

NO. 63413-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL McVAY

Appellant.

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FILED  
COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel when defense counsel failed to ask that the jury be instructed on a lesser-included offense.

2. Appellant was denied his right to a unanimous verdict.

Issues Pertaining to Assignments of Error

1. Appellant was charged with second degree identity theft based solely on his possession of a check that contained the bank account numbers of another. Hence, appellant could have been charged and convicted of possession of a stolen access device rather than identity theft. However, defense counsel unreasonably failed to request the jury be instructed with regard to this lesser included offense. Was appellant denied effective assistance?

2. Appellant was charged with two means of committing identity theft – possessing another’s financial information or possessing another’s means of identification. The jury was so instructed. The evidence only supported one means (i.e. possessing another’s financial information), but the record does not indicate the jury unanimously convicted appellant based only that

one means. Was appellant denied his right to a unanimous verdict?

B. STATEMENT OF THE CASE

1. Procedural Facts

On December 12, 2008, the Snohomish County Prosecutor charged appellant Paul McVay with two counts of second degree identity theft. CP 140-41. The charges were later amended with the prosecutor adding two counts of forgery, two counts of possessing the identification of a fictitious person, and three more counts of identity theft. CP 130-32. A jury found McVay guilty of two counts of forgery and five counts of identity theft. CP 95-89. At sentencing, the trial court imposed the top of the standard range -- 57 months. CP 29-37.

2. Substantive Facts<sup>1</sup>

On November 20, 2008, McVay was arrested when he attempted to use a false Washington State Identification Card and check to purchase a cell phone at an Everett Walmart store. RP 62-65, 82-84. Upon his arrest, officers obtained a folder McVay was carrying that contained several checks purportedly drawn from

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<sup>1</sup> Only count VI is the subject of this appeal, so the substantive facts pertain only to that count.

a Bank of America account belonging to "Five Horizens Espresso" with the account number 16029712 and the bank routing number 125000024. RP 84, 96, 124, 152. The folder also contained a Versa Check advertisement for software enabling a person to create his or her own checks. RP 84, 104-05.

At trial, the State called Theresa Greene, owner and managing partner of Five Horizons Espresso. RP 151. She inspected the checks found on McVay and testified the bank account and routing numbers on the checks corresponded with her business' checking account numbers. However, she noted the name on the check and the address was not consistent with her business name or address. RP 151-52.

The State argued McVay's possession of these checks was unlawful because McVay did not have permission to use Green's company bank account numbers or a "misspelled" version of the business name. RP 153, 291-93. The State further argued McVay's possession of the checks plus the versa check software advertisement proved McVey possessed the financial means of another with intent to defraud, constituting identity theft. RP 285, 291-93.

The defense theory was the State failed to prove Five Horizons Espresso was a “person” falling within the meaning of the identity theft statute and thus, the State had failed to prove all elements of the charged crime. RP 301, 305. The jury found McVay guilty as charged. CP 90.

C. ARGUMENT

I. **McVAY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO REQUEST THE JURY BE INSTRUCTED ON THE LESSER-INCLUDED OFFENSE.**

Defense counsel unreasonably failed to request the jury be instructed that possession of stolen property is a lesser included offense of second degree identity theft.<sup>2</sup> Because McVay was entitled to this instruction, and because there was no legitimate tactical reason for not requesting it, counsel’s failure constituted ineffective assistance.

Effective assistance of counsel is guaranteed under the federal and state constitutions. U.S. Const. amend VI; Wash. Const. art. I, § 22. U.S. Const. Amends. VI, XIV; Wash. Const. art. 1, § 22;

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<sup>2</sup> Although second degree identity theft and possession of stolen property are both class C felonies (RCW 9.94A.160; RCW 9.35.020), the former has a seriousness level of II while the latter only has a seriousness level of I. RCW 9.94A.515. Hence, for purposes of sentencing, McVay faced a standard range of 43-57 months for identity theft, while he would have faced only a standard range of 22-29 months for possession of a stolen access device. RCW 9.94A.510; CP 21.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A defendant receives constitutionally inadequate representation if: (1) defense attorney's performance fell below an objective standard of reasonableness, and (2) such deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687-89.

