

70325-1

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NO. 70325-1-I

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

STATE OF WASHINGTON,

Respondent.

v.

JUAN AGUAYO-RAMIREZ,

Appellant.

REC'D

NOV 26 2013

King County Prosecutor
Appellate Unit

FILED
NOV 26 2013
JH

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Mary Roberts, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	4
THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE IDENTITY THEFT CONVICTIONS.	4
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Barwick</u> 66 Wn.App. 706, 833 P.2d 421 (1992).....	9
<u>State v. Bergeron</u> 105 Wn.2d 1, 711 P.2d 1000 (1985).....	6
<u>State v. Delmarter</u> 94 Wn.2d 634, 618 P.2d 99 (1980).....	5
<u>State v. Esquivel</u> 71 Wn.App. 868, 863 P.2d 113 (1993).....	5
<u>State v. Henry</u> 80 Wn.App. 544, 910 P.2d 1290 (1995).....	9
<u>State v. Hundley</u> 126 Wn.2d 418, 895 P.2d 403 (1995).....	4
<u>State v. Sells</u> 166 Wn.App. 918, 271 P.3d 952 (2012).....	5
<u>State v. Vasquez</u> 178 Wn.2d 1, 309 P.3d 318 (2013).....	5, 6, 7, 8, 9, 10
<u>State v. Woods</u> 63 Wn.App. 588, 821 P.2d 1235 (1991).....	5

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Bailey v. Alabama
219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911).....9

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....4

Jackson v. Virginia
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....9

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.35.0204

RCW 9A.60.0206

U.S. Const. amend. XIV4

Wash. Const. art. I, § 34

A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the identity theft convictions.

2. The court erred in entering the judgment and sentence where the evidence did not support the convictions.

Issue Pertaining to Assignments of Error

Appellant was convicted of two counts of second degree identity theft. The State was required to prove appellant possessed another persons means of identification with the intent to commit a crime. Where the circumstantial evidence failed to plainly indicate appellant's intent to commit a crime as a matter of logical probability was there insufficient evidence to support the convictions?

B. STATEMENT OF THE CASE

1. Procedural Facts

A third amended information charged Juan Aguayo-Ramirez with three counts of second degree identity theft. CP 117-118. Gary Stille was the named victim in Count I, Frederick Sambrano was the named victim in Count II, and both Stille and Sambrano were the named victims in Count III. Id.

A jury found Aguayo-Ramirez guilty as charged. CP 139-141. Count III was vacated based on the finding that in conjunction with the

convictions in Counts I and II, the Count III conviction violated double jeopardy. CP 183. Aguayo-Ramirez was sentenced under the prison based special drug offender sentencing alternative. CP 165-173.

2. Substantive Facts

On December 5, 2012, Michael McDonald, a King County Sheriff officer working for the City of Burien stopped the truck Aguayo-Ramirez was driving because it failed to stop at a stop light. RP 248-351. McDonald was unsure whether Aguayo-Ramirez handed him a Washington State driver's license or identification card but Aguayo-Ramirez did provide McDonald with his correct name and date of birth. RP 265-266.

Aguayo-Ramirez was arrested and searched. RP 252, 271-72. Police found two invalid California driver's licenses, a Washington Mutual Bank checkbook, calling card, sim card, some coins and a .22 bullet in Aguayo-Ramirez's pockets. RP 253-254. When McDonald asked him about the licenses, Aguayo-Ramirez said, "they belong to friends of mine." RP 255, 257, 258. Although Aguayo-Ramirez appeared nervous, McDonald testified that is not uncommon for someone stopped by police. RP 252, 271.

Gary Stille and his ex-partner Frederick Sambrano identified some of the items seized from Aguayo-Ramirez. One of the California driver's

license was Stille's old license. RP 283. Stille had not seen the license in years. RP 284. Stille identified the checkbook as containing old checks issued by Washington Mutual Bank in his and Sambrano's name. Washington Mutual Bank no longer exists, the account was no longer valid, and Stille and Sambrano stopped the account sometime before 2009. RP 286,288, 304. Stille identified the calling card as his old card. RP 287. Stille said the coins were ones given to him by his great-grandmother. RP 287-288. The last time Stille saw either the calling card or coins was sometime before 2009. Id.

Sambrano identified the other California driver's license as his old pre-2000 driver's license. RP 302-303. Sambrano had both his and Stille's old licenses until October 2012, when his car was broken into and his backpack, where the licenses were kept, was stolen. RP 303, 305, 306.

Sambrano and Stille both testified they did not believe anyone had ever used their old driver's licenses or the checkbook in any fraudulent manner. RP 284, 305. Sambrano and Stille did not know Aguayo-Ramirez. RP 282, 302.

C. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE
IDENTITY THEFT CONVICTIONS.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Convictions must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a reasonable doubt. Hundley, 126 Wn.2d at 421-22. The evidence is insufficient to convict Aguayo-Ramirez of second degree identity theft. His convictions must therefore be vacated. Winship, 397 U.S. at 364; U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

The identity theft statute provides, “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). First degree identify theft requires proof the person “obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value” from the use of the means of identification. RCW 9.35.020(2).

