

NO. 35346-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICOLE A. TYRER,

Appellant.

STATE OF WASHINGTON
BY _____
OFFICE OF THE CLERK
CLERK OF COURT

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

The Honorable John P. Wulle, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's convictions of both identity theft and criminal impersonation violate state and federal constitutional guarantees against double jeopardy.

Issue pertaining to assignment of error

Appellant was convicted of both identity theft and criminal impersonation based on her use of the means of identification of another person to avoid arrest. Where criminal impersonation is a lesser included offense of identity theft as charged and prosecuted in this case, did appellant's conviction of both offenses violate double jeopardy?

B. STATEMENT OF THE CASE

1. Procedural History

On August 9, 2006, the Clark County Prosecuting Attorney charged appellant Nicole Tyrer by third amended information with one count of second degree identity theft, one count of first degree criminal impersonation, and two counts of forgery. CP 9-10; RCW 9.35.020; RCW 9A.60.040(1); RCW 9A.60.020(1)(a)(b). The case proceeded to jury trial before the Honorable John P. Wulle, and the jury returned guilty verdicts. CP 71-74. The court imposed an exceptional sentence, running the sentences on the criminal impersonation and forgery convictions

consecutively, finding that Tyrer's high offender score resulted in some current offenses going unpunished. CP 103, 112. Tyrer filed this timely appeal. CP 93-94.

2. Substantive Facts

On January 9, 2006, Trooper Richard Bettger stopped a pickup truck because he noticed that Nicole Tyrer, the passenger, was not wearing a seat belt. IRP¹ 138. Tyrer told Bettger she did not have any identification, but she gave the name Megan Campbell, provided a birth date, and said she had a California driver's license. IRP 139. Bettger issued a citation, and Tyrer signed Campbell's name. IRP 140. Tyrer was issued another traffic citation on February 4, 2006, and she again used and signed the name Megan Campbell. IRP 135, 169. On March 22, 2006, Vancouver Police Officer Neil Martin stopped Tyrer because the car she was driving had expired license tabs. IRP 160. Tyrer said she did not have any identification with her but gave the officer Megan Campbell's name, date of birth, address, and a partial driver's license number. IRP 161-62. Martin did not issue a citation. IRP 165.

Following the two citations, Megan Campbell received notice from the Washington Department of Licensing that her California driver's

¹ The Verbatim Report of Proceedings is contained in two consecutively-paginated volumes, designated as follows: IRP—8/9/06; 2RP—9/7/06.

license was going to be suspended in Washington. 1RP 145. Since she had never been to Washington, she did not know why this action was being taken, and she contacted the Department of Licensing and the Clark County Sheriff's Department. 1RP 146-47, 155.

Officer Martin began investigating the use of Campbell's name and learned Tyrer's true identity from a confidential informant. 1RP 165. Tyrer was arrested on April 20, 2006. 1RP 166. At that time, she admitted using Megan Campbell's name and identifying information and said she had done so to avoid being arrested on a warrant. 1RP 168-70.

The state charged Tyrer with one count of identity theft for her use of Campbell's means of identification, one count of criminal impersonation for her assumption of Campbell's identity, and two counts of forgery based on the signed citations. CP 9-10. Tyrer was convicted and sentenced on all four counts. CP 71-74, 103.

C. ARGUMENT

CONVICTION OF BOTH IDENTITY THEFT AND CRIMINAL IMPERSONATION VIOLATED STATE AND FEDERAL CONSTITUTIONAL GUARANTEES AGAINST DOUBLE JEOPARDY.

The United States Constitution provides that a person may not be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V. Similarly, the Washington State Constitution

provides that a person may not be "twice put in jeopardy for the same offense." Const. art. I, § 9. The constitutional guarantee against double jeopardy protects against multiple punishments for the same offense. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); U.S. Const., amend. V; Const., art. I, § 9. At trial, defense counsel argued that Tyrer was being charged with multiple crimes for essentially the same act, although he did not specifically refer to constitutional double jeopardy protections. IRP 123. Even if counsel did not raise the issue below, a double jeopardy claim may be raised for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006); RAP 2.5 (a).