Defense counsel's failure to request jury instructions for a lesser included offense may amount to constitutionally deficient performance under certain circumstances. State v. Grier, 150 Wn. App. 619, 635-41, 208 P.3d 1221(2009); State v. Pittman, 134 Wn. App. 376, 384-87, 166 P.3d 720 (2006). Reviewing courts first require the defendant to demonstrate he was entitled to lesser instructions in both fact and in law. Pittman, 134 Wn. App. at 384.

Second, the defendant must show that, under the facts of the case, it was an objectively unreasonable tactical decision for defense counsel to force the jury to find either that the greater offense occurred or that no offense occurred (the "all or nothing" tactic). Id. at 387.

A defendant is entitled to a lesser included offense instruction if each of the elements of the lesser offense is a necessary an element of the greater offense (the legal prong), and

the evidence supports an inference that only the lesser offense was committed (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Turning first to the legal prong of the Workman test, the elements of possession of a stolen access device are included within the elements of identity theft. The elements of identity theft are to knowingly obtain, possess, use, or transfer a means of identification or financial information of another person with intent to commit any crime. A person's bank account numbers qualify as "financial information." RCW 9.35.005(1); State v. Allenbach, 136 Wn. App. 95, 102-03; 147 P.3d 644 (2006). A person is guilty of possessing stolen property in the second degree if he possesses a stolen access device knowing it is stolen. RCW 9A.56.140(1) and .160(1)(c). Checking account numbers are considered an access device. State v. Chang, 147 Wn. App. 490, 493, 195 P.3d 1008 (2008). Hence, the elements of possession of a stolen access device (i.e. checking account numbers) are included within elements of second degree identity theft. The legal prong of the Workman test is satisfied.

The factual prong of the Workman test is also satisfied here. In deciding whether the record supports the inference that only the

lesser included offense was committed, courts review the record in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The State's evidence supporting the identity theft charge consisted merely of McVay's possession of checks containing stolen account numbers (i.e. a stolen access device) belonging to Five Horizons Espresso. There was no evidence McVay was trying to cash one of these checks or had the intent to do so in the future. Looking at this evidence in the light most favorable to the defendant, the jury could have inferred McVay possessed the stolen access device but had not formulated the intent to use this information to commit a crime. As such, the record shows the jury could have concluded McVay was only guilty of possessing a stolen access device.

In response, the State may argue that McVay not only possessed the company's bank numbers (financial information), but he also possessed the name of the business (a means of identification) – and consequently the evidence presented does not support the inference that only the lesser included offense was committed. Given the record, however, this argument should be rejected.

At trial, when questioning Greene, the prosecutor insinuated McVay had intended to include the official business name “Five Horizons Espresso” on the checks, but he had simply misspelled it as “Five Horizens Espresso.” RP 152-53. However, there is no evidence to support this theory beyond mere speculation. The evidence unquestionably establishes the checks found in McVay’s possession did not contain Greene’s official business name. RP 151-52. There was no evidence of any other business called “Five Horizens Espresso.” Hence, the only legitimate identifying information on the checks was the bank account numbers, and these qualify as an access device.

Given the record, defense counsel should have requested the jury be instructed on the lesser included offense, and her failure to do so constituted ineffective assistance. Although courts often will not find ineffective assistance for failure to request an instruction (i.e. an “all or nothing” strategy),<sup>3</sup> the deliberate tactical choice to employ such a strategy may constitute ineffective assistance of counsel if it falls outside the range of professionally competent assistance. Pittman, 134 Wn. App. at 390; Grier, 150

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<sup>3</sup> See e.g., State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Wn. App. at 640. Defense counsel's failure to request the lesser included instruction here constituted an unreasonable tactic.

It is objectively unreasonable to employ an all-or-nothing tactic when the defense theory does not place an element of the crime in serious dispute. In theory, this tactic is effective only when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in such a situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element. Keeble v. United States, 412 U.S. 205, 212-13, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973)).

[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble, 412 U.S. at 212-13. Given the evidence here, defense counsel's failure to request a lesser included instruction left the jury

highly likely to resolve its doubts in favor of convicting McVay for identity theft, which in fact, they did.

