Supreme Court No. 90378-6
Court of Appeals No. 69743-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VADIM FEDEROV,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

IDENTITY OF PETITIONER 1

DECISION BELOW 1

ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 2

ARGUMENT 4

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE THAT MR. FEDEROV KNOWINGLY MISUSED THE IDENTITY OF A REAL PERSON WITH THE INTENT TO COMMIT A CRIME 4

   a. There is insufficient evidence to show that Mr. Federov used the name and date of birth of a specific real person 4

   b. There is insufficient evidence to show that Mr. Federov *knowingly* used the name and date of birth of a real person 6

2. FAILING TO SPECIFY THE UNDERLYING CRIME IN THE "TO CONVICT" INSTRUCTIONS VIOLATED MR. FEDEROV'S CONSTITUTIONAL DUE PROCESS RIGHTS 8

   a. Division One erred in finding that the underlying offense is not an essential element of second degree identity theft. 10

   b. Division One applied this Court's holding in Bergeron beyond the scope of this Court's decision in that case 12

3. EQUATING BELIEF BEYOND A REASONABLE DOUBT WITH "AN ABIDING BELIEF IN THE TRUTH OF THE CHARGE" IN THE JURY INSTRUCTIONS IMPROPERLY INSTRUCTED THE JURY ON THEIR ROLE AND VIOLATED MR. FEDEROV'S CONSTITUTIONAL DUE PROCESS RIGHTS 13

CONCLUSION 17

TABLE OF AUTHORITIES

Statutes

RCW 9.35.020 ..... 3, 6, 9, 11
RCW 9A.32.050(1)(b) 10
RCW 9A.52.020 11
RCW 9A.52.030 12
RCW 9A.52.040 11

Rules

RAP 13.4 ..... 1, 2, 16

Constitutional Provisions

U.S. Constitution, Amend. XIV 4, 8
WA Constitution, Art. I, § 3 4
WA Constitution, Art. I, sec 22 ..... 4, 8

United States Supreme Court

Flores-Figueroa v. U.S., 556 U.S. 646, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009) 6, 7
In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 4, 8, 12
Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 4, 11

Washington Supreme Court

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 4
State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007) 8, 13, 14, 15
State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985) ..... i, 11
State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995) 9
State v. Bunson, 128 Wn.2d 98, 905 P.2d 346 (1995) 12
State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995) 8
State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003) 8, 10, 12
State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) 12, 13, 14
State v. Evans, 177 Wn.2d 186, 298 P.3d 724 (2013) 4, 5
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 4
State v. Lindsay, No. 88437-4, 2014 WL 1848454 (Wash. May 8, 2014) 13, 15
State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991) 8
State v. McCarty, 140 Wn.2d 420, 998 P.2d 296 (2000) 11
State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005) 9
State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002) 10
State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995) 9, 13

State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010) 9
State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997) 9, 10

Washington Court of Appeals

State v. Berry, 129 Wn.App. 59, 117 P.3d 1162 (2005).....4, 5
State v. Bryant, 65 Wn.App. 428, 828 P.2d 1121 (1992).....10
State v. Killingsworth, 166 Wn.App. 283, 269 P.3d 1064 (2012).....7
State v. Zeferino-Lopez, — Wn.App. —, 319 P.3d 94 (2014).....6, 7

A. IDENTITY OF PETITIONER

Petitioner, VADIM FEDEROV, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4(b)(2), (3), and (4) .

B. DECISION BELOW

Petitioner seeks review of the published opinion of the Court of Appeals, Division One, dated May 12, 2014, which affirmed conviction for second degree identity theft. A copy of the Court's slip opinion is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the State presented sufficient evidence to find that Mr. Federov committed second degree identity theft when he repeatedly gave a name and date of birth that did not correspond to any real person in the Judicial Information System and gave no indication that he knew that Zachary Anderson, date of birth August 30, 1984 is a real person. RAP 13.4(b)(2).

2. Whether the specific underlying crime is an essential element of the second degree identity theft statute that must be included in the "to convict" instruction. RAP 13.4(b)(3), (4).

3. Whether "abiding belief in the truth" language in the jury's reasonable doubt jury instruction improperly led the jury to believe that its

role was to find the truth in the case, not evaluate the whether the State proved its case beyond a reasonable doubt. RAP 13.4(b)(3), (4).

D. STATEMENT OF THE CASE

While driving through north Everett, Mr. Federov was pulled over for speeding. He was unable to produce a driver's license, vehicle registration, or automobile insurance. RP 105-07.[1] When asked for his name and date of birth by the officer, Mr. Federov stated his name as Zachary Anderson, date of birth of August 31, 1984. RP 109. A record check performed by the officer did not reveal any Washington drivers with the name and date of birth provided by Mr. Federov, although it did disclose a Zachary Anderson born August 30, 1984, with multiple outstanding warrants. RP 109-11. When the officer again questioned Mr. Federov about his date of birth, he continued to insist his birthdate was August 31, 1984. Despite Mr. Federov's protests and the discrepancy in dates of birth, Mr. Federov was arrested on the outstanding warrants of Zachary Anderson, dob 8/30/1984. RP 111.

