

No. 40736-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

VERNON I. MALO
Appellant.

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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

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

The Honorable, Judge Thomas McPhee
Cause No. 09-1-01656-2

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 7

 1. RCW 9.35.020 expressly authorizes that a person who commits the crime of identity theft may be punished separately for any other crimes committed arising out of the identity theft..... 7

 2. There was sufficient evidence to support Mr. Malo’s convictions for identity theft in the second degree as charged in Count I of the Second Amended Information and theft of a motor vehicle as charged in Count V of the Second Amended Information. 9

D. CONCLUSION..... 15

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Bencivenga,
137 Wn.2d 703, 974 P.2d 832 (1999) 10

State v. Calle,
125 Wn.2d 769, 888 P.2d 155 (1995) 8

State v. Camarillo,
115 Wn.2d 60, 794 P.2d 850 (1990) 10

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980) 10

State v. Gocken,
127 Wn.2d 95, 896 P.2d 1267 (1995) 7

State v. Green,
94 Wn.2d 216, 616 P.2d 628 (1980) 10

State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992) 9

Decisions Of The Court Of Appeals

In re Burchfield,
111 Wn. App. 892, 895, 46 P.3d 840 (2002) 8

State v. Walton,
64 Wn. App. 410, 824 P. 2d 533 (1992) 10

Statutes and Rules

Article I, section 9 of the Washington State Constitution 7

Fifth Amendment to the United State Constitution 7

RCW 9.35.010(6) 9, 16

RCW 9.35.020..... 1, 7

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Does RCW 9.35.020 expressly authorize that a person who commits the crime of identity theft may be punished separately for any other crimes committed arising out of the identity theft?

2. Was there sufficient evidence to support Mr. Malo's convictions for identity theft in the second degree as charged in Count I of the Second Amended Information and theft of a motor vehicle as charged in Count V of the Second Amended Information?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

On October 19, 2009, Ms. Greening, an employee of Puget Sound Energy, drove her work vehicle, a white Ford van, to the LA Fitness Center in Lacey at approximately 4:30 p.m. [RP 197-198]. After parking her work van in the LA Fitness Center parking area, she locked the van and went into LA Fitness Center for a workout. [RP 198]. Ms. Greening exited the LA Fitness Center between 5:30 p.m. and 5:45 p.m.; she discovered her work van was missing and had been stolen. [RP 198-199].

Ms. Greening called the police and her work supervisor to report that her work van had been stolen. [RP 199]. Later that day, she learned that the police had recovered her work van. [RP 204-205]. When she saw the vehicle she immediately noticed that,

"[T]he lock had been popped out of the driver door." [RP 205]. Ms. Greening further testified that the vehicle was messier than she had left it; she also testified that the following items were missing from the recovered work van: her purse, her personal telephone, a work phone, an extra set of keys, a work camera, her sunglasses, and other miscellaneous property. [RP 206-207]. She testified that she had multiple credit/debit cards including two Harborstone VISA debit cards (two separate accounts) and an American Express card. [RP 212-215].

Officer Jamie Newcomb, a five year veteran of the Lacey Police Department, testified that Ms. Greening reported that her white three-quarter ton Puget Sound Energy work van stolen at 5:29 p.m. on October 19, 2009. [RP 165]. When asked if he looked for the stolen work van, Officer Newcomb responded:

Yes, I did. I checked nearby parking lots. I was able to locate the vehicle on the south side of Safeway located on Marvin Road. Her vehicle was parked slightly slanted across a parking stall, appeared that it had been parked there haphazardly, and I observed that the driver's side door lock had been punched and the lock was actually protruding from the lock housing on the driver's side door.

[RP 166].

Meanwhile, also on October 19, 2009 at approximately 5:10 p.m., Mr. Jessie Clark, the loss prevention leader at Shopko on

Marvin Road in Lacey, Washington, testified that he began watching Mr. Malo and another male in the Shopko electronics section opening and removing an item from a box. [RP 40]. The security office at Shopko contains ten video screens hooked into 40 video surveillance cameras throughout the store; Mr. Clark continued to watch Mr. Malo and his associate. [RP 41]. He watched as they removed the security cables from an item and used a magnetic device to bypass security on an iPod. [RP 42]. Ultimately, Mr. Malo and his associate made their way to the register, only paid for a pack of triple A batteries, a moving kit in a box, and a Jones soda pop; Mr. Malo and his associate exited the store. [RP 44]. Shopko security personnel called for the police and contacted Mr. Malo in the parking lot. Mr. Malo was pushing the shopping cart containing a stolen Sony Vaio laptop computer hidden in a box; the associate was carrying the stolen iPod Touch on his person. [RP 43-57]. The computer was valued at \$799.99 and the iPod was valued at \$199.99. [RP 225-226].

