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IN THE
SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

DERRICK ROBERT EVANS,
Petitioner.

**SUPPLEMENTAL BRIEF OF
PETITIONER DERRICK ROBERT EVANS**

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ORIGINAL

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I. INTRODUCTION

Petitioner Derrick Robert Evans relies on Appellant's Brief filed in Division Two, as well as on his Petition for Review filed with this Court, to apprise the Court of the Assignment of Error, Statement of the Case and Argument. This Supplemental Brief supplements Mr. Evans's Argument, after providing a brief review of the facts.

II. Substantive Facts

Mr. Evans took a blank payroll check from his employer, Allube, Inc., and presented it to a Rent-A-Center in Grays Harbor County, Washington, as a legitimate payroll check. The check was purportedly signed by an authorized signatory and made payable to Mr. Evans in the amount of \$500. The check was cashed and Mr. Evans obtained \$480. CP at 10-11.

Allube, Inc. is a business organized as a corporation. CP at 11.

III. ARGUMENT

When a Corporation Cannot Be Considered "Another Person, Living or Dead" under the Identity Theft Statute, a Corporation is Not "Relevant" as a Person Who May Be a Victim under the Statute and Mr. Evans Was Wrongly Convicted of Identity Theft

Because identity theft cannot be committed against a corporation, Mr. Evans's conviction for theft of a corporation's identity should be reversed. Statutory interpretation is a question of law subject to de novo review. State v. Flores, 164 Wn.2d 1, 10, 186 P.3d 1038 (2008) (holding violation of particular statute did not encompass the act of selling drugs in the presence of a minor).

A. Tenets of Statutory Construction Compel the Conclusion that a Corporation is not Relevant as a Person Who May be a Victim Under RCW 9.35.020(1)

Two statutory provisions govern the issues in this case. One is the statutory definition of "person," which includes "any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." RCW 9A.04.110(17)

(emphasis added).¹ The other is the statutory description of identity theft:

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.

RCW 9.35.020(1) (emphasis added).

Given the criminal nature of this case, the only way to determine whether a corporation is relevant as a person/victim² under the identity theft statute is by reference to the plain meaning of the words of the statutes. "Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law." Internet Community & Entertainment Corp. v. Washington State Gambling Com'n, 169 Wn.2d 687, 691-92, 238 P.3d 1163 (2010).

1. The identity theft statute, RCW 9.35, defines person by reference to RCW 9A.04.110. RCW 9.35.005(4).

2. Mr. Evans employs the term person/victim to distinguish "person" when used in RCW 9.35 to refer to the victim from "person" when used in the statute to refer to the perpetrator. The question of whether a corporation can be the perpetrator of identity theft is a distinct issue not presented by this case.

In this case, applying tenets of statutory construction to the words of the statutes compels the conclusion that a corporation is not a relevant victim of identity theft. First, "a single word in a statute should not be read in isolation. Rather, the meaning of a word may be indicated or controlled by reference to associated words." Flores, 164 Wn.2d 1, 12. According to this tenet, the word "person" in RCW 9.35.020(1) cannot be read in isolation, but must be understood to be controlled by the associated words, "another person, living or dead."

Thus, whether a corporation is relevant as a person/victim of identity theft depends on whether a corporation may be considered not just a person, but "another person, living or dead." For the reasons discussed in Appellant's Brief at 5-9 and Petition for Review at 4-8, a corporation is not relevant as a person/victim of identity theft.

A second tenet of statutory construction, that "when the legislature uses different words in statutes relating to a similar subject matter, it intends

different meanings," Flores, 164 Wn.2d 1, 12, also requires the conclusion that a corporation is not relevant as a person/victim under RCW 9.35.020(1). As noted, the identity theft statute characterizes the person/victim to be "another person, living or dead." RCW 9.35.020(1).

For comparison sake, the statutes criminalizing offenses against property that employ the word "person" cited by Division Two are illustrative. See State v. Evans, 164 Wn. App. 629, 636, n.4, 265 P.3d 179 (2011), *citing*, RCW 9A.52.030; RCW 9A.56.060; RCW 9A.48.060; and RCW 9A.56.070(1). Division Two points out that under all of these statutes, a corporation is relevant as a victim. Evans, 164 Wn. App. at 636 & 636 n.4.

Comparing the language of those statutes with the language in RCW 9.35.020(1), however, compels the conclusion that the Legislature used different words in the respective statutes to mean different things. Specifically, none of the statutes cited by Division Two contains restrictive language similar to the "living or dead" language employed by the identity

theft statute. Instead, they all simply refer to a "person" who may be the victim. See RCW 9A.52.030; RCW 9A.56.060; RCW 9A.48.060; and RCW 9A.56.070(1). Because the legislature used different words in the identity theft statute, a statute relating to a similar subject matter as the comparison statutes, it must have intended different meanings for use of the term "person" in the respective statutes.

