70261-1

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COA No. 70261-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL BATEMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Jean Rietschel

REPLY BRIEF

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A. REPLY ARGUMENT SUMMARY

1. Mr. Bateman replies that under the best analysis of the state constitution, jail telephone calls are private affairs protected by Article 1, section 7, and the admission of the jail telephone call recordings was manifest constitutional error under RAP 2.5(a) and requires reversal of Mr. Bateman's convictions.

2. The identity theft statute, RCW 9.35.020, includes multiple alternative means of committing identity theft, and reversal is required because there was not substantial evidence of each means, and count 2 and count 3 must be reversed.

3. Although the Respondent did not choose to respond to the issue as properly raised in Mr. Bateman's Statement of Additional Grounds, Mr. Bateman argues that his counsel was ineffective to his prejudice.

B. REPLY ARGUMENT

1. RECORDING MR. BATEMAN'S JAIL TELEPHONE CALLS INVADED HIS PRIVATE AFFAIRS UNDER ART. I, § 7 OF THE WASHINGTON CONSTITUTION.

Respondent contends that the issue of evidentiary admission of the jail telephone calls in this case was waived as error. Brief of Respondent, at p. 11-13. But RAP 2.5(a)(3) permits a party to raise

initially on appeal a claim of "manifest error affecting a constitutional right." The error must be both (1) manifest and (2) be truly of constitutional magnitude. State v. Scott, 110 Wn.2d 682, 685, 688, 757 P.2d 492 (1988).

Mr. Bateman has argued and maintains that the error is "manifest" because it was identifiably prejudicial. See, e.g., State v. WWJ Corp., 138 Wn.2d 595, 602–03, 980 P.2d 1257 (1999).

Also, in this case, he argues that his lawyer's own use of certain jail calls does not waive the issue on appeal because if properly admissible for the State, Mr. Bateman as a protected person was entitled to present exculpatory evidence available in the tapes. 3/12/13RP at 10-11. See Brief of Respondent, at p. 12.

On the constitutional question, Mr. Bateman relies on the arguments in his Appellant's Opening Brief that a warrant was required for the recording of the jail calls under Article I, § 7 of the Washington State Constitution. Cf. State v. Modica, 136 Wn. App. 434, 149 P.3d 446 (2006), affirmed at164 Wn.2d 83, 88-89, 186 P.3d 1062 (2008); State v. Archie, 148 Wn. App. 198, 199 P.3d 1005), review denied, 166 Wn.2d 1016 (2009).

2. ALTERNATIVE MEANS ARE SET FORTH IN THE IDENTITY THEFT STATUTE AND NOT EACH WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Mr. Bateman's Opening Brief set forth his argument that the identity theft statute, RCW 9.35.020, is an alternative means statute requiring a unanimous jury under the state constitution's unanimity guarantee, Wash. Const. art. 1, section 21, along with the supporting case authority from Washington decisions, and that of legal commentators, bolstering the argument that the statute does indeed set forth such "means." Appellant's Opening Brief, at pp. 14-16.

First, he asks this Court to reject the Respondent's assertion that the appellant's argument is somehow lacking in citation to legal authority. Brief of Respondent, at p. 22 n. 12.

The question whether the language of the statute does set forth alternative means, or whether the multiple manners of committing the crime that are stated in the provision's plain language are a mere definition, is not overly complex. Mere definitions of a crime or an element do not set forth alternative means, but alternative means are set forth if the criminal statute establishes that the crime can be committed in different

distinguishable ways. State v. Lindsey, 177 Wn. App. 233, 311 P.3d 61 (2013); State v. Smith, 159 Wn.2d 763, 769, 230 P.3d 588 (2010); see also State v. Laico, 97 Wn. App. 759, 762-63, 987 P.2d 638 (1999).[1]

The identity theft statute, RCW 9.35.020, provides:

> (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.

RCW 9.35.020(1).