Mr. Federov maintained he was Zachary Anderson, date of birth

[1] The record on appeal includes three volumes of transcripts. The CrR 3.5 hearing is found in the verbatim report of proceedings dated December 6, 2012, and will be cited as 12/6/12RP. The trial is found in a single volume representing December 18-19, 2012, and will be cited simply as RP. The sentencing on December 20, 2012, is not otherwise referenced herein.

August 31, 1984, throughout the jailhouse booking procedure. RP 129, 132. After being badgered on the issue, he ultimately capitulated and stated his date of birth was August 30, 2014. RP 112. Due to the questions concerning his identity, Mr. Federov was fingerprinted and consequently identified as Vadim Fedorov. RP 133-34. Mr. Federov was charged with second degree identity theft under RCW 9.35.020.[2]

On appeal Mr. Federov contended, inter alia, that the evidence presented by the prosecution was insufficient to find him guilty of identity theft in the second degree, that the "to convict" jury instructions omitted an essential element of the crime of identity theft by failing to specify the underlying crime Mr. Federov intended to commit, and that the "abiding belief" jury instruction undercut the State's burden of proof by equating the jury's job with a search for the truth. Division One affirmed his conviction. As set forth below, Mr. Federov seeks review.

E. ARGUMENT

1. THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE THAT MR. FEDEROV KNOWINGLY MISUSED THE IDENTITY OF A REAL PERSON WITH THE INTENT TO COMMIT A CRIME.

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[2] In relevant part, RCW 9.35.020 states:

(1) 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.

Due Process requires the State to prove all essential elements of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Baeza, 100 Wn.2d 487, 490, 670 P.2d 646 (1983). Evidence of a crime is insufficient, and the State fails to meet its burden of proof, when, viewed in a light most favorable to the state, no rational trier of fact could find all essential elements of the crime were proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

a. There is insufficient evidence to show that Mr. Federov used the name and date of birth of a specific real person. The Washington identity theft statute requires that a defendant use the identity of a specific real person with intent to commit a crime. State v. Evans, 177 Wn.2d 186, 196, 298 P.3d 724 (2013) ("[A] victim of identity theft must be 'another person, living or dead.'"); see also State v. Berry, 129 Wn.App. 59, 62, 117 P.3d 1162 (2005). Merely providing a false name does not constitute identity theft because the statute is intended to protect real people from financial and other harms. See Evans, 177 Wn.2d at 199-204 (discussing legislative history of identity theft statute).

Division One incorrectly concluded that Mr. Federov used the identity of a real person because he repeatedly asserted that he was Zachary Anderson, dob August 31, 1984, a name and date of birth that does not belong to any individual in the Judicial Information System (JIS). RP 148-50. Mr. Federov insisted on multiple occasions that his date of birth was August 31, 1984 and maintained his birthdate was August 31 even when the arresting officer specifically tried to persuade him to admit it was August 30, 1984. RP 109, 117-18, 132. Providing a false name and date of birth when pulled over for speeding was not a violation of the Washington identity theft statute requiring the defendant to misuse the identity of another real person. See Evans, 117 Wn.2d at 196; Berry, 129 Wn.App. at 62. Although Mr. Federov did state once that he was born on August 30th at the jail, this statement only came after he had repeatedly denied that his birth date was August 30th, even when directly questioned by the arresting officer. RP 116-17, 119, 132. Because Mr. Federov asserted and maintained he was Zachary Anderson, date of birth August 31, 1984, characteristics not matching anyone in the JIS, no reasonable trier of fact could have found, beyond a reasonable doubt, that he used the identity of another real person with the intent to commit a crime.

b. There is insufficient evidence to show that Mr. Federov *knowingly* used the name and date of birth of a real person. Conviction for

identity theft requires a mens rea of knowledge showing that the defendant knew the "means of identification" belonged to another person. State v. Zeferino-Lopez, — Wn.App. —, 319 P.3d 94, 96-97 (2014) ("[T]he element of knowledge in second degree identity theft . . . also refers to [the defendant's] knowledge that [a means of identification] was 'a means of identification or financial information of another person, living or dead.'" (quoting RCW 9.35.020)); see also Flores-Figueroa v. U.S., 556 U.S. 646, 650, 129 S.Ct. 1886, 173 L.Ed.2d 853 (2009) (finding "knowingly" in similarly phrased federal statute applies to "all the subsequently listed elements of the crime," including that a means of identification belongs to another person). Using a false name without knowing that the identifying information belongs to another person does not constitute identity theft. See Zeferino-Lopez, 319 P.3d at 97-98.

