded from the jail, in which Mr. Bateman stated that he needed to go to Compass Health to obtain the monthly Xanax allotment he needed.[2] 3/19/13RP at 498-500. The prosecutor used this call to show the jury that Mr. Bateman possessed the pill fragments.

The prosecutor also employed the jail calls in urging rejection of any claim of lack of knowledge in Mr. Bateman's defense. In a series of jail calls including with his father, Mr.

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[1] In this case, the defense's own use of certain jail calls does not waive the issue on appeal because if properly admissible for the State, Mr. Bateman as a protected person was entitled to present exculpatory evidence available in the tapes. 3/12/13RP at 10-11.

[2] Sergeant Catey Hicks had listened to the calls and authenticated the recordings. 3/19/13RP at 487-88.

Bateman made statements that the prosecutor used to argue that Mr. Bateman possessed the puppies, including calls in which he talked about how he wanted them back, noted he was not being charged for the dogs, and also discussed power of attorney arrangements that would allow the dogs to be removed from custody and taken to foster care. 3/19/13RP at 500-02, 504. In another call, Mr. Bateman also noted that the Humane Society would need to be shown the bill of sale or other paperwork which he had. He appeared to say or believe that Melissa Matera had a contract worked out with some woman named Sophia Tuan or "whatever lady," so that Matera would be legitimate to pick up the dogs when they were delivered. 3/19/13RP at 501-03, 505-07.

In yet another call played by the State, Mr. Bateman said this was not something he wanted to talk about on the telephone. 3/19/13RP at 506. He said of the dogs, "Those are her dogs" and "Whether or not, however she got them, she don't care. Those are hers." 3/19/13RP at 508.

Further, the prosecutor used the jail calls, State's Exhibits 43, 44 and 46, throughout the case, not just when they were played during Sergeant Hicks' testimony. During the prosecutor's cross-examination of Ms. Matera, the State employed a jail call in which

Mr. Bateman angrily told her she was forgetting about him and not bailing him out of jail, to try and show knowledge of a credit card scheme. 3/19/13RP at 661-669. The prosecutor even used the jail calls in closing argument, including by playing portions that the State argued showed guilt, including on the drug charges. 3/19/13RP at 720-21, 725. The tapes were played extensively during closing argument on the identity theft and possession of stolen property counts. 3/19/13RP at 729-38.

c. A warrant was required for the recordings of Mr. Bateman's telephone conversations from jail, because he had a privacy interest in them. Article I, § 7 of the Washington State Constitution provides that "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." It is now well settled that the protections guaranteed by article I, § 7 of the Washington constitution are greater than those provided by the Fourth Amendment to the United States Constitution. State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002), citing City of Seattle v. McCready, 123 Wn.2d 260, 267, 868 P.2d 134 (1994)); see State v. Gunwall, 106 Wn.2d 54, 64, 720 P.2d 808 (1986); see State v. Jackson, 150 Wn.2d 251, 259, 76 P.3d 217 (2003); State v. Vrieling, 144 Wn.2d 489, 495, 28 P.3d 762 (2001).

The Washington Supreme Court has of course previously recognized a privacy interest in telephone records. Gunwall, 106 Wn.2d 54. In Gunwall, the Court found that the Washington Constitution provided greater protection which barred the installation of a pen register on a telephone without a warrant or court order. Gunwall, 106 Wn.2d at 68-69. Regarding the pen register, the Court noted:

> The pen register is comparable in impact to electronic eavesdropping devices in that it is continuing in nature, may affect other persons and can involve multiple invasions of privacy as distinguished from obtaining documents in a single routine search using a conventional search warrant. We conclude that a pen register intercept comes within the definition of "private communication transmitted by telephone", therefore, it may only be installed pursuant to the stricter requirements of our state statutes controlling electronic eavesdropping.

Id, citing RCW 9.73.030-.140; see also State v. O'Neill, 103 Wn.2d 853, 874-75, 700 P.2d 711 (1985).

Here, the jail routinely recorded telephone conversations of inmates and others without a warrant or other court order. Although Gunwall involved a pen register, the outcome must be the same, since recording telephone conversations is an even more intrusive invasion of privacy than merely recording telephone *numbers* as a pen register does.

