No. 47647-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Elizabeth Jenson,

Appellant.

Pierce County Superior Court Cause No. 14-1-02297-4

The Honorable Judge G. Helen Whitener

Appellant's Opening Brief

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5. The prosecution improperly sought to aggregate multiple offenses into a single charge without alleging a common scheme or plan.

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7. Ms. Jenson was convicted through operation of a statute that is unconstitutionally overbroad.

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12. The trial court's reasonable doubt instruction violated Ms. Jenson's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.

13. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.

14. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 4: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Ms. Jenson's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Jack Falk was born in 1946, orphaned at a young age, and never learned to read. RP[1] 167-168, 172, 520. By 2015, he was living in an apartment owned by a local homeless mission and his only income came from Social Security disability benefits. RP 169-172, 450. Falk believed his protective payee was taking his money, so he asked Elizabeth Jenson to help. RP 187, 408, 522-523. Ms. Jensen worked for the mission and agreed to be his payee until he could find someone else. RP 173, 417, 516-517, 526.

Falk owed Ms. Jensen some money, and the two made a payee agreement that included repayment. RP 173, 526, 530, 541. Falk received $50 weekly for spending money, and Ms. Jensen paid his bills. RP 469, 528-530.

Falk took a trip to Disneyland during the time when Ms. Jensen was the payee, and she provided him with money for the trip. RP 550-562. When he ran out of money, he borrowed from his traveling companion, and later Ms. Jensen gave Falk money he used to repay his friend. RP 452-456, 472, 480. There were other times when Ms. Jensen

[1] Trial began on March 30, 2015. The transcripts from the trial are sequentially numbered, and will be the only ones cited in this brief. They will be cited as RP.

used her own money to pay for things for Falk and then was repaid. RP 516-562.

At some point, Falk became suspicious and reported to police that bills were being paid from his account for services he didn't use. RP 214-217, 269.

The state charged Elizabeth Jensen with two counts of identity theft one, two counts of theft two, and one count of each identity theft two and theft three. CP 44-47. The operative language of each charge did not allege that Ms. Jensen had a common scheme or plan. CP 44-47.

All of the counts were alleged to have occurred over years, some for up to four years and others for closer to two years, between July of 2011 and April of 2014. CP 44-47.

At trial, Falk remembered that he always had the money he needed when Ms. Jensen was his payee, but he remembered little else. RP 166-202. The state offered hundreds of pages of bank records in support of their case. RP 262-404. These records were all from Chase Bank, and covered five accounts – some under only Falk's name, some jointly held, and one only in Ms. Jensen's name. RP 262-404.

Ms. Jensen testified, explaining that Falk was like family to her. RP 522-523, 536-538, 555. She said that she kept careful records of money she'd loaned him until she was replaced as payee, when she

disposed of them. RP 530-531, 556. She also told the jury that Falk still owed her about $1600. RP 556, 558.

The state proposed an instruction regarding reasonable doubt that included the following: "If … you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP 74. The defense objected to this instruction, but the court gave it. RP 14-16; CP 74.

The jury returned verdicts of guilty. RP 853-856.

At sentencing, the defense argued that the counts were all one course of conduct. RP 885-890. The defense reminded the court that the charges aggregated amounts, that they all involved the same victim and bank, and that the intent was the same. RP 886. The court sentenced Ms. Jensen with two points.[2] RP 899; CP171-175.

Ms. Jensen timely appealed. CP 179.

ARGUMENT

I. THE INFORMATION OMITTED AN ESSENTIAL ELEMENT OF EACH IDENTITY THEFT AND THEFT CHARGED IN COUNTS I-IV.

A. Standard of Review.

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012)

[2] Ms. Jensen had no criminal history. RP 887.

review denied, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such a challenge may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). When the challenge comes after a verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 888. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id. at* 188. If the Information is deficient, the court must presume prejudice and reverse. *Id.* at 188.

B. The state failed to allege that Ms. Jenson committed multiple acts of theft and identity theft as part of a common scheme or plan, an essential element when the state seeks to aggregate offenses to elevate the degree of a charged crime.