Here, the “all or nothing” strategy was not a reasonable choice in light of the defense theory. The defense theory was the State failed to prove Five Horizon’s Espresso was a “person” for purposes of identity theft. RP 305. Defense counsel's asking the jury to acquit McVay on insufficient evidence of that element alone was unreasonable because of the overwhelming evidence that the Five Horizons qualified as a “person.”

The term “person” is statutorily defined as any “natural person and, where relevant, a corporation, joint stock association, or an unincorporated association.” RCW 9A.04.110. The State offered the testimony of Greene, who identified herself as the owner and managing partner of the Five Horizons Espresso business. RP 151. She also implied there were more than two partners when she stated that the address on the check in question “is the partial address of one of my partners.” RP 152. This was certainly sufficient and compelling evidence from which the jury could find Five Horizons Espresso was either a corporation or an unincorporated association. Hence, the defense theory was not so

particularly compelling as to make the all-or-nothing strategy a legitimate tactical choice.

Because defense counsel had no legitimate tactical reason for failing to request the jury be instructed on the lesser-included offense of possessing a stolen access device, this Court should find McVay was denied effective assistance of counsel and reverse his conviction.

II. McVAY WAS DENIED HIS RIGHT TO UNANIMOUS VERDICT.

The jury's verdict in a criminal case must be unanimous. Wash. Const. art. I, § 21. Where a person may commit the charged crime by alternative means, the jury must be unanimous that the defendant is guilty for the single crime charged. State v. Nicholson, 119 Wn. App. 855, 860, 84 P.3d 877 (2003), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

The threshold test is whether there is sufficient evidence to support each of the alternative means presented to the jury. State v. Orteaa-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If each alternative means is supported by sufficient evidence, the jury need not be unanimous as to the means. Id. at 707-08. But if the evidence is insufficient to support all listed means and there is only

a general verdict, the conviction cannot stand unless it is clear from the trial record that it was founded upon the means for which there was substantial evidence. State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), overruled on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

There are two alternative means of identity theft: (1) to knowingly obtain, possess, use, transfer a means of identification; or (2) to knowingly obtain, possess, use, or transfer financial information of another person. RCW 9.35.020.

The statute defines financial information as:

“Financial information” means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities, or credit:

- (a) Account numbers and balances;
- (b) Transactional information concerning an account; and
- (c) Codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers, state identicard numbers issued by the department of licensing, and other information held for the purpose of account access or transaction initiation.

RCW 9.35.005(1).

Means of identification is statutorily defined as:

“Means of identification” means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person, including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; and other information that could be used to identify the person, including unique biometric data.

RCW 9.35.005(3).

Here, the to-convict instruction and the charges contained both means, but the evidence only supported one. CP 121. The check found in McVay's possession did not include the correct name or address for Five Horizons Espresso or any other unique identifying information, hence he did not possess a means of identification under RCW 9.35.005. Instead, the evidence only established that McVay possessed the business' account numbers (i.e. its financial information). See, State v. Allenbach, 136 Wn. App. 95, 102-03; 147 P.3d 644 (2006).

Given the record here, however, it is not clear the jury only relied on the financial information means in reaching its decision. As noted above, the prosecutor injected into the trial improper

speculation that McVay had intended to use Green's official business name but had inadvertently misspelled it. Based on this speculation alone, the jury might have convicted McVay of the unsupported means. This would have been improper.

Since the evidence here only supports one means and there is no indication the jury relied only on this means when reaching its verdict, McVay's conviction must be reversed. See, State v. Lobe, 140 Wn. App. 897, 906-07, 167 P.3d 627 (2007).

D. CONCLUSION

For the above stated reasons, appellant asks this Court to reverse his identity theft conviction.

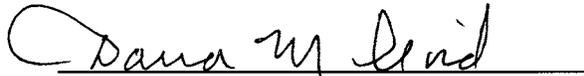
Dated this 22<sup>nd</sup> day of October, 2009.

Respectfully submitted

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 63413-5-1
	)	
PAUL McVAY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22<sup>ND</sup> DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] PAUL McVAY  
DOC NO. 824869  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

**SIGNED** IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF OCTOBER, 2009.

x. *Patrick Mayovsky*

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON,	)	
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v.	)	COA NO. 63413-5-I
	)	
PAUL McVAY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
EVERETT, WA 98201

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF OCTOBER, 2009.

x. *Patrick Mayovsky*

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