

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

NO. 34874-8-II

STATE OF WASHINGTON

Respondent,

vs.

NICK IN YOUNG PARK

Appellant.

FILED
COURT OF APPEALS
DIVISION II
07 JAN 26 PM 1:26
STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 05-1-00113-1

BRIEF OF RESPONDENT

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Date: January 25, 2007

pm 1-25-07

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I. COUNTER ASSIGNMENTS OF ERROR

The court did not improperly comment on the evidence by using a “to wit” reference in its “to convict” instruction.

**II. ISSUES PERTAINING TO
COUNTER ASSIGNMENTS OF ERROR**

1. Where an identity theft charge is based on the unauthorized use of a bank credit card may the court in its to convict instruction direct the jury's attention to that card by use of a "to wit" reference without improperly commenting on the evidence?

2. Assuming *arguendo* that the reference created an improper comment does the record affirmatively show that no prejudice occurred?

III. STATEMENT OF THE CASE

Nick In Young Park's brief correctly sets forth the procedural facts, trial testimony, and challenged jury instructions.

IV. ARGUMENT

Issue 1. Where an identity theft charge is based on the unauthorized use of a bank credit card may the court in its to convict instruction direct the jury's attention to that card by use of a "to wit" reference without improperly commenting on the evidence?

Although the state acknowledges that "to wit" references in to convict instructions are problematical they must be considered in the totality of their own particular circumstances. That is the approach taken by the court in the recent case of State v. Levy, 156 Wn. 2d 709 (2006). Faced with five separate "to wit" references to review for potential improper judicial comment it looked at each separately in its own particular instructional context. Id. at 720-22. This decision also contains a thorough review of the relevant case law in existence on the issue of improper "to wit" references and provides guidance on how the effect of any judicial comments should be analyzed .

So how does the Levy approach help in this case? First, it tells us if we have a reference which also contains the very name or noun of the element that the charge requires then the reference is certainly an impermissible judicial comment. In Levy that happened where one "to wit" reference identified the victim's address as a "building." Since the charge was burglary the effect was clearly to identify the address as a building as a matter of law. This type of "to wit" reference was first

disapproved in State v. Becker, 132 Wn. 2d 54, 64 (1997). In Park’s case no such transfer of a term from the element (specifically, “means of identification” or “financial information”) into the “to wit” reference occurred.

Next, Levy tells us if we place a term in the “to wit” reference that does not unambiguously direct the jury to meet its proof considerations then a judicial comment has likely occurred. This happened in Levy where the jury was directed to consider a “crowbar” as a deadly weapon. The court correctly noted that a crowbar is a deadly weapon only if it “has the capacity to inflict death and from the manner it is used, is likely to produce or may easily and readily produce death.” Thus, the court concluded that reference to the crowbar as a deadly weapon “was likely a judicial comment because the jury need not consider whether the State proved that its use caused it to be qualified as a deadly weapon.” In Park’s case no such ambiguity exists because a credit card either contains financial information or means of identification or it does not. There is no added special manner of use required to determine whether it contains financial information or a means of identification.

Next, Levy tells us if we have “to wit” references that can themselves be made as judicial instructions then no judicial comment occurred. This happened twice in Levy. First, with reference to a revolver

as a deadly weapon and, second, with reference to jewelry as personal property. The court cited to the Washington Pattern Jury Instructions. Levy at 722. These WPIC instructions permit a court to instruct that a revolver is a deadly weapon and that jewelry is personal property. The State acknowledges that there are no WPIC instructions that permit the court to instruct a jury in an identity theft case that a credit card is “financial information and a means of identification” as a matter of law. But there should be and probably will be in due course. Identity theft is a relatively new offense and the WPIC drafters will eventually address the issue. Can any reasonable person not entertain the notion that all credit cards contain names and account numbers thereby being of and by themselves “financial information and means of identification?” Does not the same logic underlying the WPIC instructions on jewelry as property and revolvers as deadly weapons support such an instruction on credit cards as financial information and means of identification? The State asserts that it does and on that basis the reference to the credit card should not be considered judicial comment.

Finally, Levy dealt with a reference to a victim by name in a robbery charge. Noting that the victim’s name was not an element of the offense of robbery the Levy court agreed with the Court of Appeals that naming the victim in a “to wit” reference did not suggest to the jury that it

need not find the property was taken from another. Id. at 722. In Park’s case the named bank credit card was not itself an element so the same logic suggests that reference to it did not suggest to the jury that they did not have to find that the Park improperly used “financial information” or “means of identification” as required by the elements of the offense.

Issue 2. Assuming *arguendo* that the reference created an improper comment does the record affirmatively show that no prejudice occurred?

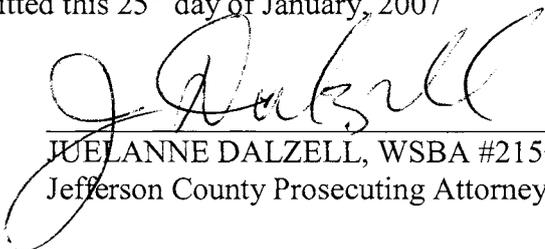
Levy also made it clear that if judicial comment on the evidence occurred they are presumed prejudicial. The State must then show that the defendant was not prejudiced by such comments, unless the record affirmatively shows that no prejudice occurred. Levy at 723. In Levy, the court looked at prejudice where the “to wit” reference in a burglary charge identified the victim’s apartment as a building. It first noted that the jury could not have concluded that the apartment “was anything other than a building.” It then found no prejudice and emphasized again that no one could realistically conclude that an apartment is not a building. Levy at 726,27. The record then will affirmatively show no prejudice could have resulted when, without the erroneous judicial comment, no one could realistically conclude that the element was not met. State v. Baxter, 134 Wn. App. 587,590 (2006).

In Park's case no one could have concluded that the named bank credit card was anything but financial information or a means of identification. In addition, the improper use of the card was undisputed at trial. Credit card transaction receipts were introduced showing that the victim's name and account number were used. RP 78,79. The defense presented no evidence (RP 105) and argued that Park was not the person who fraudulently used the credit card. Thus, even assuming judicial comment on the evidence, the record affirmatively shows no prejudice could have resulted.

V. CONCLUSION

For the reasons stated Park's identity theft conviction should be affirmed and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 25th day of January, 2007



JUELANNE DALZELL, WSBA #21508
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) Case No.: 34874-8-II

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) DECLARATION OF MAILING

Janice N. Chadbourne declares:

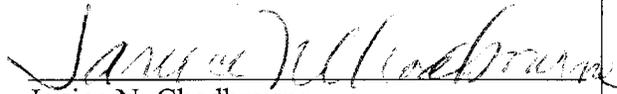
That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 25th day of January, 2007, I mailed a copy of the State's BRIEF OF RESPONDENT, to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Jennifer M. Winkler
Nielson, Broman & Koch, PLLC
1908 E Madison Street
Seattle, WA 98122-2842

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

Dated this 25th day of January, 2007 at Port Townsend, Washington.


Janice N. Chadbourne
Legal Assistant

DECLARATION OF MAILING
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