Thus, the phrase "person, living or dead" in the identity theft statute must mean something different than the unmodified "person" in the other property crime statutes, statutes in which a corporation may be a victim. Indeed, the phrase must mean what it says, a person, living or dead. When a corporation is not capable of being either alive or dead, as explained in Appellant's Brief at 5-9 and Petition for Review at 4-8, a corporation is not relevant as a person/victim of identity theft.

For all of these reasons, tenets of statutory construction reveal that a corporation is not relevant

as a person/victim under RCW 9.35.020(1) and Mr. Evans was wrongly convicted.

B. Division Two Failed Correctly To Interpret the Relevant Statutes, Making its Decision Untenable

Division Two's decision holding a corporation to be a person under RCW 9.35.020(1) is not based on the controlling statutory language of either pertinent statute. It held a corporation had to be a person/victim of identity because it was "bound by the statutory definition of 'person,' which expressly includes a corporation, and which the legislature incorporated into the identity theft statute." Evans, 164 Wn. App. 629, 634-35.

The court's belief that it was "bound" to reach this conclusion makes plain it ignored the "where relevant" language of RCW 9A.04.110(17) altogether. RCW 9A.04.110(17) does not bind any court to hold a corporation to be a person; a corporation is a person only "where relevant." Similarly, Division Two also failed to analyze the identity theft statute to determine whether a corporation is relevant as a person/victim in that context, given the specific

language that describes a person/victim as "another person, living or dead."³

Division Two's holding thus represents a failure in statutory interpretation. The court failed to interpret the statute using "the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010).

Division Two's failure of basic statutory interpretation, if condoned, would create obvious precedential problems, allowing courts to ignore operational clauses of statutes. What is more, if the "where relevant" clause of RCW 9A.04.110(17) is ignored to the extent that a corporation is *necessarily* "another person, living or dead" under RCW 9.35.020(1),

3. In contrast to Division Two, the State at least mustered an argument that reconciled the "where relevant" clause of RCW 9A.04.110(17) with the phrase, "another person, living or dead" from RCW 9.35.020(1), arguing that dictionary definitions of living and dead define them to include, essentially, extant and defunct. Brief of Respondent (filed in Division Two) at 2-3. This argument, however, is strained, at best. If the Legislature meant extant or defunct, it would have used that phrase or a similar expression. The actual phrase in the statute, "living or dead," generally pertains to things that, unlike a corporation, can be alive or dead. See Petition for Review at 5-7.

it follows that a corporation must also be a person/victim under criminal statutes that do not so specifically limit who may be a victim.

For example, under the reasoning of Division Two, a corporation must necessarily be a potential victim of certain types of assault in the second or fourth degree, which provide no limits on who can be a victim. Assault in the second degree is committed when, *inter alia*, a person "[a]ssaults another with a deadly weapon." RCW 9A.36.021; see also, RCW 9A.36.041 ("A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another."). Assault can be committed by an intentional, harmful or offensive touching. State v. Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994). If a corporation is necessarily a person, an individual who shoots a bullet into the facade of a corporate headquarters could be guilty of assault in the second degree under Division Two's reasoning.

This example may appear farfetched, but it is the logical result of Division Two's reasoning that RCW 9A.04.110(17) binds a court to hold a corporation to be a person. Indeed, such reasoning could be used in other cases with equally absurd, or even unconstitutional, results. Most importantly, the plain meaning of the statute does not support this result. Rather than binding a court to consider corporations to be persons, the statute provides that corporations are persons only "where relevant." RCW 9A.04.110(17). As argued above, the plain meaning of the relevant statutes reveals that a corporation is not relevant as a person/victim of identity theft. For these reasons, Division Two's reasoning and holding cannot be supported, it unlawfully expanded the scope of RCW 9.35, and this Court should reverse its decision.

C. Only the Relevant Statutes Themselves Can Reveal a Statutory Ambiguity; to the Extent the Court Finds a Corporation Relevant as a Person/Victim, the Statutes in this Case are Ambiguous

If the plain meaning of the statutes do not resolve this issue, the "where relevant" language of RCW 9A.04.110(17) is ambiguous in the context of the

identity theft statute. As Division Two pointed out, the definition of "person" at issue in this case pertains to all criminal statutes. Thus, the "where relevant" language provides flexibility to cover the myriad situations addressed in the criminal code.

Evans, 164 Wn. App. 629, 636.

