

NO. 66458-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIA LUCILLE ZIMMERMAN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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A. ISSUE

1. The statute that defines the crime of identity theft proscribes knowingly obtaining, possessing, using or transferring a means of identification or financial information of another person with the intent to commit "any crime." The trial court here instructed the jury in accordance with the statute, and did not require the State to prove the specific crime intended. The defense proposed a "to convict" instruction that similarly did not require proof of the specific crime intended. Did the trial court properly instruct the jury? Was any error invited?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Demetria Lucille Zimmerman was charged by information with Identity Theft in the First Degree. The State alleged that, on at least two occasions during the period of time between February 11 and July 10, 2008, Zimmerman used Jennifer Habben's name and other identifying information with the intent to commit a crime, and that Zimmerman obtained goods or services in excess of \$1500. CP 1-5.

A jury convicted Zimmerman as charged. CP 68. Based on her offender score of 9, Zimmerman's standard range was 63-84 months. The trial court imposed 36.75 months in custody, as part of a prison-based DOSA (Special Drug Offender Sentencing Alternative). CP 69-78.

## 2. SUBSTANTIVE FACTS.

Jennifer Habben, a property manager, first learned that someone else was using her identity when she received a letter from Harborview Medical Center informing her that she owed money for services obtained during visits to the facility. 3RP<sup>1</sup> 14-16. The bill for March 27, 2008, was \$2,276.62, and the bill for July 10, 2008 was \$2,423.94. 3RP 88. Habben had not gone to Harborview on the dates in question. 3RP 23.

Based on the address listed on the billing statements, a police investigation turned up Zimmerman's name.<sup>2</sup> 3RP 29. When confronted by police, Zimmerman admitted that she had

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<sup>1</sup> The verbatim report of proceedings will be referred to in this brief as follows: 1RP (11/22/10); 2RP (11/29/10); 3RP (11/30/10); 4RP (12/1/10); and 5RP (12/22/10).

<sup>2</sup> The address associated with these bills was 11044 Auburn Avenue South, which was Zimmerman's mailing address. 3RP 89, 104.

used Habben's name on a number of occasions. 3RP 35, 38.

Habben never gave Zimmerman permission to use her identity.

3RP 50.

Zimmerman testified at trial. She admitted using Habben's name when she went to Harborview on both of the dates in question. 3RP 102-04, 106. Zimmerman claimed, however, that she never intended to steal services or money from either Habben or Harborview.<sup>3</sup> 3RP 104-05. Zimmerman explained that there were warrants out for her arrest and that, because police were present during her visits to Harborview, she used a false name to avoid going to jail. 3RP 103, 107-08.

C. ARGUMENT

1. JURORS WERE PROPERLY INSTRUCTED THAT THEY COULD FIND ZIMMERMAN GUILTY OF IDENTITY THEFT IF THEY FOUND THAT SHE HAD USED HABBEN'S IDENTIFYING INFORMATION WITH THE INTENT TO COMMIT "ANY CRIME."

Zimmerman contends that the specific underlying offense that she intended to commit when she used Habben's identifying

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<sup>3</sup> While Harborview did not ultimately hold Habben liable for the costs associated with Zimmerman's visits, Harborview had never been compensated for those costs. 3RP 95-96.

information is an element of the crime of identity theft. As such, she argues, the underlying crime must be included in the "to convict" instruction, and must be found by the jury beyond a reasonable doubt. This claim should be rejected, as it is supported neither by the language of the statute nor by the relevant case law.

The identity theft statute sets out the proscribed conduct: "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) (*italics added*). The crime is identity theft in the first degree when the perpetrator obtains "credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value." RCW 9.35.020(2).

The State proceeded on two theories: either Zimmerman used Habben's name at Harborview to avoid being arrested and taken to jail on outstanding warrants, or she used the false name to obtain medical services without having to pay for them. 4RP 46, 56. The State told the jury that there was substantial evidence in support of each of these alternative means of committing the charged crime. 4RP 56.

In the "to convict" instruction, the trial court instructed the jurors that they had to find that Zimmerman knowingly used someone else's means of identification "to commit any crime."<sup>4</sup> CP 56. Jurors were also given definitions of the crimes of theft and obstructing a law enforcement officer. CP 58, 59.

The interpretation of a statute is a question of law and review is therefore *de novo*. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). While the court's primary duty in interpreting a statute is to discern and implement the intent of the legislature, the starting point must always be the plain language of the statute, and the ordinary meaning of that language. Id. at 450. When the plain language is unambiguous, the legislative intent is apparent, and the court will not construe the statute otherwise. Id.

In drafting the identity theft statute, the legislature specified only the intent to commit "any crime." RCW 9.35.020(1). The court instructed the jury in the language of the statute (CP 56), and the jury found Zimmerman guilty. There was no error.

