

62337-1

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NO. 62337-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SHANNON CULBERTSON,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	7
1. THE TRIAL COURT PROPERLY FOUND CULBERTSON GUILTY OF IDENTITY THEFT.....	7
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

North Carolina v. Alford, 400 U.S. 25,
91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)..... 10

Washington State:

State v. Berry, 129 Wn. App. 59,
117 P.3d 1162 (2005), review denied,
158 Wn.2d 1006 (2006)..... 6, 9, 11, 12

Statutes

Washington State:

RCW 9.35.001..... 8
RCW 9.35.005..... 8
RCW 9.35.020..... 1, 8

A. ISSUE

1. A defendant may be convicted of identity theft upon proof that she knowingly used financial information of a real person with the intent to commit theft. The State proved that Culbertson used an altered gift card bearing the credit card account number of Daniel Charpentier to buy or attempt to buy goods and services at several different locations; when confronted by police, Culbertson gave a false name and three different versions of where she had obtained the card. Did the trial court, as the finder of fact, properly find Culbertson guilty of the crime of identity theft?

B. STATEMENT OF THE CASE

Defendant Shannon Culbertson was charged by information with Identity Theft in the Second Degree.¹ The State alleged that, on December 3, 2007, Culbertson knowingly used the credit card number of Daniel Charpentier, without his permission, to fraudulently obtain goods or services at several different places in Auburn, Washington. CP 1-6.

¹ The crime of identity theft is divided into degrees based upon the amount obtained. Former RCW 9.35.020(2)(a), (b). The degree of the crime is not at issue in this appeal.

The case proceeded to a bench trial. CP 19. Culbertson moved to suppress evidence on several different bases, each of which was rejected by the trial court. CP 56-60. The court also found Culbertson's statements to police admissible. CP 52-55.

According to numerous witnesses presented by the State, the events supporting the charge unfolded as follows. Police responded to the Fashion Bug, an Auburn women's clothing store, at 7:51 p.m. on December 3, 2007; the call alleged possible fraudulent use of an access device. 3RP² 7-8, 55. Store personnel had noticed two women piling up clothes hurriedly, without trying them on, shortly before the store was scheduled to close. 3RP 126-27, 141-42. The gift card proffered by the older woman³ to pay for the clothes would not scan; the woman suggested that the number be entered manually. 3RP 144-46. The assistant manager had seen the same two women in the store several months earlier; on that occasion, the older woman had similarly produced a gift card that would not scan, and the purchase had

² The verbatim report of proceedings will be referred to in this brief as follows: 1RP (8-4-08); 2RP (8-5-08); 3RP (8-6-08); 4RP (8-7-08); 5RP (9-4-08).

³ Culbertson was the older of the two. 3RP 11, 24-25.

been completed by manually entering the numbers at the woman's suggestion. 3RP 128-29.

Upon arrival at the store on December 3rd, the police contacted two women, one of whom was Culbertson. 3RP 11. The officers obtained what looked like a prepaid Visa gift card from the store manager. 3RP 13-15, 57; Ex. 2, 3. Upon closer inspection, they observed plastic laminate on the front of the card that was peeling at one edge; the numbers were actually imprinted on the back of the laminate. 3RP 18-22, 58-59; Ex. 2, 3. The original numbers appeared to have been scratched off the card itself. 3RP 21-22; Ex. 2, 3. As is typical of gift cards, no name was printed on the card. 3RP 15; Ex. 2, 3.

Culbertson initially told police that she had received the card from her uncle in Arizona, and that there was \$1,000 on the card. 3RP 14, 70. Only moments before, she had told the Fashion Bug cashier that her father had given her the gift card. 3RP 146. Culbertson later told the detective investigating the case that someone named "Tommy" had given her the card to buy clothes, allowing her to spend up to \$500. 3RP 102; Ex. 4 at 2-3.

Culbertson identified herself to the responding officers as "Sarah J. Larimore," and gave a birth date and the last four digits of

a social security number. 3RP 24-25. When the officers discovered her true identity, Culbertson said that she had lied because she had a "bad past." 3RP 29-34, 62-68. The officers transported Culbertson and her companion to the jail for booking. 3RP 36, 69.

