

NO. 36417-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JON MESKE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying appellant's motions to dismiss made at halftime and following closing arguments but before the court entered a verdict.

2. The evidence was insufficient to convict appellant of the charged offense.

3. The trial court failed to enter written findings of fact and conclusions of law after the bench trial.

**Issues Pertaining to Assignments of Error**

1. Appellant allegedly tried to cash a forged check and was therefore charged with identity theft under the "means of identification" alternative. The trial court denied the State's day-of-trial motion to amend the charge to include the "financial information" alternative. Did the trial court err in denying appellant's motions to dismiss, and was the evidence insufficient to convict appellant as charged when a forged payroll check does not constitute a "means of identification" in the context of the crime of identity theft?

2. Should this court remand for entry of written findings of fact and conclusions of law as required by CrR 6.1(d)?

B. STATEMENT OF THE CASE

1. Procedural History

By amended information,<sup>1</sup> the Grays Harbor County prosecutor charged appellant Jon Meske with second degree identity theft. CP 6; RCW 9.35.020(3). The prosecutor alleged that on April 2, 2007, Meske "did knowingly use or transfer a means of identification to another person, to wit: ATS Northwest Incorporated, with intent to commit or aid the commission of any crime[.]" CP 6 (emphasis added).

A bench trial was held May 22, 2007, before the Honorable F. Mark McCauley. 1RP.<sup>2</sup> Before trial, the prosecutor moved to amend the charge a second time by adding the "financial information" alternative for commission of the offense. 1RP 1-2; see RCW 9.35.020(1) (A person commits the crime of identity theft if he "knowingly obtain[s], possess[es], use[s], or transfer[s] 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." (Emphasis added). The State's motion was denied. 1RP 13. The State chose to proceed to trial against Meske as charged. 1RP 13-14.

The State presented the testimony of seven witnesses:

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<sup>1</sup> The original information erroneously charged Meske under RCW 9.35.020(1). CP 1-2.

<sup>2</sup> There are two volumes of verbatim report of proceedings referenced as follows: 1RP - 5/22/07 (trial); 2RP - 6/11/07 (sentencing).

*Louise Dunjic* - Assistant Manager of the bank where Meske attempted to cash the check, 1RP 15-21;

*David Cox and Jon Snodgrass* - City of Aberdeen police officers who responded to the bank's 911 call, 1RP 21-29;

*Melissa Sawyer* - a passenger in the car Meske drove to the bank, 1RP 29-32;

*Christy Alcatraz* - the office manager for ATS Northwest Incorporated, the company named on the forged check, 1RP 32-42;

*Robert Turner* - the owner of ATS Northwest Incorporated, 1RP 42-45;  
and

*Charles Chastain* - a City of Aberdeen Police detective who interviewed Meske after his arrest. 1RP 45-50.

The defense called no witnesses and Meske did not testify.

In an oral ruling at the conclusion of trial, the court found Meske guilty as charged. 1RP 63-65. On June 11, 2007, the court imposed a standard range sentence of 51 days (time served). CP 8-14; 2RP 5-6. This appeal timely follows. CP 15.

## 2. Substantive Facts

On April 2, 2007, Meske went into an Aberdeen branch of Bank of America and presented a payroll check for cashing. 1RP 15-18, 22, 43. The check was drawn on the account of ATS Northwest Incorporated

(ATS) and was payable to Meske in the amount of \$823. Ex. 2; 1RP 17,20. The check showed the correct name, address and account number for the company's payroll account, but contained a bank routing number that was missing a digit, an invalid account signature and was made out to a person (Meske) who never worked for the company. 1RP 39, 43. Meske presented the check along with his own identification. 1RP 20.

When a bank employee contacted ATS, she learned the company had never issued the check. 1RP 18-19, 34-36. The employee then called the police, who came and interviewed Meske. 1RP 19-20, 23.

Meske told police a person named Matthew Dustin gave him the check in payment for Meske towing a car from Portland to Aberdeen. 1RP 23-24, 27, 48-49. The police apparently did not believe Meske and therefore arrested him. 1RP 25.

When the State rested, Meske moved to dismiss the charge, arguing the prosecution had failed to present any evidence he knowingly used or transferred a means of identification. 1RP 51. Meske argued the forged ATS check failed to meet the statutory definition of "means of identity." 1RP 51-53. The court denied Meske's motion. 1RP 56.

Following closing argument, the court, in an oral ruling, found Meske guilty as charge. 1RP 63. To date, no written findings of fact or conclusions of law have been filed.

C. ARGUMENTS

1. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MESKE AS CHARGED.

The state failed to prove beyond a reasonable doubt that Meske "knowingly use[d] or transfer[red] a means of identification to another person . . . with intent to commit or aid the commission of any crime" because by definition, the check Meske tried to cash cannot constitute a "means of identification." CP 6 (emphasis added). Meske's conviction must therefore be reversed and the charge dismissed with prejudice.

In every criminal prosecution, constitutional due process requires the state to prove all elements of the charged crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the state, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

To convict Meske of second degree identity theft as charged, the state had to prove beyond a reasonable doubt that (1) he knowingly used or transferred a means of identification of ATS, (2) with intent to commit

or aid the commission of any crime. CP 6; RCW 9.35.020(3).<sup>3</sup> The issue here is whether the state met its burden to prove Meske knowingly used or transferred a "means of identification" of ATS. A review of the statutory definitions for "means of identification" and "financial information" shows the state failed to meet its burden.

"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) (emphasis added).

"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,<sup>[4]</sup> 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

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<sup>3</sup> The text of RCW 9.35.020 is presented in its entirety in appendix, attached to this brief.