As Mr. Bateman argued, at least one legal commentator so clearly views the stated manners of committing the crime as creating alternative means that this analysis is included in the pattern jury instruction comments. Appellant's Opening Brief, at p. 16 (citing 11A Washington Pattern Instruction 131.06 (RCW 9.35.020), 3rd ed. 2008). This authority indicates that the "use" of the financial information should be set forth only when also charged, along with the listed possessory means.

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[1] The Court of Appeals decision in State v. Allenbach, 136 Wn. App. 95, 97, 147 P.3d 644 (Division Two 2006), noted that the appellant was arguing *inter alia* that the trial court "erred by instructing the jury on alternative means of committing identity theft," but this issue was not substantively addressed, including in the unpublished portion of the opinion.

Crucially, on its face, if "use" is a discrete means of committing the crime, each of the other listed manners must also be alternative means, because "use" is not set forth in a discrete phrase, or set forth with an accompanying *mens rea*, as in the trafficking statute. See State v. Lindsey, 177 Wn. App. at ___, 311 P.3d at 65-66. And in State v. Nonog, 145 Wn. App. 802, 187 P.3d 335 (2008), aff'd on other grounds, 169 Wn.2d 220, 237 P.3d 250 (2010), the Court of Appeals deemed the interference with domestic violence reporting statute to set forth distinguishable means of committing the offense, where the crime required a domestic violence crime, followed by a person who:

> prevents or attempts to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

State v. Nonog, 145 Wn. App. at 812 (quoting RCW 9A.36.150(1)). The Court made clear that each of these variations were themselves essential terms, and certainly not a mere definition. State v. Nonog, 145 Wn. App. at 812-13 (also noting RCW 9A.72.120, under which tampering with a witness

may be committed by alternative means, and State v. Fleming, 140 Wn. App. 132, 135–37, 170 P.3d 50 (2007).

The identity theft statute is similar to the statutes in these cases, and these authorities support the contention that alternative means were charged in this case, considering the statute, and also the jury instructions. CP 66, CP 67 ('to-convict' instructions); Appellant's Opening Brief, at pp. 16-17. As argued, the central distinction for purposes of alternative means is that the manners of committing the crime that are listed in the statute are not a 'definition' of an element – definitions do not create alternative means. Appellant's Opening Brief, at pp. 15-16 (citing Smith, 159 Wn.2d at 785).

The State's argument based on State v. Arndt and State v. Peterson fails. Brief of Respondent, at p. 24. Respondent neglects to note that the Supreme Court has stated that courts must evaluate each case on its own merits to determine if alternative means were presented to the jury. State v. Peterson, 168 Wn.2d 2d 763, 769, 230 P.3d 588 (2010) (citing State v. Arndt, 87 Wn.2d 374, 378, 553 P.2d 1328 (1976)).

in the instant case the prosecutor could have, but chose not to, limit the means of identity theft presented to the jury by

circumscribing the 'to-convict' and definitional jury instructions to a narrower set of means that that set forth in the statute.

Furthermore, the title of the statute, "Identity Theft," provides no support for a contention that the statute's setting forth of multiple ways of committing the crime – which include not only obtaining financial information, but also transferring it -- are merely definitions of a single titled crime.

Indeed, 'obtaining,' 'transferring,' and 'using' financial information are instances of conduct that are more repugnant to each other than they are consistent with each other. See Arndt, at 378-79. And they plainly do not inhere in the same transaction, Arndt, at 378-79, either as generic acts of conduct, or as the prosecutor below argued in the merits of the present case.

Importantly, because the State's trial case began with a narrative recounting how the owner of the certain financial information (credit card numbers, or the credit cards) went missing from her home after a burglary, see 3/14/13RP at 151-59; 3/8/13RP at 159, and see Appellant's Opening Brief, at pp. 2, 4, yet neither Mr. Bateman nor the guilty-pleading, testifying co-defendant Ms. Matera, were placed on trial *for any burglary*, it

was particularly hazardous, for purposes of jury unanimity, that the "obtained" means was included in the jury instructions, simply because that means is listed in the RCW statute. CP 66, CP 67. The same is true of the 'transfer' means along with the remaining alternatives. CP 66, CP 67.