Division One's decision upholding Mr. Federov's conviction for identity theft is in direct conflict with that Court's holding in Zeferino-Lopez. In Zeferino-Lopez, Division One found that a defendant who purchased a counterfeit social security card containing a social security number belonging to a real person was not guilty of identity theft because he did not know the number on the card belonged to a real person. Id. at 98. Mr. Federov likewise gave no indication that he knew that the name and date of birth he provided to the officer corresponded to a real person.

Further, the name and date of birth he gave did not match anyone in the JIS and he expressly denied that he was Zachary Anderson, date of birth August 30, 1984. RP 116-17. As in Zeferino-Lopez, where the state failed to show that the defendant knowingly used a means of identification belonging to another person, an element of the crime of identity theft, the state here did not meet its burden of proving that Mr. Federov knew that the name and date of birth he provided to the arresting officer belonged to another person. 319 P.3d at 97-98.

Division One correctly found in Zeferino-Lopez that knowledge that a means of identification actually belongs to another person is an element of the crime of identity theft. The ordinary understanding when knowingly is used before a verb is that it modifies both the verb and any objects of the verb. See Flores-Figueroa, 556 U.S. at 650 ("In ordinary English, where a transitive verb has an object, listeners in most contexts assumes that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."); See id. at 650-53 (discussing examples in ordinary English understanding of modifiers of transitive verbs); State v. Killingsworth, 166 Wn.App. 283, 289, 269 P.3d 1064 (2012) (finding to convict instruction "knowingly trafficked in stolen property" requires showing defendant knowingly trafficked and that the

property was stolen). Because knowingly modifies use, a transitive verb, in the identity theft statute, it "also refers to [a person's] knowledge that it was 'a means of identification or financial information of another person, living or dead.'" Zeferino-Lopez, 319 P.3d at 97.

2. FAILING TO SPECIFY THE UNDERLYING CRIME IN THE "TO CONVICT" INSTRUCTIONS VIOLATED MR. FEDEROV'S CONSTITUTIONAL DUE PROCESS RIGHTS.

Constitutional due process requires the State to prove every essential element of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; In re Winship, 397 U.S. at 364; State v. Lord, 117 Wn.2d 829, 876, 822 P.2d 177 (1991). Jury instructions, therefore, must inform the jury of the applicable law, detailing every essential element of the alleged crime, and inform the jury of the State's burden of proving every element beyond a reasonable doubt. State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995); State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

A "to-convict" instruction is insufficient if it does not specify all the essential elements of a crime. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). An incomplete "to-convict" instruction is unconstitutional because it leaves the jury "guess[ing] at the meaning of an essential element of a crime or . . . assum[ing] that an essential element need not be proved." State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917

(1997); State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005) ("The 'to convict' instruction carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence."). The unconstitutionality of jury instructions lacking an essential element has been affirmed by this Court numerous times. See State v. Sibert, 168 Wn.2d 306, 328, 230 P.3d 142 (2010). The Court "review[s] a challenged jury instruction de novo, evaluating it in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995); State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995).

a. Division One erred in finding that the underlying offense is not an essential element of second degree identity theft. In order for the jury to be adequately instructed on the crime of identity theft, "to convict" instructions must contain the underlying crime the defendant intended to commit. Second degree identity theft occurs when a person "knowingly obtain[s], possess[es], use[s], or transfer[s] 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), (3).[3]

The underlying crime is an essential element of identity theft

[3] RCW 9.35.020(1) defines the underlying elements of identity theft in the first and second degree. First degree identity theft is distinguished from second degree by the value of the money, goods, etc. obtained, i.e., greater than $1500. RCW 9.35.020 (2), (3).

because a jury finding that the defendant acted with the intent to commit "a crime" is constitutionally inadequate. To find that a defendant committed identity theft, the jury must find that he improperly used someone's identity with the intent to commit a specific crime, not crime per se. See State v. DeRyke, 149 Wn.2d 906, 913, 73 P.3d 1000 (2003) ("It is elementary that a person cannot be convicted of rape per se, but only of a specific degree of rape."). By not specifying the specific crime Mr. Federov acted with the intent to commit, the jury is not fully informed on what the state must prove for an individual to be guilty of identity theft. State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). They are inadequately educated on the applicable law and left guessing as to what actions constitute "any crime" under Washington law. Smith, 131 Wn.2d at 263.

Division One has previously found that an underlying crime is an essential element in a criminal prosecution. Murder in the second degree occurs when a person commits or attempts to commit a felony and causes the death of another person in the commission of the felony or flight therefrom. RCW 9A.32.050(1)(b). The underlying felony is an essential element of murder in the second degree. State v. Bryant, 65 Wn.App. 428, 438, 828 P.2d 1121 (1992). Although the Court's pronouncement in Bryant arose in a discussion of the adequacy of the charging document,

the distinction is immaterial because both the jury instructions and the charging document must contain all the essential elements of the crime. State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000) ("[S]ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged (information) and tried (jury instructions), the dissent's distinction is without a difference.").