A criminal defendant has a constitutional right to be fully informed of the charge she faces. This right stems from the Fifth, Sixth, and Fourteenth Amendments to the federal constitution, as well as art. I, §§ 3 and 22 of the Washington constitution. The right to a constitutionally-sufficient Information is one that must be "zealously guarded." *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

All of the essential elements of a crime must be alleged in the charging document. *Rivas*, 168 Wn. App. at 887. An Information that omits an essential element fails to charge a crime. *Id.*

To obtain a conviction for first-degree identity theft, the state must prove that the defendant obtained an amount in excess of $1,500. RCW

9.35.020(2). Similarly, a conviction for second-degree theft requires proof of an amount exceeding $750. RCW 9A.56.040(1)(a). Multiple acts of identity theft or theft may be aggregated to reach these statutory amounts, but only if the acts are all part of a common scheme or plan. RCW 9A.56.010(21)(c), RCW 9.35.020(5).

In aggregation cases, the existence of a "common scheme or plan" is an essential element of the offense. *Rivas*, 168 Wn. App. at 890-91. Thus, when the state seeks to aggregate multiple transactions to reach the minimum dollar amount for an offense, it must allege the essential element of a common scheme or plan in the Information. *Rivas*, 168 Wn. App. at 890-91.

The Information here did not allege that Ms. Jenson committed multiple acts of identity theft pursuant to a common scheme or plan. CP 44-47. Nor did the state charge her with committing multiple acts of theft pursuant to a common scheme or plan. CP 44-47.

Nonetheless, in counts I-IV, the state sought to convict Ms. Jenson based on the aggregation of multiple transactions over years. The court's "to convict" instructions each included the "common scheme or plan" element for counts I-IV. CP 84, 94, 97, 100. In closing, the prosecutor outlined the combination of transactions claimed to be part of such a common scheme or plan. RP 786-816, 836-842.

The jury necessarily relied on multiple transactions to reach the statutory amounts alleged.

The Information was insufficient as to counts I-IV. CP 44-46. It did not allege that each offense consisted of multiple transactions that were part of a "common scheme or plan." CP 44-46. A "common scheme or plan" is an essential element when the state seeks to elevate the degree of an offense by aggregating multiple crimes. *Rivas*, 168 Wn. App. at 890-91. The convictions in counts I-IV must be reversed and the charges dismissed without prejudice. *Id.*

II. THE IDENTITY THEFT STATUTE IS UNCONSTITUTIONALLY OVERBROAD

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Det. of Lane*, 182 Wn. App. 848, 332 P.3d 1042, 1044 (2014). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

Free speech challenges are different from most constitutional challenges to statutes; under the First Amendment, the state bears the

burden of justifying a restriction on speech.[3] *State v. Immelt*, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). Furthermore, a defendant may challenge a statute as overbroad even where the constitution clearly does not protect his own conduct.[4] *State v. Pauling*, 149 Wn.2d 381, 387, 69 P.3d 331 (2003). This is so "because prior restraints on free speech pose a greater harm to society than the possibility that some unprotected speech will go unpunished." *Id.* (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

B. The identity theft statute is unconstitutionally overbroad because it criminalizes thought.

Under the First Amendment, the state may not "control the moral content of a person's thoughts." *Stanley v. Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). Any attempts to do so are "wholly inconsistent with the philosophy of the First Amendment." *Id.*, at 565.

A statute is unconstitutionally overbroad "if it sweeps within its prohibitions constitutionally protected free speech activities." *State v.*

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[3] Ordinarily, the burden is on the party challenging the statute to show beyond a reasonable doubt that it is unconstitutional. *Washington Off-Highway Vehicle Alliance v. State*, 163 Wn. App. 722, 733, 260 P.3d 956 (2011) *review granted*, 173 Wn.2d 1013, 272 P.3d 247 (2012) (Off-Highway Vehicle Alliance I) and aff'd sub nom. *Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 290 P.3d 954 (2012) (Off Highway Vehicle Alliance II).

[4] An overbroad statute must be invalidated unless the reviewing court can impose a proper limiting construction. *Johnston*, 156 Wn.2d at 362-36; *Pauling*, 149 Wn.2d at 386. To save it from constitutional infirmity, "the statute must be construed to prohibit only unprotected speech." *Johnston*, 156 Wn.2d at 362-63.

