

FILED

NOV 12 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

28794-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL EMANUEL ALSTON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

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(509) 237-1744

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant. Certain conditions of community custody should, however, be stricken as unauthorized by law.

III. ISSUES

1. Did the defendant receive fair notice of the crime?
2. Did the court properly score the current offenses separately, consistent with RCW 9.35?
3. Did the court err in imposing prohibitions that are not crime-related?

IV. STATEMENT OF THE CASE

In January 2007, Matthew Mahan noticed unusual charges on his business credit card. RP 26-27. Only Mr. Mahan, his brother, and his mother had credit cards issued for the family business. RP 29. The charges were to T-Mobile (\$350), Comcast Cable (\$535.36), and Western Union (\$175) and totaled \$1,060.36. RP 27, 40; PE 1. Christina Wright signed a

receipt for one of the transactions. RP 31. Mr. Mahan had not authorized these charges. RP 28.

The credit card company promptly informed Mr. Mahan of the charges, and he cancelled his card. RP 31. He reported the unauthorized transactions to the bank issuing the credit card and to the police department. RP 28.

Officer Gilbreath subpoenaed business records related to the suspicious transactions. RP 40. The T-Mobile account was under the name of Samuel E. Austin and used the Defendant Samuel Emanuel Alston's social security number, date of birth, and street address. RP 41-42, 48, 64-67; PE 2. The Western Union transaction used Shelley Dominic's physical address and a hotmail account apparently created using Mr. Alston's computer. RP 43-46, 48-49, 66; PE 3. Ms. Dominic was Mr. Alston's girlfriend with whom he then resided. RP 64, 66-67. The Comcast Cable account was Mr. Alston's. RP 45-46, 66. Mr. Mahan did not have a home computer, did not use the business computers, and did not have a hotmail account. RP 28, 45, 51. But Mr. Alston had both a computer and a Comcast Cable account which were used to create a hotmail account purporting to be Mr. Mahan's, although using Mr. Alston's phone number and street address. RP 45-49. All the information indicated that Mr. Alston, not Mr. Mahan, had used the card for

these three transactions. RP 72-73. Mr. Mahan was not acquainted with either Ms. Wright or Mr. Alston. RP 28, 38, 43.

Apparently Mr. Mahan's credit card was being used to pay Mr. Alston's bills or for Mr. Alston's benefit. RP 59, 61, 72-74.

The Defendant Samuel Emanuel Alston was charged with identity theft in the second degree (RCW 9.35.020(1) and (3)) and theft in the second degree (RCW 9A.56.020(1)(a)).

Count 1: That the said SAMUEL EMANUEL ALSTON, in the County of Walla Walla, State of Washington, between the 2nd day of January, 2007 and the 3rd day of January, 2007, did knowingly use or transfer a means of identification of another person, to-wit: MATTHEW MAHAN, with the intent to commit or aid the commission of any crime, and the defendant or an accomplice used said person's means of identification or financial information to obtain an aggregate total of credit, money, goods, services, or anything else of value in an amount less than \$1,500 in value;

Count 2: That the said SAMUEL EMANUEL ALSTON, in the County of Walla Walla, State of Washington, between the 2nd day of January, 2007 and the 3rd day of January, 2007, did wrongfully obtain or exert unauthorized control over the property or services of another of a value exceeding two hundred fifty dollars (\$250.00) but less than one thousand five hundred dollars (\$1,500.00), with intent to deprive him or her of such property or services, to-wit: cash, belonging to MATTHEW MAHAN.

CP 4-5; RP 6.

At the close of the State's case, the Defendant made a motion to dismiss for insufficient evidence. RP 68. The prosecutor summarized that the Defendant was the beneficiary of credit card expenditures and that the fraudulent internet activity which arranged the transactions was conducted on a computer registered to the Defendant. RP 68. The court noted that this was of necessity a circumstantial case and that the circumstantial evidence was sufficient to go to the jury. RP 68-69.

The Defendant testified that he separated from his girlfriend Shelley Dominic in June or July 2007, many months after the appearance of suspicious January 2007 transactions on Mr. Mahan's card. RP 26-27, 78. He testified that after he moved out of Ms. Dominic's house, she and his cousin Christina Wright assumed payment for his accounts with T-Mobile and Comcast Cable. RP 78-79. He accused Ms. Wright of the thefts and denied any involvement. RP 80-81, 83. Walla Walla police determined that Mr. Alston made no complaint of identity theft related to these events. RP 88-89.