Finally, as argued in the Appellant's Brief, there was not substantial evidence on each of the means that the prosecutor chose to employ in the jury instructions, and reversal of the counts for this constitutional error is required. Appellant's Opening Brief, at pp. 16-18 (citing, *inter alia*, Wash. Const. art. 1, § 21 and State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994)).

3. AS DEFENDANT ARGUED IN HIS SAG, COUNSEL WAS INEFFECTIVE IN ALLOWING HEARSAY TESTIMONY FROM THE NORDSTROM MANAGER WHICH DEFEATED HIS DEFENSE THAT HE DID NOT KNOW THE CREDIT CARDS' MAGNETIC STRIPS CARRIED ILLEGAL FINANCIAL INFORMATION.

Mr. Bateman's defense was that he had no idea that the credit cards loaned to him by Ms. Matera were anything other than her proper cards, including when she lent him one of them so he could buy two pairs of blue jeans at Nordstrom. 3/20/13RP at 749-53, 756-57.

For her part, Ms. Matera indicated that Mr. Bateman did not know that she had unlawfully worked with an associate to have that person encode illegal financial information onto the magnetic strip of certain of her own credit cards. 3/19/13RP at 546-48, 554; 3/20/13RP at 622, 628. As she described, this process is called "cloning," because the plastic card itself may have the holder's own name stamped or embossed on it, but the magnetic information on the back is that of someone else. 3/19/13RP at 542-43.

As Matera testified, Mr. Bateman did not know this. 3/20/13 at 756-57. In this context, it was inadmissible hearsay for the Nordstrom manager, Kelsey Danielsson, to testify as a State's witness that the sales clerk in her store told Danielsson that she did a "4 by 4" check, to see if the magnetic strip information matched the name embossed on the front of the plastic card itself (which the defense argued was embossed as 'Melissa Matera'). 3/18/13RP at 271-73.

This issue was crucial. Mr. Bateman did not know that his friend Ms. Matera, rather than graciously lending him a credit card of hers, in fact had lent him a "cloned" card that had her name embossed on the front, but which had a magnetic strip containing the wrongful credit card information of another person.

Danielsson's testimony that the 4 by 4 was executed was hearsay, and the trial court abused its discretion in ruling to the contrary. Had counsel objected earlier, the trial court would have sustained the objection earlier. Hearsay is inadmissible. ER 802. "Hearsay" is defined as testimony repeating an out-of court statement that a party offers in court to prove the truth of the matter asserted in the statement. ER 801(a),(c). The store manager's testimony was hearsay. State v. Collins, 76 Wn. App. 496, 499, 886 P.2d 243 (1995); ER 801(a).

Therefore, as Mr. Bateman strongly contended in his Statement of Additional Grounds, his lawyer was ineffective under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984), for failing to timely and earlier object. Statement of Additional Grounds (SAG), at pp. 1-2, 14-17. Further, where his counsel may have elicited statements from this witness in this regard, and particularly where the prosecutor in closing argument used the hearsay to specifically argue against Mr. Bateman's viable 'cloned card' defense theory, Mr. Bateman was effectively deprived of adversarial counsel. United States v. Cronic, 466 U.S. 648, 658–59, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); 3/18/13RP at 269-70, 273-74; 3/18/13RP at 713-14 (State's closing argument).

Mr. Bateman argues that defense counsel's failure to earlier obtain the proper hearsay ruling from the trial court was ineffective assistance of counsel, requiring reversal. Statement of Additional Grounds, at pp. 1-2, 14-17.

C. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Bateman asks this Court to reverse his judgment and sentence.

DATED this 24 day of February, 2014.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DANIEL BATEMAN, Appellant.	)))))))))	NO. 70261-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GRACE WIENER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DANIEL BATEMAN 876456 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF FEBRUARY, 2014.

X_____

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