If a statute constitutes a lesser included offense of another statute, conviction for both offenses violates double jeopardy. Jackman, 156 Wn.2d at 749; State v. Roybal, 82 Wn.2d 577, 582, 512 P.2d 718 (1973). A crime is a lesser included offense if each element of the lesser offense is a necessary element of the greater offense. State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006) (second degree child molestation necessarily includes elements of fourth degree assault as charged, thus assault is lesser included offense); Roybal, 82 Wn.2d at 583; State v. Godsey, 131 Wn. App. 278, 289, 127 P.3d 11 (because resisting arrest requires no proof independent of that also required for proof of third

degree assault, resisting arrest is a lesser included offense of assault under RCW 9A.36.031(1)(a), review denied, 149 P.3d 379 (2006)).

Each element of criminal impersonation was a necessary element of identity theft as charged and prosecuted in this case. Thus, criminal impersonation is a lesser included offense of identity theft, and Tyrer's conviction for both offenses violates double jeopardy.

Identity theft is prohibited under RCW 9.35.020, which provides as follows:

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). A person is guilty of criminal impersonation if he or she

(a) Assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose; or

(b) Pretends to be a representative of some person or organization or a public servant and does an act in his or her pretended capacity with intent to defraud another or for any other unlawful purpose.

RCW 9A.60.040(1).

The lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than as they broadly appear in the statutes.

State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997). Although the

state included the “financial information” language from the identity theft statute in the charging document, no evidence was presented as to the use of any financial information, and the prosecutor argued to the jury that Tyrer committed identity theft by using Campbell’s means of identification, not her financial information. CP 9; IRP 199. Thus, only the means of communication prong is relevant to the lesser included offense analysis. See Stevens, 158 Wn.2d at 311 (looking at applicable definition of assault to determine if child molestation was lesser included offense in that case). Similarly, only subsection (a) of the criminal impersonation statute is relevant, based on the charging information and evidence in this case. See CP 9-10.

To establish identity theft as charged and prosecuted in this case, the state had to prove that Tyrer obtained and used Megan Campbell’s means of identification with the intent to commit any crime. By proving this offense, the state necessarily established that Tyrer committed criminal impersonation: she assumed Megan Campbell’s identity by using her means of identification for an unlawful purpose.

The prosecutor’s closing argument demonstrates that criminal impersonation is a lesser included offense of identity theft in this case. The prosecutor argued that Tyrer committed identity theft when she unlawfully obtained and used Megan Campbell’s information for the

purpose of defrauding law enforcement, avoiding arrest, and committing forgery. IRP 185. She argued that Tyrer committed criminal impersonation when she gave a false identity to avoid arrest and defraud the officer as to her true identity. IRP 188. Every one of these elements was included in the state's proof of identity theft. Thus, by proving Tyrer committed identity theft, the state necessarily proved all the elements of criminal impersonation.

The question of whether criminal impersonation is a lesser included offense of identity theft has not been addressed by Washington case law. Division One of the Court of Appeals held that the two offenses were not the same in law and thus denied an equal protection claim that the state was required to charge criminal impersonation, then a misdemeanor, rather than identity theft, a felony. State v. Presba, 131 Wn. App. 47, 54-55, 126 P.3d 1280 (2005), review denied, 143 Wn.2d 829 (2006). In that case, the defendant had argued at trial that criminal impersonation was a lesser included offense, but the issue was not pursued on appeal. Presba, 131 Wn. App. at 51. The Court of Appeals nonetheless discussed the trial court's analysis of the issue. The trial court had ruled that criminal impersonation was not a lesser included offense of identity theft because one could assume a false identity and thus commit criminal impersonation without using the means of identification of a real

person as required by the identity theft statute. Presba, 131 Wn. App. at 51.

The trial court's ruling turns the lesser included offense analysis on its head. The proper question to ask is whether it is possible to commit the greater offense without having committed the lesser. Roybal, 82 Wn.2d at 583. Instead, the trial court asked whether it was possible to commit the lesser offense without committing the greater. In any event, this discussion of the trial court's ruling has no precedential value since the issue was not before the appellate court. See State v. Christensen, 153 Wn.2d 186, 196, 102 P.3d 789 (2004) (court's gratuitous statement on issue not before court was dicta and had no precedential value).