Because the Defendant was on supervision with the Department of Corrections at that time, there are records indicating that the Defendant stayed with his girlfriend Ms. Dominic from the June 9, 2006 through May 11, 2007. RP 64, 67. The DOC records do not corroborate Mr. Alston's

testimony that his cousin was also residing with Ms. Dominic. RP 88. The Defendant admitted a conviction for a crime of dishonesty – robbery in the first degree. RP 82. He acknowledged that the T-Mobile account was his and that he did not report any fraud to the police. RP 84, 85.

The jury convicted the Defendant on both counts. CP40, 47-65.

V. ARGUMENT

A. THE DEFENDANT RECEIVED FAIR NOTICE OF THE CHARGES AGAINST HIM.

The Defendant complains that he did not have notice of the theft charge in count two, because the information described the property stolen as being “cash.” Brief of Appellant at 6.

The U.S. constitution gives an accused the right “to be informed of the nature and cause of the accusation.” U. S. Const. amend. VI. The Washington constitution similarly provides that an accused “shall have the right ... to demand the nature and cause of the accusation against him” Wash. Const. art. I, § 22.

An information is sufficient if it names the defendant, if the date and location are proper, and if it can be understood therefrom:

- (6) That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as

to enable a person of common understanding to know what is intended;

- (7) The act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.

RCW 10.37.050. The Washington Supreme Court has stated the law of charging documents as follows:

It is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged. This rule is subject to two statutory exceptions: (1) where a defendant is convicted of a lesser included offense of the one charged in the information (RCW 10.61.006); and (2) where a defendant is convicted of an offense which is a crime of an inferior degree to the one charged (RCW 10.61.003).

In re St. Pierre, 118 Wn.2d 321, 328, 823 P.2d 492 (1992), quoting *State v.*

Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988).

Generally, a charging document must contain “ [a]ll essential elements of a crime” so as to give the defendant notice of the charges and allow the defendant to prepare a defense. *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812, P.2d 86 (1991). But the standard of review depends on when the charging document is challenged. *Kjorsvik*, 117 Wash.2d at 103, 812, P.2d 86. When, as here, the defendant challenges the charging document for the first time on appeal, we liberally construe the document in favor of validity. *Kjorsvik*, 117 Wash.2d at 105, 812, P.2d 86. This encourages defendants who recognize a charging defect to raise an objection when the defect can be cured by amendment. *Kjorsvik*, 117 Wash.2d at 103, 812, P.2d 86.

Under the liberal construction rule, “even if there is an apparently missing element, [if] it may be able to be fairly

implied from language within the charging document,” then the charging document will be upheld on appeal. *Kjorsvik*, 117 Wash.2d at 104, 812, P.2d 86. Thus, we look at the entire information to determine if it contains the necessary allegations. *Kjorsvik*, 117 Wash.2d at 104, 812, P.2d 86. The test is: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Kjorsvik*, 117 Wash.2d at 105-106, 812, P.2d 86.

State v. Tresenriter, 101 Wn.App. 486, 491, 4 P.3d 145, 14 P.3d 788, *review denied* 143 Wn.2d 1010, 21 P.3d 292 (2000).

In the instant case, the Defendant did not challenge the charging document until this appeal. In other words, this Court must liberally construe the charging information in favor of validity.

No essential element of the crime is absent. The charging document informed the Defendant Mr. Alston that in count two he was accused of wrongfully obtaining or exerting unauthorized control over property or services (specifically cash) valued at somewhere between \$250 and \$1500. CP 5. The information explained the date and location of the offense and provided the victim’s name. CP 5. More details were provided in the Certificate of Probable Cause. CP 1-3.

Because theft can involve the theft of services or any kind of property, the prosecutor specified that what was stolen was money. Cash is

ready money.

The Defendant argues that cash is not equivalent to credit card transactions. Brief of Appellant at 8. The effect of the transactions would have been the wrongful obtaining of money for immediate use in paying bills or acquiring cash. They are sufficiently equivalent. More to the point, the information accurately informs that Mr. Alston was not accused of taking a computer or a vehicle or an oil change or a massage, but of taking money.