The Washington Supreme Court's interpretation of the burglary statute provides a useful analogy. Burglary requires the

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<sup>4</sup> Zimmerman proposed the same language. CP 24.

intent to commit "a crime" against a person or property in the building entered unlawfully. RCW 9A.52.020(1), 9A.52.025(1), 9A.52.030(1). Faced with the question whether the specific crime intended was an element of burglary, such that it had to be charged and instructed on, our supreme court concluded that the specific underlying crime was not an element of the crime of burglary. State v. Bergeron, 105 Wn.2d 1, 4, 711 P.2d 1000 (1985) ("The intent required by our burglary statutes is simply the intent to commit any crime against a person or property inside the burglarized premises.").

To explain its conclusion, the court delved into the history of the common-law offense of burglary:

In 1890, the courts were still operating under the strong influence of the common law definition of burglary. . . . [O]ne of the elements of common law burglary was that the breaking and entering be "with the intent to commit a felony" therein. . . . Thus, at common law, the indictment obviously had to plead facts showing a felony was intended because if anything other than a felony was intended the breaking and entering did not constitute burglary. So it is that those states with burglary statutes which still require an intent to commit a felony, or intent to commit a felony or larceny, or intent to commit other designated crimes, can logically require that a specific intended crime be alleged and proved. *There is no similar reason to require it in the State of Washington where burglary is a statutory offense and where our*

*burglary statutes require only an intent to commit any crime.*

Bergeron, 105 Wn.2d at 14-15 (italics added). The court accordingly held that the specific crime intended to be committed inside burglarized premises is not an element of burglary that must be included in the "to convict" instruction: "It is sufficient if the jury is instructed . . . in the language of the burglary statutes." Id. at 16.

Zimmerman nevertheless dismisses the analogy to the burglary statute, relying on the "unique nature of burglary in Washington." Brief of Appellant at 7. She points out that "Washington's burglary offense is now a statutory offense, no longer based upon the common law." Id. at 6-7. Based on the Bergeron court's reasoning, that is exactly why the specific underlying crime is *not* an element of the offense of burglary. Identity theft, also a statutory offense, similarly does not require identification and proof of the specific underlying crime intended.

Zimmerman urges this Court to look to the crime of felony murder for guidance, since the specific underlying crime is an element of felony murder. State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121, rev. denied, 119 Wn.2d 1015 (1992). One problem with this analogy is the fact that felony murder requires that the

underlying crime be a *felony*; thus, the State must specify and prove the specific crime to convict a defendant of felony murder, simply to show that the charge is supported by a felony.

Moreover, felony murder is divided into degrees based on the specific underlying crime. Second-degree felony murder may be supported by "any felony . . . other than those enumerated in RCW 9A.32.030(1)(c)." RCW 9A.32.050(1)(b). Thus, the specific underlying crime is an essential element of the specific degree of felony murder. Burglary is not similarly divided into degrees based upon the crime the burglar intends to commit within.

Perhaps most significantly, the underlying crime in felony murder furnishes the mental state for the crime of felony murder itself. State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) ("The state of mind necessary to prove a felony murder is the same state of mind necessary to prove the underlying felony."); State v. Quillin, 49 Wn. App. 155, 165, 741 P.2d 589 (1987) ("First degree felony murder requires no specific criminal mental state other than the one necessary for the predicate crime -- in this case, robbery in the first degree."), rev. denied, 109 Wn.2d 1027 (1988); Bryant, 65 Wn. App. at 438 (in felony murder, "the underlying crime functions as a substitute for the mental state the State would otherwise be

required to prove"); State v. Bolar, 118 Wn. App. 490, 502, 78 P.3d 1012 (2003) ("the mens rea for felony murder is based solely on the mens rea for the predicate offense"), rev. denied, 151 Wn.2d 1027 (2004). Thus, it is clear that the underlying crime *must* be a necessary element of felony murder. There is no similar relationship between burglary and the crime intended within.

2. ANY ERROR IN THE JURY INSTRUCTIONS WAS INVITED.

Even if the trial court erred in instructing the jury, any error was invited. Zimmerman's claim should be rejected on this basis as well.

The invited error doctrine precludes appellate review of alleged instructional error if the instruction was given at the defendant's request. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). Thus, "[a] party may not request an instruction and later complain on appeal that the requested instruction was given." Id. (quoting State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990)).

Zimmerman proposed a "to convict" instruction that required the State to prove (in addition to dollar value) that she "knowingly

used a means of identification or financial information of another person," and that she did so "with the intent to commit *any crime*." CP 24 (italics added). Because she requested an instruction that contains the same alleged error as the one given by the trial court, Zimmerman cannot now complain on appeal that the requested instruction was given.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Zimmerman's conviction for Identity Theft in the First Degree.

DATED this 23<sup>rd</sup> day of September, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Thomas M. Kummerow**, the attorney for the appellant, at **Washington Appellate Project**, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. DEMETRIA LUCILLE ZIMMERMAN**, Cause No. **66458-1-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name  
Done in Seattle, Washington

09-28-11  
Date

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