Johnston, 156 Wn.2d 355, 363, 127 P.3d 707 (2006) (citation and internal quotation marks omitted). Criminal statutes "require particular scrutiny and may be facially invalid if they make unlawful a substantial amount of constitutionally protected conduct... even if they also have legitimate application." *Pauling*, 149 Wn.2d at 386 (citation internal quotation marks omitted).

The identity theft statute makes it a crime to knowingly possess another person's "means of identification" with intent to commit "any crime." RCW 9.35.020(1). This includes the mere possession of information such as a person's "current or former name." RCW 9.35.005(3).[5]

The statute is overbroad because it criminalizes thought. Efforts to control thought are unconstitutional. *Stanley*, 394 U.S. at 565. Imposing criminal liability "upon proof of mere intent provides too great a possibility of speculation and abuse." *United States v. Oviedo*, 525 F.2d 881, 885 (5th Cir. 1976).

In its effort to stop "unscrupulous persons" from "find[ing] ever more clever ways" to use personal and sensitive information,[6] the legislature cast a net so broad that it criminalized a vast amount of private

[5] The statute likewise criminalizes possession of "financial information," broadly defined, with intent to commit any crime. RCW 9.35.020(1); RCW 9.35.005(1).

thought, unaccompanied by any overt act. The statute's overbreadth is thus more than "substantial." *Immelt*, 173 Wn.2d at 6.

For example, a person who becomes enraged while looking through a telephone book and forms the intent to strike another is guilty of second-degree identity theft, even absent any overt act. RCW 9.35.020(1). Such a person knowingly possesses a vast number of "current or former name[s]" with the intent to commit the crime of assault. RCW 9.35.020(1); RCW 9.35.005(3). Indeed, given the legislature's intent to separately impose punishment for each name possessed, the phone-book possessor could be convicted of thousands of felonies, despite having sinned only in the mind. *See* RCW 9.35.001 (specifying that the unit of prosecution); *State v. K.R.*, 169 Wn. App. 742, 746 n. 1, 282 P.3d 1112 (2012).

Similarly, a child who intends to send a threatening email to a classmate could be convicted for doing no more than making a mental note of the target email address. Under RCW 9.35.020(3), she would be guilty of a class C felony for her knowing possession of "an electronic address" with intent to commit any crime, even though she could not be convicted of attempted harassment in the absence of a substantial step. RCW 9.35.020(1); RCW 9.35.005(3).

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[6] *See* RCW 9.35.001, Findings – Intent.

The statute's substantial overbreadth renders it unconstitutional. *Immelt*, 173 Wn.2d at 1, 6. Ms. Jenson's convictions for identity theft must be reversed and the case remanded for resentencing on the theft convictions. *Id.*, at 13-14.

C. No limiting construction can save the statute from overbreadth.

The statute expressly prohibits bare possession of information, where the defendant has "the intent to commit, aid, or abet *any* crime." RCW 9.35.020(1) (emphasis added). No construction consistent with this broad language could prevent the statute from applying to citizens who merely think about committing crimes.

Even though Ms. Jenson's alleged conduct false within the statute's legitimate sweep, the statute must be invalidated and her identity theft convictions reversed. *Broadrick*, 413 U.S. at 612; *Pauling*, 149 Wn.2d at 387.

III. THE COURT MISCALCULATED MS. JENSON'S OFFENDER SCORE, BECAUSE ALL OF HER CONVICTIONS SHOULD HAVE SCORED AS THE SAME CRIMINAL CONDUCT.

A sentencing court must determine the defendant's offender score pursuant to RCW 9.94A.525. The sentencing judge must determine how multiple current offenses are to be scored. Offenses that comprise the "same criminal conduct" are "counted as one crime. RCW

9.94A.589(1)(a). "Same criminal conduct" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a).

The phrase "same criminal intent" does not refer to a crime's *mens rea*. *State v. Phuong*, 174 Wn. App. 494, 546-47, 299 P.3d 37 (2013). Instead, courts consider how intimately related the crimes are, the overall criminal objective, and whether one crime furthered the other. *Id.* Multiple offenses that are part of a common scheme or plan should be considered to have the same criminal intent for purposes of RCW 9.94A.589(1)(a). That is, the overall criminal objective is to accomplish the scheme or plan.