The information fairly explained the nature and cause of the accusation in ordinary and concise language so as to enable a person of common understanding to know what was intended. The Defendant apparently understood the charge. Mr. Alston did not seek a bill of particulars or make any objection to the charging document before the verdict. He had fair notice.

B. THE COURT PROPERLY SCORED THE TWO COUNTS AS SEPARATE OFFENSES.

The Defendant is convicted of identity theft and theft for using Mr. Mahan's credit card in three unauthorized transactions. He claims that the sentencing court should have treated the offenses as the same criminal conduct under RCW 9.94A.589(1)(a) and counted as one crime.

The identity theft statute evinces a clear intent to both prosecute *and*

punish identity theft separately from other offenses.

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*.

RCW 9.35.020(6) (emphasis added).

The legislature specifically intends that each individual who obtains, possesses, uses, or transfers any individual person's identification or financial information, with the requisite intent, be classified separately and *punished separately* as provided in chapter 9.94A RCW.

RCW 9.35.001 notes (emphasis added).

Unlawfully obtaining, possessing, or transferring each means of identification or financial information of any individual person, with the requisite intent, is a separate unit of prosecution for each victim and for each act of obtaining, possessing, or transferring of the individual person's means of identification or financial information.

RCW 9.35.001.

Thus, a defendant may be prosecuted for both second-degree theft and second-degree identity theft arising from the same criminal conduct without violating the double jeopardy clause. *State v. Milam*, 155 Wn.App. 365, 228 P.3d 788 (2010) (defendant committed both crimes by using a stolen ATM card and PIN to withdraw \$360 from an ATM).

Consider *State v. Tresenriter*, 101 Wn.App. 486, 4 P.3d 145, 14 P.3d 788, *review denied* 143 Wn.2d 1010, 21 P.3d 292 (2000). There the

defendant was convicted of nine counts of theft of a firearm, one count of burglary, and one count of possessing stolen property. *Tresenriter*, 101 Wn.App. at 495. The court held that “[e]ven if the burglary and other crime involve the same criminal conduct ... the trial court had discretion to apply the burglary anti-merger statute and punish the burglary separate from the theft counts and the stolen property count,” because RCW 9A.52.050 authorized separate punishment for burglary. *Tresenriter*, 101 Wn.App. at 496.

The Defendant urges that RCW 9.94A.589(1)(a) be applied. This statute states that current offenses may be counted as one crime if the court “enters a finding that some or all of the current offenses encompass the same criminal conduct.” RCW 9.94A.589(1)(a). A finding of “same criminal conduct” requires a finding that the crimes “require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.*

The statutes conflict. RCW 9.35 requires separate punishment; RCW 9.94A.589(1)(a) requires treating the different offenses as one offense. When statutes dealing with the same subject matter conflict to the extent that they cannot be harmonized, the more recent specific statute will supersede the more general predecessor. *State v. Becker*, 59 Wn. App. 848, 852-53, 801 P.2d 1015 (1990).

RCW 9.94A.589(1)(a) is the more general predecessor. It precedes the identity theft statute and addresses generally the scoring of all offenses. RCW 9.35 was more recently crafted and even more recently amended to emphasize that identity theft offenses should be punished separately from other offenses. It addresses the separate punishment of a specific offense (identity theft) only. Therefore, RCW 9.35's directive is the controlling authority. The two counts should be treated as separate offenses. The trial court made no error.

C. SENTENCING CONDITIONS THAT ARE NOT AUTHORIZED BY LAW SHOULD BE STRICKEN.

The Defendant challenges certain sentencing conditions, specifically the order that he not "possess" alcohol and that he attend alcohol or drug treatment. The law authorizes a prohibition against alcohol consumption. RCW 9.94A.703(3)(e). However, the specific conditions challenged by the Defendant do not appear to be authorized by law.

The State concedes that these conditions do not appear to be crime-related prohibitions permitted under RCW 9.94A.703(3)(c), (d), or (f). *See also* RCW 9.94A.030(10) (defining "crime-related prohibition"). The record does not demonstrate that Mr. Alston used drugs or alcohol in carrying out

the offenses. Accordingly, these conditions should be stricken

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: November 10, 2010.

Respectfully submitted:



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