Questioned by a detective while in custody, Culbertson identified the gift card that she had presented at the Fashion Bug. 3RP 84. Culbertson said that she lived in Puyallup, but had come to town with a friend, Daniele, to take Culbertson's daughter to a medical procedure on the following day. 3RP 85-87; Ex. 4 at 2. They booked room 132 at the Days Inn. 3RP 87; Ex. 4 at 2; Ex. 6. Daniele's friend Tommy drove them to a Walgreen's so Culbertson could get medicine for her daughter; then they stopped at a gas station where Tommy bought cigarettes. Ex. 4 at 2. When Culbertson realized that neither she nor Daniele had brought any clothes, Tommy gave them a Visa gift card and told them not to spend more than \$500. Ex. 4 at 2-3. They went to the Fashion Bug and tried to buy clothes with the card, but the card did not work when the clerk tried to swipe it through the credit card machine. Ex. 4 at 3. Culbertson insisted that she had "no idea the card was bad." Ex. 4 at 3.

Detective Dynes went to the Days Inn and obtained a copy of the registration form for room 132, as well as the merchant copy of the signed credit receipt; the number used to pay for the room was "4537010508601013." 3RP 96-99; Ex. 6. The front desk clerk had to manually enter the gift card number. 4RP 30-34.

The detective next went to a Chevron gas station, where he obtained a sales receipt with the same credit card number. 3RP 104-06. He also viewed a surveillance video that showed Culbertson in the store alone. 3RP 112-13, 170-75; Ex. 8.

Finally, the detective obtained a surveillance video from Walgreen's in which Culbertson appeared. 3RP 117-18; 4RP 6-9; Ex. 9. The electronic record from the relevant date and time (12-3-07 at 6:13 p.m.) showed a transaction using the same credit card number; the transaction was "keyed" rather than "swiped." 4RP 10-15, 18-19; Ex. 10. The items purchased did not include any medication. 4RP 13; Ex. 10.

Detective Dynes was able to locate the owner of the account number on the gift card. 3RP 114-15. Daniel Charpentier lived in Manitoba, Canada. Ex. 7. He was the sole owner of Visa account number 4537-0105-0860-1013. Id. On December 3, 2007, Charpentier was in the Seattle area on business. Id. He used his

Visa credit card at several places in the greater Seattle area, including Kent. Id. Charpentier had no idea how anyone had obtained his credit card information; he did not give anyone permission to use it. Id.

Culbertson neither testified nor put forth any witnesses. 4RP 39-41. During defense counsel's closing argument, he conceded that the State had proved that Culbertson used a fake Visa gift card with Daniel Charpentier's account number on it. 4RP 53-54. For the first time, however, counsel argued that "[u]sing another person's account information alone is not identity theft. . . . identity theft is using someone's personal information to manipulate that I.D. to one's own goals." 4RP 54. Relying on State v. Berry,⁴ counsel argued that, because the gift card had no name on it, and Culbertson did not use any identification with Charpentier's name on it, the trial court should find Culbertson not guilty of identity theft. 4RP 54-57.

After reading Berry, the trial court rejected the argument. The court concluded that Berry was a charging case, and that it held only that the victim named in the charging document must be

⁴ 129 Wn. App. 59, 117 P.3d 1162 (2005), review denied, 158 Wn.2d 1006 (2006).

an actual person. 4RP 61-64. After going through the evidence presented at trial, the court found Culbertson guilty beyond a reasonable doubt: "I find beyond any reasonable doubt that the Defendant, Shannon Culbertson, in King County, Washington on December 3, 2007 did knowingly possess and use financial information being a credit number of another person used on a reported gift card and she used that with the intent to commit a crime, theft of property and that the theft was less than \$1,500.00." 4RP 66. The court entered written findings of fact and conclusions of law in accordance with its finding of guilt. CP 48-51.

The court imposed a DOSA (Drug Offender Sentencing Alternative). 5RP 9-10; CP 36-44.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND
CULBERTSON GUILTY OF IDENTITY THEFT.

Culbertson contends that she could not be found guilty of identity theft for doing no more than knowingly using Charpentier's account number on the fraudulent gift card to purchase goods or services. She claims that, to prove identity theft, the State must prove that she used some additional "personal information"

belonging to Charpentier. The language of the statute contradicts this claim.

The statute under which Culbertson was charged and convicted is entitled "Identity Theft." It provides that:

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.

Former RCW 9.35.020(1) (emphasis added).⁵ "Financial information" includes "account numbers." RCW 9.35.005(1)(a).

The legislature made clear its intent in passing this statute:

The legislature finds that financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain and use financial information. The legislature intends to penalize unscrupulous people for improperly obtaining financial information.

RCW 9.35.001.