Flexibility in the criminal context, however, is limited to the language of the statutes at issue. Internet Community & Entertainment Corp., 169 Wn.2d 687, 691-92. In other words, whether a corporation is relevant as a "person" must be determined by reference to the specific criminal statute employing the term, not to whether it would make apparent sense to consider a corporation a person in a particular context. Accordingly, whether the phrase "where relevant" is ambiguous can only be determined by reference to the identity theft statute, RCW 9.35.⁴

4. In particular, Division Two's discussion of the property interests of corporations is irrelevant to whether the particular statutes at issue, when read together, are ambiguous. See Evans, 164 Wn. App. 629, 636; see also Brief of Respondent (filed in Division Two) at 4-5 (arguing logic compels the conclusion that since corporations can suffer from theft of personal and financial information, corporations are relevant to the crime of identity theft and the statutes are not ambiguous).

Significantly, the identity theft statute is not one in which it is obvious that a corporation is "relevant" as a person/victim. Unlike many criminal statutes, the identity theft statute addresses the issue of who can be a victim with specificity, criminalizing actions against "another person, living or dead":

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.

RCW 9.35.020(1) (emphasis added).

Given this statutory language, it is not just a conceivable, but a reasonable interpretation of the combined statutes that a corporation is not relevant as a person/victim of identity theft because a corporation can be neither living nor dead. Thus, the statutes, read together, are ambiguous, and the rule of lenity requires this Court "to interpret an ambiguous statute in favor of a criminal defendant absent legislative intent to the contrary." State v. Mandanas, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010); Gonzalez, 168 Wn.2d 256, 263. Since there is no evidence the Legislature

intended corporations to be victims under the identity theft statute, the statutes should be interpreted to exclude corporations as person/victims of identity theft.

The State's argument regarding legislative intent to the contrary is without merit. In its brief filed in Division Two, the State argued the legislative intent to include corporations as victims was manifested by amendments to the identity theft statute. Brief of Respondent at 3-4. No such intent may be discerned from the amendments. Indeed, the Legislature specifically deleted a provision of the original statute in which "person" was defined always to include corporations. If anything, then, the amendments show the Legislature intended that corporations will not necessarily be "persons" under the identity theft statute.

The original statute, enacted in 1999, specifically included corporations in the definition of "person." RCW 9.35.010(3)(c) (1999) (defining "person" to "mean[] an individual, partnership, corporation, or association"). That definition was changed the next legislative session. In 2001, the Legislature deleted

that definition and incorporated the current definition, which references RCW 9A.04.110. RCW 9.35.005(4) (2001). As discussed, RCW 9A.04.110(17) only includes corporations as persons "where relevant."

At the same time, the Legislature inserted the phrase "living or dead" after the word "person" in its description of identity theft contained in RCW 9.35.020. RCW 9.35.020 (2001) ("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.").⁵

In sum, from 1999 to 2001, a "person" was changed from always including a "partnership, corporation, or association," to including such entities only "where relevant," and a previously unqualified person/victim was now qualified as "living or dead." However else these amendments may be interpreted, they certainly cannot support the State's suggestion that they reveal

5. Cf. RCW 9.35.020 (1999) (No person may knowingly use or knowingly transfer a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity harming or intending to harm the person whose identity is used, or for committing any felony).

a Legislative intent "to consistently expand[] the crime to cover victims beyond a mere individual human." Brief of Respondent at 4. Indeed, a more logical interpretation is that the Legislature intended to clarify that a corporation may be a person/perpetrator but not a person/victim.

For these reasons and the reasons set forth in Appellant's Brief at 9-15 and Petition for Review at 8-12, this Court should apply the rule of lenity and interpret the statutes at issue in Mr. Evans's favor to exclude corporations as victims.

* * * * *

Mr. Evans relies on Appellant's Brief, filed in the Court of Appeals, and his Petition for Review, filed in this Court, for the remainder of his arguments.

IV. CONCLUSION

For all of these reasons and the reasons set forth in Appellant's Brief and Petition for Review, Derrick Robert Evans respectfully requests this Court to reverse the Court of Appeals' decision and reverse his conviction.

Dated this 30th day of April, 2012.

Respectfully submitted,

/s/ Carol Elewski

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CERTIFICATE OF SERVICE

I certify that on this 30th day of April 2012, I caused a true and correct copy of this Supplemental Brief to be served by e-filing, with the Respondent's consent, on:

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Attached please find for filing the Supplemental Brief of Petitioner Derrick Robert Evans in State v. Evans, Case Number 86772-1.

If you have any questions, please contact the undersigned.

Sincerely,

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