b. Division One applied this Court's holding in *Bergeron* beyond the scope of this Court's decision in that case. Division One incorrectly applied this Court's holding in State v. Bergeron because the Court's holding in that case is limited to burglary prosecutions. In Bergeron, this court found that, for burglary, it is not necessary to include the underlying crime in the jury instructions or the charging document. 105 Wn.2d 1, 15, 711 P.2d 1000 (1985). As Division One notes, identity theft, like burglary, is a statutory offense, slip op. at 10, and both statutes require a showing that the defendant acted with the intent to commit a crime. Compare RCW 9A.52.020 with RCW 9.35.020. But the burglary statute is unique in that it allows the jury to infer that if a defendant in a burglary prosecution was found to be unlawfully within a building, he was there with the intent to commit a crime. RCW 9A.52.040; Bergeron, 105 Wn.2d at 13-14 n.30; State v. Jackson, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989) ("RCW

9A.52.030 provides that a burglary may be inferred (intent exists) if one either unlawfully remains upon another's premises or an entry occurs."). It is unnecessary to instruct the jury on the underlying crime in a burglary prosecution because jurors can infer from the defendant's mere unlawful presence within a building that he was there with the intent to commit a crime. See State v. Bunson, 128 Wn.2d 98, 105, 905 P.2d 346 (1995) (stating RCW 9A.52.030 was adopted by legislature to clarify proof of intent to commit a crime). Because there is no comparable inference of intent in the identity theft statute, jurors must be instructed on and find that the defendant acted with the intent to commit a specific crime to satisfy the intent prong of the identity theft statute. DeRyke, 149 Wn.2d at 913.

3. EQUATING BELIEF BEYOND A REASONABLE DOUBT WITH "AN ABIDING BELIEF IN THE TRUTH OF THE CHARGE" IN THE JURY INSTRUCTIONS IMPROPERLY INSTRUCTED THE JURY ON THEIR ROLE AND VIOLATED MR. FEDEROV'S CONSTITUTIONAL DUE PROCESS RIGHTS.

The role of the jury is to test whether the prosecution has met its burden of proof, not to search for the truth. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). In order to fulfill this role, the jury must be informed of the State's burden of proving every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. at 363. If the jury is not also properly instructed on what constitutes reasonable doubt,

the State is relieved of its burden and the presumption of innocence that underlies the criminal justice system is "washed away." State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007) ("The presumption of innocence can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve."). The court must vigilantly protect the presumption of innocence to maintain the integrity of the criminal justice system. Id.

By equating proof beyond a reasonable doubt with "an abiding belief in the truth," the WPIC 4.01 jury instructions mischaracterized the crucial role of the jury. The "abiding belief in the truth" language is "improper because [it] suggests that the jury's role is to solve the case." State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). The role of the jury is not to determine the truth of the State's claims, but to assess whether the State has met its burden of proving its case beyond a reasonable doubt. Id. Equating the jury's role with a search for truth misstates and trivializes the burden of proof that must be met by the State. State v. Lindsay, No. 88437-4, 2014 WL 1848454, at *7-8 (Wash. May 8, 2014).

This Court's decision in State v. Pirtle is not controlling because the Court did not address whether WPIC 4.01's "abiding belief in the truth" language mischaracterizes the role of the jury. Although this court

upheld the "abiding belief in the truth" language in WPIC 4.01 in Pirtle, it did so on grounds that it "does not diminish the definition of reasonable doubt given in the first two sentences, but neither does it add anything of substance to WPIC 4.01." 127 Wn.2d 628, 658, 904 P.2d 245 (1995). In doing so, the Court did not address whether the language encourages the jury to view its role as a search for truth rather than evaluation of the case presented by the State. Id. The definition of reasonable doubt in the jury instructions is irrelevant if the jury does not understand its role as applying that standard in evaluating the State's case. See Emery, 174 Wn.2d at 760.

This Court's holding in Bennett is also not controlling in this case because the Court did not address the "abiding belief in the truth" language in WPIC 4.01 in that case. In Bennett, this Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn.App. 48, 935 P.2d 656 (1997) to be inaccurate and misleading. 161 Wn.2d at 317-18. The Court directed trial courts to use WPIC 4.01 "until a better instruction is approved" without further comment on the language of WPIC 4.01. Id. at 318.

Although this Court directed trial courts to use WPIC 4.01, this Court has since found language similar to the "abiding belief in the truth" language of WPIC 4.01 to be problematic. In Emery, this court found the prosecutor's instructions to the jury to "speak the truth" and return a

verdict "speak[ing] the truth" improper. 174 Wn.2d at 751, 760. The Court found that describing the jury as truth-seeker mischaracterized its role in the criminal justice system of determining "whether the State has proved the charged offense beyond a reasonable doubt." Id. at 760. Unlike Emery, where the error was harmless because the instructions were not given by the court and the evidence was overwhelming, here the "belief in the truth" language was part of the official jury instructions and, as argued above, the state has not produced overwhelming evidence of Mr. Federov's guilt. Id. at 764 n.14; See supra at 3-8. The "belief in the truth" instruction was improper because it failed to accurately inform the jury of its role and the State's burden of proving its case beyond a reasonable doubt. Emery, 174 Wn.2d at 760; Bennett, 161 Wn.2d at 315-16.