The State charged Culbertson with Identity Theft in the Second Degree under RCW 9.35.020 as follows:

That the defendant SHANNON R. CULBERTSON in King County, Washington, on or about December 3, 2007, did knowingly obtain, possess, use or transfer a

⁵ RCW 9.35.020 has since been amended, although not in any way relevant to this appeal.

means of identification or financial information, to-wit: the credit card number of another person, living or dead, to-wit: Daniel Charpentier, with the intent to commit, or to aid or abet, any crime and obtained an aggregate total of credit, money, goods, services, or anything else of value that was less than \$1500 or obtained no credit, money, goods, services or anything of value

CP 1. The State proved all of the facts alleged in the information and all of the facts necessary under the statute to prove identity theft. The State proved beyond a reasonable doubt that Culbertson knowingly used Daniel Charpentier's financial information, in the form of his credit card account number, with the intent to commit theft. See CP 51.

Culbertson relies wholly on language in State v. Berry, 129 Wn. App. 59, 117 P.3d 1162 (2005), review denied, 158 Wn.2d 1006 (2006), to support her argument that the State had to prove that she used some additional personal information of Charpentier's, in addition to his account number, to prove identity theft. That case is simply inapposite.

The State charged Berry with Identity Theft in the Second Degree, alleging that he had used a driver's license belonging to "Tim Davis" with the intent to commit a crime. Berry, 129 Wn. App.

at 62. Berry entered an Alford⁶ plea of guilty. Id. at 63. The State, in the certification for determination of probable cause, alleged that Berry had presented a driver's license in the name of Timothy J. Davis at a Home Depot store in an attempt to cash a check. Id. A clerk's suspicions led to Berry's arrest. Id. A detective contacted the bank listed on the check and determined that the account holder information was fictitious, but the checking account number was valid and belonged to Herb Paulson. Id. Paulson provided a statement, advising that he did not know Berry, and did not give Berry permission to use his checking account number. Id.

Appealing the trial court's denial of his motion to withdraw his guilty plea, Berry argued that the certification was not sufficient to support the crime of identity theft because there was no evidence that Timothy J. Davis even existed. Id. at 66. The court noted that "[t]he only real person named in the certification was Herb Paulson. But Berry was not charged with identity theft of Herb Paulson." Id. at 67. The court held that "to commit identity theft the defendant must obtain, possess, use, or transfer the means of identification of *a real person.*" Id. at 62 (*italics in original*).

⁶ North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

The language on which Culbertson relies came in response to the State's argument that the certification provided ample evidence that Berry committed identity theft of Herb Paulson by using his account number to obtain credit: "Nor does identifying Herb Paulson as the owner of the account on which Berry issued a forged check cure the omission. Berry simply used an account number that matched Paulson's account number. He did not use Paulson's name or other examples of identity." Id. at 67.

While Culbertson quotes the language, he ignores the context – as the trial court here correctly observed, Berry was a charging case. 4RP 62. "[Berry] just holds that identifying the victim, as an actual person is necessary in a charging document The proof of a real victim was there [in Berry] but that doesn't cure the failure to charge." 4RP 62.

Indeed, the court in Berry emphasized this very point: "By definition, identity is a key element of identity theft. Without proving the identity of the victim, the crime is merely forgery or simple theft. Because Berry was not charged with stealing the identity of a specific, real person, the certification did not (and could not) provide a factual basis for the plea." Id. at 68.

By contrast, here, the State alleged in the information that Daniel Charpentier was the victim of Culbertson's identity theft. CP 1. The State provided ample proof that Charpentier was a "specific, real person." Ex. 7. Moreover, in Berry, the State failed to show any connection between Berry and Herb Paulson, perhaps leading the appellate court to think that it might have been sheer happenstance that Berry put a number on his fake check that matched Paulson's account number. Here, the State showed that Charpentier, a resident of Manitoba, was in the Seattle area using his credit card on the very day that Culbertson proffered a fake gift card with Charpentier's credit card number on it. This makes it highly unlikely that the match was coincidental.

The State proved that Culbertson stole Daniel Charpentier's identity by knowingly using his personal financial information with the intent to commit theft. Nothing more was necessary for the crime of identity theft. The trial court properly found Culbertson guilty of Identity Theft in the Second Degree.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Culbertson's conviction for Identity Theft in the Second Degree.

DATED this 24th day of July, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Eric Broman**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent**, in **STATE v. SHANNON CULBERTSON** Cause No. **62337-1-1**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

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Name
Done in Seattle, Washington

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