31355-7-III

FILED
July 8, 2013
Court of Appeals
Division III
State of Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KATHY ANN HENDRICKSON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:

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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.

III. ISSUE

Did the court abuse its discretion in denying the motion to vacate the identity theft conviction?

IV. STATEMENT OF THE CASE

A jury convicted the Defendant Kathy Hendrickson of multiple felonies regarding different victims. CP 8-36. In Court of Appeals No. 30437-0, the Defendant is appealing the convictions regarding victims Richard Wernette and John Lohrmann.

While the direct appeal was ongoing, the prosecutor provided the Defendant's attorney with information from the OSP (Oregon State Police) laboratory regarding a quality control issue on handwriting analysis. CP 40. Ron Emmons, a forensic document examiner with the

OSP lab, was qualified as an expert and testified at trial. RP 67, 73. He compared the handwriting on three credit card applications with known handwriting on envelopes. RP 82-98. He concluded that the handwriting on the applications made in Mr. Riordan's name was actually the Defendant's. RP 91-92, 99. Following the trial, and after an external and independent review, the OSP lab concluded that the examination did not conform with generally accepted practices such that the findings were not accurate under the generally accepted practices and the conclusions were not adequately supported by documentation and evidence. CP 40-41.

Based on this information, the Defendant made a motion for relief from judgment, asking that the conviction for identify theft (count 11) be vacated. CP 38-45. The Defendant argued that the prosecutor had relied on Mr. Emmons' testimony in closing such that the testimony was indisputably "vital" in obtaining the conviction. CP 39.

The prosecutor responded that Mr. Emmons' testimony was offered for the stalking charge (on which the jury had acquitted), which was proven in part by the Defendant's various applications and subscriptions in the victim's name. CP 47. The identify theft was proved through the testimony of detectives demonstrating the Defendant's *virtual* fingerprint, i.e. her *online* purchase of items for herself in the victim's

name. CP 48. The prosecutor argued that the handwriting evidence was not material to the identity theft conviction. CP 49.

The trial judge agreed.

> The Court's recollection of the trial testimony, evidence, and Mr. Emmons' testimony is consistent with the State's response. His testimony was pertinent to the proof of the Stalking charge, Count 10. The jury found the Defendant guilty of that charge.
>
> The Court agrees with the State's argument that without Mr. Emmons' testimony, the jury would not have probably come to a different conclusion on the other guilty counts. The other admissible evidence was substantial and overwhelming.

CP 51.

The State charged the Defendant in count 10 with the stalking of her former boyfriend Gregory Riordan and in count 11 with the identity theft. CP 9, 11-12. In the amended information, the State had charged stalking by repeated harassment which placed Mr. Riordan in fear of injury to self or property; and identity theft by use of another's identification or financial information ***to obtain*** credit, money, ***goods***, services, or anything else of value. CP 12 (emphasis added); RP 386-87. The jury acquitted the Defendant of the stalking charge and convicted on the identity theft charge. CP 16.

Mr. Riordan had met the Defendant through an online dating

website. RP 10. They dated for several months and broke up in 2006. RP 11. After the breakup, Mr. Riordan began to receive threatening emails, his tires were slashed three times, police twice came to investigate anonymous complaints against him, he caught the Defendant trespassing in his home, outrageous emails were being sent in his name, he began to receive thousands of magazine subscriptions, accounts were being opened and closed without his knowledge, and on and on. RP 13-29. Mr. Riordan testified that he found that he was being billed for presents sent to the Defendant (as well to people he did not know) from businesses where he had online accounts, like Fingerhut and Flowers.com. RP 21-22.

Detective Maidment testified that he began a two-year investigation into the Defendant after a Morrow County (Oregon) detective asked for assistance in obtaining a search warrant for the Defendant's computer. RP 164-67. Police did not find a computer in the Defendant's home. RP 167. But they did find a notebook with the private information (addresses, dates of birth, social security numbers, email addresses, social networking profiles, and credit card numbers) of other individuals, including Mr. Riordan. RP 168-72. Also in her home, police found bills (Pacific Power and Qwest) with the victim's name. RP 179, 183.