This Court recently reiterated the position it established in Bennett in State v. Lindsay. In Lindsay, this Court again found that a prosecutor's statements to the jury to "find the truth" or "speak the truth" mischaracterized the role of the jury and were improper. 2014 WL 1848454 at *7-8. The Court broadly held that "[t]elling the jury that its job is to "speak the truth," or some variation thereof, misstates the burden of proof and is improper." Id.

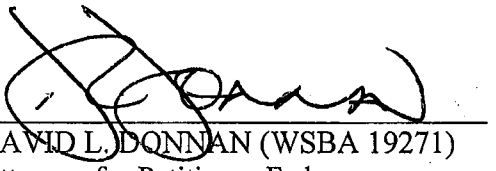
F. CONCLUSION

For the reasons stated herein, Mr. Federov requests this Court

accept review of this appeal pursuant to RAP 13.4(b)(2), (3), and (4), reverse his conviction, and remand for a new trial.

DATED this 11th day of June, 2014.

Respectfully submitted:



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VADIM FEDOROV, Appellant.	)	NO. 69743-9-I DIVISION ONE PUBLISHED OPINION FILED: May 12, 2014

LAU, J. — Vadim Fedorov appeals from the judgment and sentence entered after a Snohomish County jury found him guilty of second degree identity theft. Because (1) the passage of time and change of circumstances did not render the Miranda[1] warnings stale, (2) the evidence sufficiently established that Fedorov used the name of a specific, real person with intent to commit a crime, (3) the court was not required to instruct the jury as to the specific crime Fedorov intended to commit, and (4) the court's reasonable doubt instruction properly stated the law, we affirm.

FACTS

On October 7, 2012, Everett Police Officer Christopher Reid stopped Fedorov for speeding. Fedorov had no driver's license. Officer Reid asked him for his name and

[1] Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

APPENDIX

date of birth. He identified himself as Zachary Anderson with an August 31, 1984 birth date. A computer search showed multiple arrest warrants for an individual named Zachary Anderson, born on August 30, 1984. Officer Reid decided the match was sufficiently close and arrested Fedorov on the warrants. Officer Shane Nelson read Fedorov his Miranda rights in Officer Reid's presence. Fedorov said he understood those rights and was willing to talk to the officers.

Still not convinced that Fedorov was who he claimed to be, officers took his fingerprints and compared them to the known prints for Zachary Anderson.[2] Officers determined Fedorov's true name was Vadim Fedorov. At trial, Sergeant George Hughes testified that he contacted Fedorov in the booking area after learning about the fingerprint results:

> Q. . . . You took that information. You went out to that area?
> A. Yes. And I walked up by one of the deputy stations and I called for, I think it was a Zachary and then an Anderson. And then finally I called for Fedorov, and Mr. Fedorov raised his hand.
> I motioned him to come up to me, and he came up. And I said, "You know, it really pisses me off. You waste our time like this. Why didn't you just tell me who you were?" I said, "Do you think we're stupid?" And he says, "Yeah." I said, "Go sit down."
> Q. Okay. And when you called out the name for Zachary Anderson, did the defendant have any kind of, did he display any kind of physical—anything?
> A. He was just looking around the room. Yeah.
> Q. Any other statements the defendant made at that point?
> A. I didn't talk to him any further.

Report of Proceedings (RP) (Dec. 18, 2012) at 137-38.

The State charged Fedorov with second degree identity theft, alleging he used the identity of Zachary Anderson, born on August 30, 1984, to mislead a public servant. A jury found Fedorov guilty as charged. Fedorov appeals.

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[2] Fingerprint comparison is not part of the general booking process.

ANALYSIS

Voluntariness of Statements

Fedorov first contends the trial court erroneously denied his CrR 3.5 motion to suppress the above-quoted statements he made at the jail to Sergeant Hughes, who questioned Fedorov about his identity. He argues the passage of time and changed circumstances rendered the Miranda warnings "stale." Br. of Appellant at 2. According to Fedorov, fresh Miranda warnings were required before Sergeant Hughes questioned him. The parties agree the questioning constituted custodial interrogation for Miranda purposes. The issue here is whether Sergeant Hughes's failure to issue fresh Miranda warnings before questioning Fedorov rendered Fedorov's responses involuntary and, thus, inadmissible.

The United States Supreme Court "has eschewed per se rules mandating that a suspect be re-advised of his rights in certain fixed situations in favor of a more flexible approach focusing on the totality of the circumstances." United States v. Rodriguez-Preciado, 399 F.3d 1118, 1128 (9th Cir. 2005). Generally, "[w]here a defendant has been adequately and effectively warned of his constitutional rights, it is unnecessary to give repeated recitations of such warnings prior to the taking of each separate in-custody statement." State v. Duhaime, 29 Wn. App. 842, 852, 631 P.2d 964 (1981) (fresh warnings held unnecessary where the defendant signed a written waiver of constitutional rights less than two hours before the challenged questioning occurred).