As the court recognized in Presba, because identity theft requires the use of a real person's identity, whereas the false identity assumed for criminal impersonation need not be that of a real person, the two offenses are not the same in law. Presba, 131 Wn. App. at 55. Even though identity theft requires proof of an element criminal impersonation does not, criminal impersonation requires no proof independent of that required for identity theft in this case. When Tyrer used the means of identification of Megan Campbell, a real person, with the intent to commit a crime, she necessarily committed an act under an assumed false identity for an

unlawful purpose. Criminal impersonation is therefore a lesser included offense of identity theft. See Godsey, 131 Wn. App. at 289.

Double jeopardy may not be offended by convictions of both a greater and lesser offense where the state relies on two separate acts to prove the charges. Godsey, 131 Wn. App. at 290. That is not the case here, however. The Washington Supreme Court recently addressed the unit of prosecution for identity theft in State v. Leyda, 157 Wn.2d 335, 138 P.3d 610 (2006). The Court held that

[O]nce the accused has engaged in any one of the statutorily proscribed acts against a particular victim, and thereby committed the crime of identity theft, the unit of prosecution includes any subsequent proscribed conduct, such as using the victim's information to purchase goods after first unlawfully obtaining such information.

Leyda, 157 Wn.2d at 345. Here, Tyrer was charged with one ongoing offense of identity theft, from January 9 through March 22, 2006. CP 9. During this period, she encountered Officer Martin and continued to use Campbell's identity. The criminal impersonation on March 22, 2006, was part of the single ongoing identity theft. Any attempt to prosecute Tyrer for both the ongoing offense and the lesser included offense violates her right to be free from double jeopardy. See Brown v. Ohio, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L.Ed.2d 187 (1977).

In Brown, the defendant stole a car in East Cleveland, Ohio, and was apprehended nine days later driving in the town of Wickliffe. He was charged in Wickliffe with “joyriding” alleged to have been committed on December 8, and pled guilty. After serving a short jail sentence, he went back to East Cleveland, where the county charged him with felony auto theft, alleged to have occurred on November 29. The only difference between the two offenses is that the felony auto theft required an intent to permanently deprive the owner of the car. Brown, 432 U.S. at 162-64.

On appeal, Brown challenged his felony conviction on double jeopardy grounds. The state court concluded that although joyriding was a lesser included offense of felony auto theft, there was no double jeopardy violation because the two convictions were based on acts occurring on separate dates. Brown, 432 U.S. at 164.

The Supreme Court disagreed. The Court first noted that joyriding was a lesser included offense of auto theft and that “the greater offense is therefore by definition the ‘same’ for purposes of double jeopardy as any lesser included offense in it.” Brown, 432 U.S. at 168. The Court then explained that the different charging periods could not alter this result:

The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the expedient of dividing a single crime into a series of temporal or spatial units. The applicable Ohio statutes, as written and construed in this case, make the theft and operation of a single car a single offense.

Although the [two prosecuting entities] may have had different perspectives on Brown's offense, it was still only one offense under Ohio law. Accordingly, the specification of different dates in the two charges on which Brown was convicted cannot alter the fact that he was placed twice in jeopardy for the same offense in violation of the Fifth and Fourteenth Amendments.

Brown, 432 U.S. at 169-70.

The reasoning in Brown applies with equal force here. As Leyda makes clear, Tyrer's single offense of identity theft was continuing when she used Campbell's means of identification in her encounter with Officer Martin. In charging both identity theft and criminal impersonation, the state improperly broke up this continuous conduct to obtain convictions on both the greater and the lesser included offense. Under Brown, this is impermissible.

Tyrer could not have committed identity theft as charged and prosecuted in this case without also committing criminal impersonation. Therefore, criminal impersonation is a lesser included offense, and conviction of both offenses violates Tyrer's double jeopardy protections. The criminal impersonation conviction must be dismissed.

D. CONCLUSION

Tyrer's convictions for both identity theft and the lesser included offense of criminal impersonation violate state and federal constitutional protections against double jeopardy. Her conviction for criminal impersonation must be dismissed.

DATED this 19th day of February, 2007.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Nicole A. Tyrer*, Cause No. 35346-6-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
February 20, 2007

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