The police arrived quickly and Mr. Malo's associate ran away from the scene and escaped. [RP 226-242]. Mr. Malo, on foot, began circling a 2001 black Ford Harley Davidson special edition F-

150 pickup, but when the police arrived Mr. Malo ran away from this pickup truck. [RP 227-242].

After Mr. Malo had been arrested for the thefts from ShopKo, law enforcement focused on the 2001 black Ford Harley Davidson special edition F-150 pickup as the security personnel at Shopko had seen Mr. Malo and his unidentified male associate arrive in this vehicle and they had been walking back toward it when the police had arrived in response to the Shopko theft call. [RP 88]. Officer McClanahan also testified that when “Mr. Malo was arrested and then searched subsequently to that, there was a Ford pickup key in his pocket with a Harley Davidson insignia on it.” [RP 89].

Officer McClanahan, a twenty-four year law enforcement veteran, impounded the black pick-up was and applied and was granted a search warrant. [RP 89]. The key found in Mr. Malo’s pocket opened the black 2001 Harley Davidson special edition pickup that the Shopko associates had seen Mr. Malo arrive in and head toward and circle before he was arrested. [RP 89-90].

Officer McClanahan searched the black pickup at approximately 11:11 p.m. on October 19, 2009. [RP 90]. When Officer McClanahan searched the black pickup, he was searching for evidence of the Shopko thefts:

Q. And so going through the items that were there at this point, had there been any – were you aware of the stolen van incident involving Ruth Greening?

A. I had been made aware of it just before conducting the search, but at the moment at the time of getting the warrant, I was not aware of it.

Q. And so prior to entering the vehicle with the search warrant, had you made any connection between the Ruth Greening incident that occurred earlier that day and this vehicle?

A. Not prior to entering the pickup.

[RP 91].

There were many items spread all over the interior of the black pickup of interest to Officer McClanahan. [RP 91-124].

Within the black pickup, Officer McClanahan found some special tools which he described:

Again, this is a screwdriver, scissors. Here we have a couple of scissor-type tools. This one in the orange in particular, you'll note in looking at it, the tips have been filed down and they've been separated in a unique way, and this particular tool would be perfect to jam into a door lock and twist the lock mechanism off, particularly the little circle that holds locking mechanism in place. This particular tool would be, in the manner that it's fashioned and in the manner it's been changed, in my opinion and in my experience, would be a perfect tool to jam in and open a door that's locked.

[RP 117-118].

Officer McClanahan then provided a summary of the items and where they were found in the black Ford Harley Davidson

special edition pickup using photographs he had taken of the interior of the vehicle:

The first item that I spoke of, the checkbook of Ruth Greening, the front passenger floorboard area, and that's this particular area in here. The credit and ID cards I spoke of earlier that were on the top of the console, and that's this front console right here, so there's a pretty large area and all those items were found right on the top of here.

My Item No. 3, the Olympus digital camera, that's again on this passenger floorboard area up front. The day planner was also found on the passenger floorboard area. The purse found on the passenger floorboard area, same are up here. The flash drive in this glove box area right in here.

The glass smoking pipe, if you'll see here there's two – kind of hard to see – but there's two cup holders. The one closest to the driver was where that glass smoking pipe was found.

The Verizon phone, again, found on top of the console.

The pink zippered case is not going to show it on the passenger's side of the vehicle, but over here there's these pockets that you can stick items that you see in the driver side, and there's a similar one on the passenger's side and that's where that item was found.

The cellular telephone I spoke of found on the middle floorboard area, so the area right in front of this console. The Nextel cellular phone was found, again, in this passenger door pocket of the vehicle similar to the one over here.

The digital scale was found in the passenger door pocket of the vehicle, again same. The Broadband-To-Go card was found on the center console.

The Garmin device, GPS, was, located on the rear passenger seat, so right on the seat here. The AT&T Vue phone was on the rear passenger floorboard, so right down in this vicinity right here.

The pair of Bushnell binoculars, top of the rear passenger seat. The pair of sunglasses, again, the same place on the rear passenger's seat.

The Dell laptop computer was on the driver's floorboard in the rear, so on the floor right in this vicinity right here. And then the tools were found by lifting this. There's a lid here, and if you lift that lid up it comes up and opens a large area that things can be stored in and that's where those tools were found.

[RP 122-123].

Responding to a question regarding Ms. Greening's credit/debit cards, Officer McClanahan described that the cards were laid out on top of the center console of the cab of the black pickup truck. [RP 124].

Ms. Kee, a forensic scientist at the Washington State Patrol Crime Lab, tested and confirmed that the suspected controlled substance found in the black pickup pursuant to the lawfully obtained search warrant was, in fact, methamphetamine. [RP 145].

C. ARGUMENT.

1. RCW 9.35.020 expressly authorizes that a person who commits the crime of identity theft may be punished separately for any other crimes committed arising out of the identity theft.