Fedorov argues fresh warnings were necessary partly because three and a half [3] hours passed between the initial advice of rights and the challenged questioning. But courts have upheld confessions in the face of far lengthier delays. See 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 6.8(b) at 805 (3d ed. 2007) (collecting cases supporting proposition that fresh warnings are generally unnecessary "after the passage of just a few hours"). In Rodriguez-Preciado, for example, the court held fresh warnings were unnecessary even though the police resumed questioning 16 hours after advising the defendant of his rights. Rodriguez-Preciado, 399 F.3d at 1129. And in United States ex rel. Henne v. Fike, 563 F.2d 809 (7th Cir. 1977), cited by the State, the court held fresh warnings were unnecessary despite a nine hour interval. Fike, 563 F.2d at 814. The interval here—three and a half hours—was brief by comparison.

Fedorov also contends fresh warnings were necessary due to the "change in personnel." Br. of Appellant at 11. He relies on Zappulla v. New York, 391 F.3d 462 (2d Cir. 2004), but that case is distinguishable. In Zappulla, the court concluded the defendant's confession violated due process where

> (1) 24-hours had lapsed between the giving of Miranda warnings and the questioning of Zappulla about [the victim's] murder; (2) Zappulla was not in continuous police custody between the initial giving of Miranda warnings and the subsequent interrogation; and (3) the second interrogation concerned a crime unrelated to that for which he was initially arrested.

Zappulla, 391 F.3d at 474. Here, the "lapse" was relatively short, and Fedorov remained in police custody after the issuance of Miranda warnings. Finally, although Sergeant Hughes questioned Fedorov about a crime arguably unrelated to the arrest

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[3] Both parties agree the time lapse between Miranda warnings and the contested statements to Sergeant Hughes was three to three and a half hours.

warrants, significantly, both Officer Reid and Sergeant Hughes asked questions for the same purpose—to determine Fedorov's true identity. The mere lapse of time and change of interrogator does not render Miranda warnings "stale" necessitating repetition of rights before a voluntary statement may be made. Wyrick v. Fields, 459 U.S. 42, 48-49, 103 S. Ct. 394, 74 L. Ed. 2d 214 (1982); United States v. Andaverde, 64 F.3d 1305, 1312 (9th Cir. 1995).

Fedorov also argues that "the securing of the fingerprint comparisons" constituted a change in circumstances necessitating fresh warnings. Br. of Appellant at 11. On this point, he cites no authority. Argument unsupported by citation to authority need not be considered. RAP 10.3(a)(6); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). In any event, the police may actively deceive a suspect without destroying the voluntariness of a confession. See State v. Burkins, 94 Wn. App. 677, 695, 973 P.2d 15 (1999) ("Deception alone does not make a statement inadmissible as a matter of law; rather, the inquiry is whether the deception made the waiver of constitutional rights involuntary."); see also Commonwealth v. Martinez, 458 Mass. 684, 693, 940 N.E.2d 422 (2011) ("If the making of false or incriminating statements and being confronted by them were to undermine and render ineffective an otherwise valid Miranda waiver, police would be obliged to repeat Miranda warnings whenever a defendant in an interrogation moves toward inculpating himself. This is not the law."). Considering the totality of the circumstances discussed above, we conclude "the securing of the fingerprint comparisons" was not an intervening circumstance necessitating fresh warnings.

We conclude the trial court properly admitted Fedorov's challenged statements.

Sufficiency of the Evidence

Fedorov next challenges the sufficiency of the evidence supporting his second degree identity theft conviction. He contends the State failed to prove (1) that he used the identity of a "specific real person or corporation" and (2) that he used the identity "with the intent to effectuate any specific crime." Br. of Appellant at 14-15.

"A sufficiency challenge admits the truth of the State's evidence and accepts the reasonable inferences to be made from it." State v. O'Neal, 159 Wn.2d 500, 505, 150 P.3d 1121 (2007). We will reverse a conviction "only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt." State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). An identity theft conviction requires proof that the defendant knowingly obtained, possessed, used, or transferred 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.[4] RCW 9.35.020(1). The victim must be a "specific, real person." State v. Berry, 129 Wn. App. 59, 67, 117 P.3d 1162 (2005).

Fedorov first argues, "The State failed to prove that Mr. Fedorov misused the identity of a person in light of his dogged insistence on a date of birth that did not match any of the more than 26 individuals with similar names found just within the Judicial Information System (JIS)." Br. of Appellant at 14. We are not persuaded.

[4] First degree identity theft requires proof that the defendant obtained "credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value . . . ." RCW 9.35.020(2). Second degree identity theft requires a violation not amounting to first degree identity theft. RCW 9.35.020(3).