<sup>4</sup> A "person" includes a "corporation." RCW 9.35.005(4); RCW 9A.04.110(17).

could be used to identify the person, including unique biometric data.

RCW 9.35.005(3) (emphasis added).

The check Meske attempted to cash meets the definition of "financial information" because it contained the correct account number for the ATS payroll account. 1RP 44. Such account numbers are "for the purpose of account access or transaction initiation." RCW 9.35.005(1)(c). But Meske was not charged under the "financial information" prong of the identity theft statute, only the "means of identification" prong. CP 6.

As shown above, items that describe finance or credit information, such as account numbers, are specifically excluded from the definition of "means of identification." RCW 9.35.005(3). As such, the check Meske tried to cash could not, by definition, constitute a "means of identification" because it described the ATS payroll account number. Ex. 2; 1RP 44. This conclusion is clear from the plain language of the statute, and no statutory construction or legislative intent analysis is necessary. See, e.g., State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000) ("When a statute is clear and unambiguous, its meaning is to be derived from the language of the statute alone and it is not subject to judicial construction.").

In Azpitarte, the issue was whether second degree assault could serve as the predicate offense to elevate violation of a court order from a gross misdemeanor to a Class C felony. 140 Wn.2d at 139. Resolution of this issue turned on the Court's interpretation of former RCW 10.99.040, which provided:

(a) Willful violation of a court order issued under subsection (2) or (3) of this section is a gross misdemeanor except as provided in (b) and (c) of this subsection (4). . . .

(b) Any assault that is a violation of an order issued under this section and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony punishable under chapter 9A.20 RCW, and any conduct in violation of a protective order issued under this section that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony punishable under chapter 9A.20 RCW.

(Emphasis added)(amended, Laws 2000, ch. 119, § 18).

In concluding second degree assault could not serve as the predicate offense, the Court noted that "[t]he statute clearly excludes the use of first and second degree assaults to elevate [a] violation of a no-contact order from a gross misdemeanor to a felony." Azpitarte, 140 Wn.2d at 141.

Like the statute at issue in Azpitarte, RCW 9.35.005(3) unambiguously precludes from the definition of "means of identification" any item that describes finance or credit information such as an account

number. Because the check Meske tried to cash contained the account number for the ATS payroll account, it falls outside the definition of "means of identification" for purposes of prosecuting Meske for identity theft.

There is no evidence Meske knowingly used or transferred a means of identification of ATS. Therefore the state failed to prove every element of the charged offense beyond a reasonable doubt. This Court should reverse Meske's conviction and dismiss with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

2. BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW, THIS COURT SHOULD REMAND TO THE TRIAL COURT.

CrR 6.1(d) requires written findings of fact and conclusions of law be entered after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 624, 964 P.2d 1187 (1998). The purpose of this rule is to enable effective appellate review. Id. at 622. Absent written findings of fact and conclusions of law, an appellant cannot properly assign error and the court cannot review whether the findings of fact and conclusions of law are supported by the record. See, e.g., Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993) (appellate court only reviews whether findings of fact are supported by substantial evidence and whether the

findings of fact support the conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

The court's oral findings are not binding and cannot replace written findings of fact and conclusions of law. Head, 136 Wn.2d at 622. The appellate court should not have to comb through oral rulings to determine if appropriate findings were made, nor should an appellant be forced to interpret oral rulings. Id. at 624.

The proper remedy for the failure to enter written findings of fact and conclusions of law under CrR 6.1(d) is remand to the trial court for entry of findings. Id. at 622. Assuming written findings are ultimately entered, reversal will be required if the delay prejudices Meske. Id. at 624-25. Meske reserves the right to offer further argument depending on the content of any written findings.

D. CONCLUSION

For the reasons stated herein, this Court should reverse Meske's conviction and dismiss the charge with prejudice.

DATED this 30 day of November, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

Handwritten signature of Christopher H. Gibson in black ink, written over a horizontal line. The signature is cursive and includes the number '18031' and the word 'for'.

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APPENDIX

West's Revised Code of Washington Annotated Currentness

Title 9. Crimes and Punishments (Refs & Annos)

Chapter 9.35. Identity Crimes (Refs & Annos)

**→9.35.020. Identity theft**

(1) 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.

(2) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(3) Violation of this section when the accused or an accomplice uses the victim's means of identification or financial information and obtains an aggregate total of credit, money, goods, services, or anything else of value that is less than one thousand five hundred dollars in value, or when no credit, money, goods, services, or anything of value is obtained shall constitute identity theft in the second degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(4) A person who violates this section is liable for civil damages of one thousand dollars or actual damages, whichever is greater, including costs to repair the victim's credit record, and reasonable attorneys' fees as determined by the court.

(5) In a proceeding under this section, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(6) The provisions of this section do not apply to any person who obtains another person's driver's license or other form of identification for the sole purpose of misrepresenting his or her age.

(7) In a proceeding under this section in which a person's means of identification or financial information was used without that person's authorization, and when there has been a conviction, the sentencing court may issue such orders as are necessary to correct a public record that contains false information resulting from a violation of this section.

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

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STATE OF WASHINGTON                    )  
  )  
Respondent,                                )  
  )  
vs.    )  
  )  
JON MESKE,                                )  
  )  
Appellant.                                 )

COA NO. 36417-4-IP

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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 30<sup>TH</sup> DAY OF NOVEMBER 2007, 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] HAROLD S. MENEFFEE  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF NOVEMBER 2007.

x Patrick Mayovsky