

FILED  
May 06, 2013  
Court of Appeals  
Division III  
State of Washington

No. 31355-7-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

KATHY ANN HENDRICKSON,

Defendant/Appellant.

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Appellant's Brief

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A. ASSIGNMENT OF ERROR

The trial court erred in denying Ms. Hendrickson's motion to vacate the identity theft conviction.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court abuse its discretion in denying Ms. Hendrickson's motion to vacate the identity theft conviction and order a new trial?

C. STATEMENT OF THE CASE

Kathy Hendrickson was convicted by a jury of three counts of felony cyberstalking, two counts of threatening to bomb or injure property, two counts of felony harassment, two counts of intimidating a public servant, and one count of identity theft. RP<sup>1</sup> 416-17. The information charged Ms. Hendrickson committed identity theft (Count 11) because she “did knowingly use or transfer a means of identification of another person, to-wit: Gregory James Riordan, with the intent to commit or to 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 . . .” CP 8-13.

As partial proof of the identity theft, the State called Ronald Emmons, a forensic document examiner for the Oregon State Police Crime Lab. RP 67-73. Testifying as a hand writing expert, Mr. Emmons provided the following pertinent testimony:

Q [prosecutor] So this is a known [writing] sample from the Defendant; is that correct?

A [Mr. Emmons] Right. This is one of the many known samples that were sent to me . . . So this was the beginning of my realization that this individual, there is a good possibility she was involved in it and I concentrated my examination in that area.

Q Okay. Go to the next one.

A This was a copy of one of the questioned documents. It was an application for a Master Card, I believe, it is. A Shell, Shell premium Master Card. That was one of the questioned document[s] I examined . . .

Q Okay. The next one. And what is that?

A Again, this was another -- this is another document, a credit card application. Again, it has the hand -- mostly hand printing, some numbers and scrawled signature on the bottom. And it's -- I don't know. I don't have them side by side, but it has many of the same features on it that first credit card application also had as far as handwriting features indicating that they were both written by the same individual . . .

Q Okay. Next one, please.

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<sup>1</sup> RP citations are to the verbatim report of proceedings of the trial originally provided in Cause No. 30437-0-III, a copy of which was transferred to this appeal per the Court's order dated April 25, 2013.

A And again, this was a third credit card application that I looked at. Again, it showed many of the same features. Similar style of slurred writing signature . . .

RP 83-85.

Q And what exactly -- Let me probably just jump to the chase here. What did you conclude after examining all of these documents and looking at the handwriting and doing your analysis? Were you able to draw a conclusion, first of all, who wrote it?

A Yes, I was.

Q And who did you determine wrote it?

A At the end of my examination, I concluded that the questioned writings were written by Kathy Hendrickson . . .

RP 91.

During her closing argument, the prosecutor stated the following:

She [Ms. Hendrickson] also stole the victim's identity and misused that identity to obtain, first of all, we heard about a Fingerhut account that was illegally used so that she could buy herself some jewelry and it went right to her house. Mr. Riordan said he didn't buy her that stuff. He did at one point while they were going out. He certainly didn't buy anything else. And you also heard that she misused that financial information to apply fraudulently for credit cards in his name. You saw those forms filled out in her handwriting, as Mr. Emmons told you, with his social security number written on it. The victim didn't write those. Greg told you didn't write those. He couldn't fill out more credit cards application because his credit was shot and he was advised not to apply for any more cards while he rebuilt his credit.

RP 392-93.

After Ms. Hendrickson had been convicted and her appeal<sup>2</sup> had been filed, the Oregon State Police (OSP) Forensic Services Division (FSD) notified the prosecutor who subsequently notified defense counsel that the handwriting analysis procedures employed by Mr. Emmons in this case did not conform to that department's Quality Assurance Program policies and procedures. CP 40-43. Following a criminal investigation, the Department found the following:

The external technical review of this case revealed that (a) the original examination did not conform to generally accepted practices within the Forensic Document community (b) the conclusions set forth in the original analytical report were not adequately supported by the documentation and evidence in the case notes or records and (c) the analytical findings in the analytical report were not accurate within the generally accepted practices of the Forensic Document Profession.

CP 44-45

Based on this report Ms. Hendrickson moved to vacate the identity theft conviction. CP 38-45. The trial court denied the motion without a hearing. CP 51-52

This appeal followed. CP 53.

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<sup>2</sup> Cause No. 30437-0-III, argued April 30, 2013.

D. ARGUMENT

The trial court abused its discretion in denying Ms. Hendrickson's motion to vacate the identity theft conviction and order a new trial.

A trial court's decision regarding a motion for new trial will not be disturbed on appeal, absent an abuse of discretion. *State v. Williams*, 96 Wash.2d 215, 221, 634 P.2d 868 (1981). A court abuses its discretion where the decision was manifestly unreasonable, or based on untenable grounds or reasons. *Moreman v. Butcher*, 126 Wash.2d 36, 40, 891 P.2d 725 (1995). To obtain a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence: (1) will probably change the result of the trial; (2) was discovered after the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *State v. Swan*, 114 Wash.2d 613, 641–42, 790 P.2d 610 (1990). The absence of any one of these five factors is grounds to deny a new trial. *Williams*, 96 Wash.2d at 223, 634 P.2d 868.

Here, there is no question that all five factors were met.

Considering the first and fourth factors, the revelation of Emmons' malfeasance was clearly material and would likely change the results of the trial. The report revealed that Emmons' procedures were not

acceptable, his analytical findings were not accurate, and his conclusions were not adequately supported by the documentation and evidence in the case notes or records. CP 44-45. Emmons' malfeasance negates all his conclusions that Ms. Hendrickson was the person who fraudulently applied for three credit cards using the victim's name.

Emmons' testimony that Ms. Hendrickson authored the three credit card applications clearly pertains to the identity theft conviction, despite the prosecutor's assertions to the contrary in her response brief to the trial court. See CP 46-49. The prosecutor argued in closing argument to the jury that Ms. Hendrickson stole the victim's identity and misused his financial information to apply fraudulently for credit cards in his name. "You saw those forms filled out in her handwriting, as Mr. Emmons told you, with his social security number written on it." CP 392-93. Clearly the prosecutor argued identity theft to the jury when referring to Emmons' testimony. Therefore, the first and fourth factors are met.

Considering factors two and three, it is undisputed that Emmons' malfeasance was discovered after the trial and could not have been discovered before trial by the exercise of due diligence. See CP 40-43.

Finally, considering the fifth factor the evidence of Emmons' malfeasance is more than "merely" impeaching; it is critical, with respect to Emmons' own credibility, the validity of his testing, and the reliability of his conclusions. *See State v. Roche*, 114 Wash. App. 424, 438, 59 P.3d 682, 691 (2002), citing *State v. Savaria*, 82 Wash.App. 832, 838, 919 P.2d 1263 (1996) ("[I]mpeaching evidence can warrant a new trial if it devastates a witness's uncorroborated testimony establishing an element of the offense. In such cases the new evidence is not merely impeaching, but critical."). Since all five factors were met, the trial court abused its discretion in denying the motion to vacate the identity theft conviction and order a new trial.

E. CONCLUSION

For the reasons stated, the conviction for identity theft should be reversed.

Respectfully submitted, May 6, 2013,

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s/David N. Gasch  
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on May 6, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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