It is undisputed that Zachary Anderson, born on August 30, 1984, is a "specific, real person."[5] Berry, 129 Wn. App. at 67. Fedorov acknowledges he used the name "Zachary Anderson" but claims that the August 31, 1984 birth date he used belonged to none of the Zachary Andersons of record.

Fedorov's argument ignores Officer Reid's testimony. According to Officer Reid, Fedorov initially insisted his birth date was August 31, 1984. He later used the actual date of Zachary Anderson's birth date—August 30, 1984:

> Q. So you asked him for his birth date and he gave the birthday of 8/31/84; correct?
> A. Yes, sir.
> Q. And Dispatch came back to a Zachary Anderson 8/30/84?
> A. Yes, sir.
> . . . .
> Q. At any point while at the jail or on the traffic stop did the defendant ever admit that his birthday was 8/30/84?
> A. At the jail, Mr. Fedorov finally admitted that he was born on the 30th.

RP (Dec. 18, 2012) at 109-12. Assuming the truth of this evidence, a rational trier of fact could find beyond a reasonable doubt that Fedorov used the name and birth date of a specific, real person—Zachary Anderson, born on August 30, 1984.

Fedorov also challenges the sufficiency of the evidence establishing that he used Zachary Anderson's identity "with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). Under Washington law, "[a] person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor." RCW 9A.76.175. Here, assuming the truth of the State's evidence, we conclude that a

[5] The court admitted Anderson's state identification card, which confirmed his name and August 30, 1984 birth date.

rational trier of fact could infer that Fedorov acted with intent to commit the crime of knowingly making a false or misleading material statement to a public servant.

The record shows Fedorov repeatedly told Officer Reid his name was Zachary Anderson. These statements caused Officer Reid to arrest Fedorov on Anderson's outstanding warrants. At the jail, Fedorov also claimed Anderson's birth date. Officer Reid informed a booking officer that "some of the details were off and that [Fedorov] may have been lying about his name." RP (Dec. 18, 2012) at 111. Given the uncertainty of Fedorov's identity, jail staff performed a fingerprint analysis. A corrections deputy testified that because fingerprinting was not part of the standard booking process, it took "extra time" to book Fedorov into jail. RP (Dec. 18, 2012) at 135. At no point during the analysis did Fedorov reveal his true identity.

Sergeant Hughes confronted Fedorov after the fingerprinting analysis indicated his true name was Vadim Fedorov. Fedorov raised his hand when Sergeant Hughes called out "Fedorov" in the jail's booking area. When Sergeant Hughes asked if Fedorov thought the jail staff was "stupid," Fedorov responded, "Yeah." RP (Dec. 18, 2012) at 137. Fedorov planned to reveal his true identity during his booking interview. A booking officer testified, "He told one of our officers that he was going to admit to his identity after—during his interview process." RP (Dec. 18, 2012) at 130.

Given Fedorov's multiple acts of intentional deception, a rational trier of fact could infer that he intended to violate the false statement statute, RCW 9A.76.175.

To-Convict Instruction

Fedorov next challenges instruction 8, the WPIC[6] to-convict instruction directing the jury to consider whether Fedorov used another person's identity "with the intent to commit or aid or abet any crime." (Emphasis added.) Fedorov argues the instruction must specify the crime he allegedly intended to commit—in this case, a violation of the false statement statute. The parties agree that the sole issue is whether the particular crime intended by a defendant charged with second degree identity theft is an essential element that must appear in the trial court's to-convict instruction. We review this issue de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) (adequacy of to-convict instructions reviewed de novo).

Washington courts have addressed similar issues in a line of cases beginning with State v. Bergeron, 105 Wn.2d 1, 711 P.2d 1000 (1985). In Bergeron, the appellant argued that "the particular crime which the defendant intended to commit inside the building or dwelling is an element of the crime of burglary, and that such crime must be specifically charged, instructed on (in a jury trial) and found as a fact (in a trial to the court)." Bergeron, 105 Wn.2d at 6. The court disagreed, reasoning that burglary in Washington is modernly a statutory offense and that our burglary statutes plainly "require only an intent to commit any crime." Bergeron, 105 Wn.2d at 15. It concluded:

> [W]e now hold that the specific crime or crimes intended to be committed inside burglarized premises is not an element of burglary that must be included in the information, jury instructions or in the trial court's findings and conclusions. It is sufficient if the jury is instructed (or that the court find and conclude, as it did in the present case) in the language of the burglary statutes.

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[6] 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 131.06, at 560 (3d ed. 2008).

Bergeron, 105 Wn.2d at 16. In so holding, the court expressly overruled State v. Johnson, 100 Wn.2d 607, 674 P.2d 145 (1983), to the extent that Johnson held the charging document and jury instructions must specify the defendant's intended crime "as an element of the offense." Bergeron, 105 Wn.2d at 8.