As a consequence, the jail's recording of Mr. Bateman's telephone calls was without "authority of law" and violated art. I, § 7. Existing law, correctly viewed, shows a strong policy interest in protecting the privacy of telephone conversations even in the jail context. Although the Supreme Court has decided that the recording of a pretrial detainee's telephone conversations by the county jail did not violate the Privacy Act, this was based on facts including an emphasis that actual security concerns existed. State v. Modica, 164 Wn.2d 83, 88-89, 186 P.3d 1062 (2008) (recording of jail calls did not violate the privacy act because of security concerns).

But the Modica Court was concerned that Washington's Privacy Act, chapter 9.73 RCW, (the Act) is one of the most restrictive in the nation. State v. Christensen, 153 Wn.2d 186, 198, 102 P.3d 789 (2004); Modica, at 88-89. The Act proscribes the interception or recording of private communications, including those transmitted by telephone, "without first obtaining the consent of all the participants in the communication." RCW 9.73.030 (1)(a). Evidence obtained in violation of the Act is inadmissible for any purpose at trial. RCW 9.73.050.

Here, where a constitutional issue is presented, it must be noted that under the related Privacy Act, consent is considered obtained "whenever one party has announced to all other parties engaged in the communication or conversation, in any reasonably effective manner, that such communication or conversation is about to be recorded or transmitted." RCW 9.73.030 (3). In this case, although Sergeant Hicks testified that jail officials warned the parties, through a recording, that their conversations would be recorded, neither party announced the same to the other party. A person or governmental entity should not be able to render their illegal conduct legal merely by preannouncing it.

Nor does the doctrine of implied consent apply here. See State v. Townsend, 147 Wn.2d 666, 675-78, 57 P.3d 255 (2002) (a party implies consent when he knows that his messages will be recorded on the computer or answering machine of the other party). Here, Mr. Bateman was not leaving a message for his father or the others he spoke with, or sending him an e-mail; he was directly speaking to these persons – as Sergeant Hicks noted, the calls are of necessity initiated by the person in custody. 3/19/13RP at 487-88, 493. The recipients were not recording him; the jail was. And the parties had no choice in the matter if they needed to

communicate with family and the like, 3/19/13RP at 488-89; unlike the defendant in Townsend, who could have advised the other party to override his default software settings or chosen a different method of communication altogether. Because neither party in these multiple calls had consented, the recordings cannot be deemed proper under any "consent" theory.

Mr. Bateman also contends that the Supreme Court's reasoning for its decision was erroneous in Modica. But ultimately, the very existence of the Privacy Act's primary focus on whether the parties intended the information conveyed in the disputed conversations to remain confidential, is instructive in the constitutional issue. State v. Faford, 128 Wn.2d 476, 484, 910 P.2d 447 (1996).

The larger constitutional issue requires a finding of invasion of privacy. Cf. State v. Archie, 148 Wn. App. 198, 200-04, 199 P.3d 1005, review denied, 166 Wn.2d 1016, 210 P.3d 1019 (2009). For example, in State v. Jorden, the Supreme Court ruled that random searches of motel room registries without any individualized or particularized suspicion violated art. I, § 7. State v. Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007); see also State v. Young, 123 Wn.2d 173, 186-87, 867 P.2d 593 (1994) (use

of thermal imaging device on residence without search warrant invaded person's private affairs and conducted without authority of law); City of Seattle v. Mesiani, 110 Wn.2d 454, 455, 755 P.2d 775 (1988) (random suspicionless sobriety checkpoints invalidated under art. I, § 7 as they lacked particularized and individualized suspicion).

These cases stress the need to protect a citizen's private affairs and allow searches only with the authority of law supported by an individualized and particularized suspicion. The listening and recording of telephone calls by the jail invaded the private affairs of Mr. Bateman and his conversants, as these telephone calls could potentially "reveal intimate details of one's life." Jorden, 160 Wn.2d at 129. The listening and recording was done without a search warrant or any other court authorization, was not based upon any individualized and particularized suspicion, and, as a result, Mr. Bateman contends it was conducted without authority of law in violation of art. I, § 7 of the Washington Constitution.

The extent to which the recorded jail telephone calls in this case were pivotal to the outcome cannot be understated. The evidence that Mr. Bateman had any idea that his girlfriend Ms. Matera had obtained and was using illegal financial information was

very weak. Because the State employed Mr. Bateman's private calls to obtain the convictions on the counts, the convictions should be reversed.