Article I, section 9 of the Washington State Constitution, and the Fifth Amendment to the federal constitution prohibit multiple punishments for the same offense. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). But a trial court does not necessarily impose multiple punishments for the same criminal

conduct if the conduct it punishes more than once violates more than one criminal statute. See *State v. Calle*, 125 Wn.2d 769, 776-77, 888 P.2d 155 (1995). The fundamental issue is whether the legislature intended to authorize multiple punishments for a criminal conduct that violates more than one statute. See *Calle*, 125 Wn.2d at 776.

Washington courts use a three-step analysis to determine whether the legislature intended to authorize multiple punishments for criminal conduct that violates more than one statute. *In re Burchfield*, 111 Wn. App. 892, 895, 46 P.3d 840 (2002) (citing *Calle*, 125 Wn.2d at 776). First, we look to the statutory language to determine whether the legislature specifically authorized separate punishments. *In re Burchfield*, 111 Wn. App. At 895-96. Second, if the statute is silent, we apply the “same evidence” test to determine whether each offense has an element not contained in the other. *Id.*, at 896. Third, if each offense contains a separate element, we look for evidence of legislative intent to treat the crimes as one offense for double jeopardy purposes. *Id.*

The appellant apparently overlooks the 2008 amended identity theft statute which specifically authorizes separate

punishments for each offense arising out of identity theft. RCW 9.35.010(6) states:

Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately.

Therefore, based on the above express legislative language and the facts of this case, the State respectfully requests that this Court affirm the convictions and the sentence.

2. There was sufficient evidence to support Mr. Malo's convictions for identity theft in the second degree as charged in Count I of the Second Amended Information and theft of a motor vehicle as charged in Count V of the Second Amended Information.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the

prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas, supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

The trial court correctly instructed the jury regarding the crime of identity theft:

A person commits the crime of identity theft in the second degree when, with intent to commit or aid or abet any crime,

he or she knowingly obtains, possesses, uses, or transfers another person's means of identification or financial information of another person.

[CP 31].

The trial court also correctly instructed the jury regarding the crime of theft of a motor vehicle: [A] person commits the crime of theft of a motor vehicle when he or she commits the theft of any motor vehicle. [CP 37]. The trial court correctly instructed the jury that theft "means to wrongfully obtain or exert unauthorized control over the property of another with intent to deprive that person of such property." [CP 37]. Finally, the trial court correctly instructed the jury as to accomplice liability in Jury Instruction No. 11. [CP 30].

The appellant argues that the State did not prove that Mr. Malo intended to commit a crime with Ms. Greening's financial information and specifically posits that the State overlooked that element in closing arguments. [Brief of Appellant, page 15].

The timing of the various thefts in this case as well as how the credit cards and ID cards were found separated and spread out in Mr. Malo's truck is very important as explained by the State in closing argument:

...So again, they had gone ahead and started to separate all out all of the items of financial information,

account information, checkbooks, and credit cards, debit card technically, in very conspicuous open area and had essentially discarded the rest of the stuff in the very brief time that they had had a chance to possess that.

Now, you have the possession of the stolen property offense and that's the access devices, and the access devices, again, we've gone through. You have the one access device, Harborstone Credit Union debit card, one account number. You have a second Harborstone debit card and a second account number, and you have the Costco American Express card all in Ms. Greening's name, again all of this property she said obviously – no one else other than her husband, perhaps, would have permission to have. Look at the definitions for access device, look at the elements, State submits that has been proven clearly beyond a reasonable doubt.

Motor vehicle theft. You have the fact that Ms. Greening – and you have to look at the time on it. Ms. Greening parked the vehicle at 4:30 at the LA Fitness Center. You had the fact that she went ahead and had not had – had only been there for an hour, and when she come out at 5:30 it's already gone. And what do we also know about that, what was going on?

There were the two individuals that were in the truck that possessed her property. Mr. Jessie Clarke said that when he viewed the video, and the video that we submitted you started when he already had picked up the fact that they were beginning to mess around with the spider wraps and everything, he said – estimated that the people came in right around 5:04 p.m., the tape starts up as I recall around 5:08, 5:09, right around there, 5:10. So literally about 4:30, in the course of 33 or 34 minutes this vehicle or these two individuals have waited for her to go into LA Fitness, have gone ahead and gone up to the vehicle, had gone ahead and gone ahead and whatever time it takes to sardine can, to punch around the metal as the picture shows, go ahead and pull out that lock, disable the lock mechanism, open the door and get in.