The Supreme Court subsequently applied Bergeron in the context of aggravated first degree murder. In State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722 (1986), the trial court instructed the jury that a conviction required a finding that "the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime." Jeffries, 105 Wn.2d at 419. On appeal, the defendant challenged the instruction on the basis that it omitted the particular crime he allegedly concealed. Relying on Bergeron, the court held, "The specific crime need not be stated, as the statute did not require it." Jeffries, 105 Wn.2d at 420.

Bergeron's rationale applies with equal force here. Like burglary (and aggravated first degree murder), identity theft is a statutory offense. The statute merely requires proof of intent to commit "any crime." RCW 9.35.020(1). Under Bergeron, the statute is plain on its face and thus does not support "reading the element of intent to commit a particular crime into the statutory offense . . . ." Bergeron, 105 Wn.2d at 15.

Fedorov relies on State v. Bryant, 65 Wn. App. 428, 438, 828 P.2d 1121 (1992). In Bryant, the defendant argued "the information charging him with second degree felony murder was constitutionally defective for failing to specify the prong of the statute on which the underlying charge of first degree assault was based." Bryant, 65 Wn. App. at 437. In rejecting the defendant's argument, we noted that "the underlying crime is an element of felony murder . . . ." Bryant, 65 Wn. App. at 438.

Bryant is not controlling because it contained no discussion of jury instructions. The issue before us was the adequacy of the charging document, not the adequacy of the to-convict instruction. Despite Fedorov's suggestion, those issues are analytically distinct. See State v. Saunders, 177 Wn. App. 259, 269, 311 P.3d 601 (2013) (discussing "the different underlying purposes for including an essential element in a charging document and including such an element in a to-convict instruction.").

Further, cases discussing the elements of felony murder are of questionable relevance due to the felony murder statutes' unique language. Whereas the identity theft statute broadly requires intent to commit any crime, the second degree felony murder statute more narrowly requires commission or an attempt to commit "any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c)." RCW 9A.32.050(1)(b).[7] Commission of a felony listed in RCW 9A.32.030(1)(c) may elevate the offense to first degree felony murder. In contrast, the identity theft statute refers to "any crime" without qualification. According to Bergeron, this textual consideration is legally significant. We are unpersuaded by Fedorov's analogy to Bryant.

Fedorov also cites State v. DeRyke, 149 Wn.2d 906, 73 P.3d 1000 (2003). In DeRyke, the court held "it was error to give the jury a 'to convict' instruction for the charge of attempted first degree rape which did not specify the degree of the rape

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[7] At the time we decided Bryant, the statute required proof that the defendant committed or attempted to commit "any felony other than those enumerated in RCW 9A.32.030(1)(c) . . . ." Laws of 1975-76, 2d Ex. Sess., ch. 38, § 4. Fedorov asserts, "A person is guilty of murder in the second degree when he commits or attempts to commit any felony, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he causes the death of another." Br. of Appellant at 18. His statement of the law is incomplete.

allegedly committed." DeRyke, 149 Wn.2d at 912. Fedorov does not argue that instruction 8 contained a similar deficiency. Instead, he relies on DeRyke for the unremarkable proposition that "the 'to convict' instruction must generally contain all elements of the charged crime." Br. of Appellant at 17. As discussed above, instruction 8 contained all essential elements of the charged crime.

As Fedorov acknowledges, the issue is ultimately one of due process. A to-convict instruction may violate due process if it leaves the jury guessing at the meaning of an element of the crime or relieves the State of the burden of proving an element. Saunders, 177 Wn. App. at 270. Fedorov does not claim the jury was left guessing as to which crime he intended to commit. His attorney conceded during closing arguments that her client was "guilty of making a false statement to a police officer . . . ." RP (Dec. 18, 2012) at 166. Finally, under Bergeron, Fedorov's claim that the to-convict instruction omitted an essential element is contrary to the identity theft statute's plain language. The to-convict instruction properly states the law.[8]

Reasonable Doubt Instruction

Fedorov lastly challenges the court's reasonable doubt instruction. He claims it was error to instruct the jury that "[i]f, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."[9] Fedorov

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[8] Fedorov argues, "The error in failing to include the underlying offenses in the 'to convict' instruction was not a harmless error." Br. of Appellant at 20. Given our analysis, we need not reach this issue.

[9] The trial court used 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01, at 85 (3d ed. 2008), which includes the "abiding belief" language.

argues, "The 'belief in the truth' language encourages the jury to undertake an impermissible search for the truth." Br. of Appellant at 22.

We disagree. State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), and State v. Pirtle, 127 Wn.2d 628, 904 P.2d 245 (1995), control. Fedorov relies on State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), to challenge the "abiding belief" language. He claims this language is similar to the impermissible "speak the truth" remarks made by the State during closing. Emery, 174 Wn.2d at 751. Emery found the "speak the truth" argument improper because it misstated the jury's role. Here, read in context, the "belief in the truth" phrase accurately informs the jury its "job is to determine whether the State has proved the charged offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760. The reasonable doubt instruction accurately stated the law.

CONCLUSION

For the reasons discussed above, we affirm Fedorov's conviction.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 69743-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: June 10, 2014