2. MR. BATEMAN'S RIGHT TO UNANIMITY AND DUE PROCESS WAS VIOLATED ON COUNTS 2 AND 3 WHERE NOT ALL OF THE ALTERNATIVE MEANS OF IDENTITY THEFT WERE SUPPORTED BY SUBSTANTIAL EVIDENCE.

a. Right to Unanimity on the Walgreens and Nordstrom counts. Criminal defendants in Washington have a right to a unanimous jury verdict. Wash. Const. art. 1, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to an *expressly* unanimous verdict. Ortega-Martinez, 124 Wn.2d at 707 (right to expressly unanimous jury verdict includes right to unanimity on means by which defendant committed crime) (citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987); State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982); and State v. Simon, 64 Wn. App. 948, 831 P.2d 139 (1991)).[3]

[3] Wash. Const. art. 1, § 21 states: "The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases ..." As the Supreme Court has stated:

This constitutional dictate allows that a jury may be instructed on multiple or all of the statutory alternative means of committing a crime, and subsequently the defendant *may be convicted* by a general verdict; however, if there was no unanimity instruction or special verdict, and it also turns out on direct review that the record fails to include substantial evidence of each of the alternative means that the State itself chose to have the jury instructed on, reversal for a new trial is required. State v. Strohm, 75 Wn. App. 301, 305, 879 P.2d 962 (1994) (citing State v. Kitchen, at 410-11); Ortega-Martinez, at 707-08; State v. Howard, 127 Wn. App. 862, 872, 113 P.3d 511 (2005).

Here, the Identity Theft statute clearly indicates alternative means of committing the specified crime. The reasonable characterization of the statute's alternative language itself indicates

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> Allowing juries of less than 12 in courts not of record, creates a right to 12-member juries in courts of record. Seattle v. Filson, 98 Wn.2d 66, 70, 653 P.2d 608 (1982), overruled on other grounds in In the Matter of Eng, 113 Wn.2d 178, 776 P.2d 1336 (1989). Additionally, by allowing verdicts of nine or more only in civil cases, the final clause implicitly recognizes unanimous verdicts are required in criminal cases. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Workman, 66 Wn. 292, 295, 119 P. 751 (1911).

State v. Ortega-Martinez, 124 Wn.2d at 707.

a crime that can be committed in a variety of different ways, without reliance on multiple words in mere definitions, or an improper reading of means within a means. State v. Lindsey, ___ Wn. App. ___ (Wash. App. Div. 2, October 15, 2013); see State v. Smith, 159 Wn.2d 763, 769, 230 P.3d 588 (2010) and State v. Laico, 97 Wn. App. 759, 762-63, 987 P.2d 638 (1999). The statute, RCW 9.35.020, provides:

> (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

RCW 9.35.020(1), see also 11A Washington Pattern Instruction 131.06 (RCW 9.35.020), 3rd ed. 2008) (indicating "use" of the financial information should be set forth only when also charged, along with the possessory means). Alternative means were charged. CP 66, CP 67 ('to-convict' instructions).

b. Reversal is required. The prosecutor in the to-convict instructions removed none of the alternative means. CP 66, CP 67. As detailed supra, the State's case on the Walgreens count showed that Mr. Bateman drove or accompanied Ms. Matera to the Walgreens store, where an improper card or financial information was used by her to buy womens' items. 3/18/13RP at 275-96.

Even considering accomplice liability, as the counts respectively, there was not substantial evidence that Mr. Bateman had either obtained, or on that date used, the financial information. Either deficiency requires reversal.

Similarly, Mr. Bateman allegedly used illegal financial information to purchase two pairs of jeans at Nordstrom. Although the State's evidence of the burglary of the Snover/Nevins home indicated that the credit cards had been taken a period of hours to a day before all these purchases, there was simply no substantial evidence that Mr. Bateman had illegally obtained the financial information as opposed to merely possessing it – which he would have done without knowledge of any illegality.

Adequate evidence for a trier of fact to find each alternative is required, in order to affirm conviction on a general verdict without violating Mr. Bateman's right to jury unanimity. State v. Kitchen, supra, 110 Wn.2d at 410-11 (when the crime charged can be committed by more than one means, only where substantial evidence supports a guilty verdict for each means, is it harmless to fail to instruct the jury that they must be unanimous as to the means the defendant actually used to commit the offense); Wash. Const. art. I, § 21. Mr. Bateman contends that reversal is required.

E. CONCLUSION

Based on the foregoing, Mr. Bateman asks this Court to reverse his judgment and sentence.

DATED this 31 day of October, 2013.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70261-1-I
v.	)	
	)	
DANIEL BATEMAN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DANIEL BATEMAN 876456 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326-0769	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF OCTOBER, 2013.

X_____

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