Simultaneity is not required for a finding of same criminal conduct. *State v. Williams*, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); *State v. Porter*, 133 Wn.2d 177, 183, 942 P.2d 974 (1997).

Here, Ms. Jenson's five felony convictions comprised the same criminal conduct. The state conceded and the trial court found that two pairs of offenses comprised the same criminal conduct.[7] RP 878, 899; CP 158. The court should also have considered these pairs to comprise the same criminal conduct as each other and count V as well.

[7] Initially, the prosecutor took the position that each felony scored separately. CP 135.

All five offenses involved the same victim (Mr. Falk). CP 44-46. All five involved the same criminal intent because they were intimately related and they were aimed at a single overall criminal objective (wrongfully obtaining money belonging to Mr. Falk).[8] Each of the schemes alleged in counts I-V took place over the same generally overlapping charging period, with individual transactions commencing in 2011 and ending in 2014. CP 44-46. Finally, all five felonies transpired in the same "place" – Mr. Falk's accounts with J.P. Morgan Chase. Ex. 2-8; RP (4/1/15) 262-356; RP (4/2/15) 375-404.

Ms. Jenson's offenses meet all the requirements of RCW 9.94A.589(1)(a). They comprise the same criminal conduct. The court abused its discretion by scoring Ms. Jenson's offenses separately in calculating her offender score. RCW 9.94A.589(1)(a). Ms. Jenson's case must be remanded for resentencing. *Phuong*, 174 Wn. App. at 494, 546-47.

IV. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MS. JENSON'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH."

A jury's role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103,

[8] The prosecutor argued this theory to the jury directly. RP 788, 794, 803, 811.

286 P.3d 402 (2012). Here, over objection, the trial court instructed the jury that proof beyond a reasonable doubt means having "an abiding belief *in the truth of the charge*." CP 74 (emphasis added). This occurred both at the start of trial and at the close of the evidence. RP 14-16, 127-130, 148-149, 663-664; CP 74.

Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 74; RP 148-149.[9]

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 74; RP 148-149.

[9] Ms. Jenson does not challenge the phrase "abiding belief." Both the U.S. and Washington Supreme Courts have already determined that phrase to be constitutional. *See Victor v. Nebraska*, 511 U.S. 1, 15, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (citing *Hopt v. Utah*, 120 U.S. 430, 439, 7 S.Ct. 614, 30 L.Ed. 708 (1887)); *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995). Rather, Ms. Jenson objects to the instruction's focus on "the truth." CP 75.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 74; RP 148-149. Jurors were obligated to follow the instruction.

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.[10] *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Ms. Jenson her constitutional right to a jury trial.[11] Ms. Jenson's convictions must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

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[10] Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the "truth" language in that instruction. *Id.*

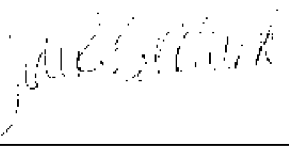
[11] U.S. Const. Amends. VI, XIV; art. I, §§ 3, 21, 22.

CONCLUSION

The Information charging theft and identity theft counts failed to allege the essential elements of the charges, so counts I-IV should be dismissed. Also, the statute criminalizing identity theft is unconstitutionally overbroad, and those convictions must be reversed. In addition, the trial court gave an erroneous reasonable doubt instruction, and all convictions should be reversed. Finally, Ms. Jensen's acts comprised the same course of criminal conduct and should not have counted separately at sentencing.

Respectfully submitted on October 1, 2015,

BACKLUND AND MISTRY



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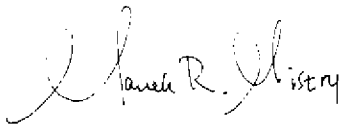

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CERTIFICATE OF SERVICE

I certify that on today's date:

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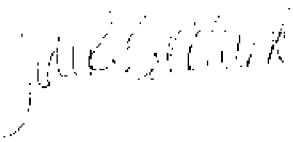

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