And as I pointed out, they either went ahead and rifled through the truck then or van then, excuse me, or they took the time at that point to move the van over to another

location. It would have taken presumably a little bit of time, it appears, to have found the second pair of keys because there was no sign that the ignition had been damaged. It appears that a key was used. And again, we know from Ms. Greening's testimony that the second spare key that she kept kind of buried in one of the cup holder areas was not recovered. So whether it was rifled through at LA Fitness or more likely at the scene of a more remote location, that van was moved over nearby to the Safeway parking lot.

Obviously, a second vehicle, the suspect vehicle, had to follow. At that point they went ahead and removed a lot of items, put it in their truck, either at that point started looking through and organizing it or waited till they got to the Shopko parking lot to do it, because we notice by the time they left that truck in the Shopko parking lot these things had already been laid out and now they're on to the next crime.

So again, we know that it takes a few minutes, according to the officer, to get from the LA Fitness area and the Martin Way Safeway over to Shopko. We know that we recovered from the suspect vehicle the tools, one tool specifically that was uniquely altered that would be perfect for getting into the metal – punching the metal and cutting around that lock to pull it out, as well as the fact that it took them essentially 33 minutes to do all of this before they're walking into the Shopko store.

[RP 326-329].

Regarding the crime of identity theft's element of intent to commit a crime with the stolen credit/debit cards and other identification information, the fact that Mr. Malo and his associate had gone through Ms. Greening's property (after stealing her vehicle) in a very short time period and separated out all of the credit/debit cards, check book, and other identification information. The act of sorting that property apart from the other stolen property

demonstrates the intent to use the stolen items to commit a crime. Clearly, neither Mr. Malo nor his associate could use Ms. Ruth Greening's stolen credit/debit cards at Shopko as they are both males. The inference of sorting out the stolen property and separating out all of the financial information is that Mr. Malo and his associate were going to use Ms. Greening's financial information and cards; any use of that information and cards would be a crime.

Regarding the crime of theft of a motor vehicle, the same extremely strong circumstantial evidence supports the theft of Ms. Greening's white work van. Ms. Greening parked her van at the LA Fitness Center at approximately 4:30 p.m.; when she leaves the Center at 5:30 her van is gone. The police subsequently find it nearby with the lock punched; many items have been stolen from within the van. Meanwhile, shortly after 5 p.m., Mr. Malo and his associate are stealing items from the nearby Shopko store. When Mr. Malo is arrested, a key is found to a black pickup. The black pickup is searched, pursuant to a lawfully obtained search warrant, and Ms. Greening's stolen property is found sorted in the black pickup.

In approximately one half hour, Mr. Malo and his male associate had broken into her vehicle, moved it, searched it, removed the items into the black pickup, sorted through Ms. Greening's property, sorted out all of the credit/debits cards, checkbook, and other ID cards, then drove the black pickup to Shopko where they committed the thefts there.

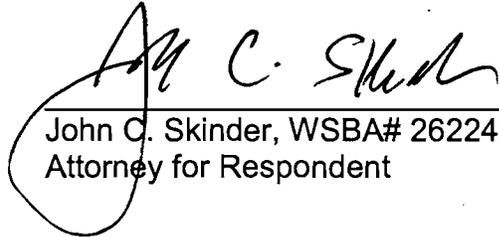
The circumstantial evidence in this case is extremely compelling. All of the above information leads to the fact that Mr. Malo had the key to the black pickup in his pocket when he is arrested by the police. Law enforcement had no idea that Mr. Malo had stolen Ms. Greening's van and property, until pursuant to the lawfully obtained search warrant, they located all of her property in the black pickup that he had the key to. The timeline in this case and the circumstantial evidence clearly supports the jury's determination that Mr. Malo was legally responsible for the theft of Ms. Greening's white work van and identity theft in the second degree as the principal or as an accomplice.

D. CONCLUSION.

Based on the direct and circumstantial evidence in this case, there was clearly sufficient evidence to support the jury's findings.

Also, RCW 9.35.020(6) expressly and specifically authorizes separate punishments for each offense arising out of identity theft. Therefore, the State respectfully asks this court to affirm the defendant's convictions and sentence.

Respectfully submitted this 7th day of JANUARY, 2011.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

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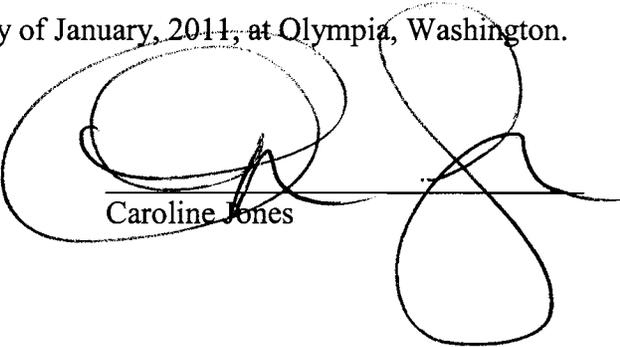
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of January, 2011, at Olympia, Washington.


Caroline Jones