Eventually police seized a computer from the Defendant's daughter's apartment. RP 187. On this computer, they found a list of aliases and email accounts used to make anonymous accusations of harassment, stalking, and child molestation against Mr. Riordan. RP 188-203; PE 16. With the assistance of Yahoo and Google, police determined that some of these anonymous accounts (some incorporating Mr. Riordan's name) were created from an IP address at a Walla Walla community college computer lab. RP 202-04, 222. Mr. Riordan was living in Kentucky and assisting the police investigation. RP 196. While Mr. Riordan was chatting with a person he met on AdultFriendFinder whom he believed to be the Defendant, police discovered the Defendant at the college computer lab. RP 208-10. Police seized this computer and discovered that, in the time that the Defendant was using the computer, Mr. Riordan's Fingerhut account information and a lot of the same information (regarding Mr. Riordan) as was found on the daughter's computer had been downloaded. RP 206-07, 211, 213. One account that used Mr. Riordan's name had profile information indicating an alternate email using the Defendant's name. RP 270. These suspicious accounts were accessed by passwords from the daughter's computer and the community college computer. RP 285.

Police found the Fingerhut bill on the Defendant's daughter's computer and the Fingerhut name and phone number on an envelope in the Defendant's home. RP 300.

In closing argument, the prosecutor argued that the identity theft was accomplished by the Defendant using Mr. Riordan's existing Fingerhut account to purchase jewelry and mail it to herself. RP 392. The Defendant had the Fingerhut 1-800 number at home and was accessing the Fingerhut account on the community college computer. RP 398.

Relevant to the handwriting expert, the prosecutor argued that the victim did not apply for the credit cards, but that "the Defendant, in a plan and pattern to annoy and harass him and threaten his livelihood, did that." RP 393. Relevant to the stalking charge, the prosecutor argued the victim's life "basically imploded" as a result of the phone harassment and credit issues. RP 396-97.

V. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE MOTION FOR RELIEF FROM JUDGMENT.

The State asserts that there was no abuse of discretion where the new evidence was not material to the particular count, was merely impeaching of a witness whose testimony was relevant to the acquitted

count only, and, therefore, was not likely to change the verdict that is supported by overwhelming evidence.

The State agrees with the Defendant's recitation of the legal standards. The standard of review is abuse of discretion, i.e. an exercise of discretion based on untenable grounds or reasons. *State v. Smith*, 159 Wn. App. 694, 699-700, 247 P.3d 775 (2011). To obtain a new trial for newly discovered evidence, the defendant must demonstrate all five factors: the alleged new evidence (1) will probably change the result of trial; (2) was discovered after the trial; (3) could not have been discovered by due diligence; (4) is material; AND (5) is not merely cumulative or impeaching. *State v. Williams*, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

The trial court found that the very first factor was not satisfied – that the new evidence would not change the result of the trial. The court could also have found that the reason the new evidence would not change the result of trial is because it was merely impeaching of the witness and because it was not material to the particular count.

In three days of trial, the State presented a lot of evidence including "an awful lot of technical computer information." RP 404. It would be easy to jump to a hasty conclusion if the information is not well reviewed and digested. The prosecutor argued that the identity theft was

the purchase of goods from Fingerhut. The Fingerhut account was an existing account actually created and used by Mr. Riordan. RP 22. The proof of these purchases was the Fingerhut phone number found in the Defendant's home, the Defendant's receipt of the goods, and the virtual fingerprint connecting the Defendant to these purchases.

The credit card applications, which Mr. Emmons reviewed, were offered for a different purpose. These applications intended to create new accounts without Mr. Riordan's approval. The State did not present evidence of anything of value being purchased on these credit cards. The prosecutor's argument relevant to the credit card applications was that the Defendant made these applications to harass the Defendant. The State did not show that she actually acquired anything of value through them.

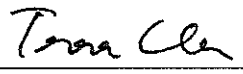
This being the record, the trial court had tenable reason to find that Mr. Emmons' testimony that was only relevant to count 10 and his impeachment would not change the verdict as to a different count.

VI. CONCLUSION

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

DATED: July 8, 2013.

Respectfully submitted:



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David Gasch <gaschlaw@msn.com> Kathy A. Hendrickson DOC # 895317 3420 NE Sand Hill Road Belfair, WA 98528	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 8, 2013, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**