Second degree identify theft is where a person commits identity theft “under circumstances not amounting to identity theft in the first degree.” RCW 9.35.020(3); State v. Sells, 166 Wn.App. 918, 923, 271 P.3d 952 (2012)

The jury was instructed that Count I was predicated on Aguayo-Ramirez’s possession of Stille’s invalid California driver’s license, and Count II on his possession of Sambrano’s pre-2000 California driver’s license. CP 117-118, 134-135; RP 335, 336. Although there was sufficient evidence for the jury to find Aguayo-Ramirez knowingly possessed Stille’s and Sambrano’s means of identification, there was insufficient to find the intent to use the identification to commit a crime in the future element beyond a reasonable doubt.

Intent to commit a crime may only be inferred from surrounding facts and circumstances if they “plainly indicate such an intent as a matter of logical probability.” State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (quoting State v. Woods, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991)); see, State v. Esquivel, 71 Wn.App. 868, 871, 863 P.2d 113 (1993) (same); see also, State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) (criminal intent may be inferred from the defendant's conduct, but only where it is plainly indicated as a matter of logical probability). Intent may not be inferred from evidence that is “patently equivocal.” Vasquez,

178 Wn.2d at 8 (citations omitted); State v. Bergeron, 105 Wn.2d 1, 20, 711 P.2d 1000 (1985).

The State argued Aguayo-Ramirez's statement to McDonald that the licenses "belong to friends of mine" and his apparent nervousness when stopped by McDonald were sufficient to prove the intent element beyond a reasonable doubt. RP 339-341. The State admitted, however, Aguayo-Ramirez's statement could be interpreted to mean that the licenses were given to him by Stille and Sambrano, which according to Stille and Sambrano was untrue, or they were given to him by someone else to hold. RP 340. The statement is equivocal and does not "plainly indicate" intent to commit a future crime as a "matter of logical probability."

Vasquez is instructive. Vasquez was charged with forgery. Vasquez, 178 Wn.2d at 4. Under the forgery statute "[a] person is guilty of forgery if, with intent to injure or defraud: ... He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged." RCW 9A.60.020(1)(b). A store security guard suspected Vasquez of shoplifting. The guard searched Vasquez and found a forged social security card and permanent resident card inside Vasquez's wallet. Vasquez, 178 Wn.2d at 4-6. When the guard asked Vasquez if the cards were his Vasquez responded "yes." Id. at 14-16.

When asked where he got the cards Vasquez said he purchased them from a friend in California. Id. at 15-16.

The Vasquez Court held the evidence (Vasquez's statements to the security guard) was too equivocal to support the inference Vasquez's possession of the forged cards was with the intent to defraud. The Court reasoned it "is unclear as to whether Vasquez meant to respond that he simply owned the cards or meant to persuade Englund (the security guard) that the cards were his legitimate social security and permanent resident cards." Vasquez, 178 Wn.2d at 15. It ruled that because the guard's testimony did not indicate "precisely" what Vasquez meant his statement was "patently equivocal evidence and cannot serve as a basis for inferring Vasquez's intent to injure or defraud." Id.

Forgery is similar to identity theft. In pertinent part, forgery requires the possession of an illegal written instrument and identity theft requires the possession of another's means of identification. Forgery also requires the possession be with intent to defraud or injure and identity theft requires possession with intent to commit a crime. The two offenses both require the State prove beyond a reasonable doubt "possession" and specific "intent."

Just as Vasquez's statements were equivocal and insufficient to serve as a basis for inferring his intent to defraud, Aguayo-Ramirez's

statements to McDonald were equivocal because McDonald's testimony did not indicate "precisely" what Aguayo-Ramirez meant and therefore insufficient to infer his intent to use the licenses or information on the licenses to commit a future crime. As the State admitted, Aguayo-Ramirez's statement to McDonald could mean one of two things: that the persons whose names were on the licenses gave Aguayo-Ramirez the licenses because they were his friends; or the licenses were given to him by someone else to hold.

If Aguayo-Ramirez meant someone other than the person named on the license gave him the license to hold there is no logical nexus between that and an intent to use the license or the information on the license to commit a future crime. Even if Aguayo-Ramirez's statement was not equivocal and he meant the person named on the license was his friend and gave him the license it could indicate he obtained the license illegally, but that is still insufficient to support the inference of intent. In Vasquez, the evidence showed Vasquez obtained the forged social security and resident cards illegally, but the Court did not find illegally obtaining the forged cards plainly indicated as a matter of logical probability Aguayo-Ramirez's intent to use them to commit a future crime. See, Vasquez, 178 Wn.2d at 15-16 (Vasquez's admission to the security guard he paid for \$50 for the cards and they were fake belies an inference he

intended to defraud the guard or inference of an intent to injure or defraud).

The other reason argued by the State, Aguayo-Ramirez's apparent nervousness when stopped by McDonald is likewise insufficient to infer the requisite intent. McDonald testified it is not uncommon for someone to exhibit nervous behavior when stopped by police. Washington courts have also concluded "most persons stopped by law enforcement officers display some signs of nervousness." State v. Henry, 80 Wn.App. 544, 552 910 P.2d 1290 1995) (quoting State v. Barwick, 66 Wn.App. 706, 710, 833 P.2d 421 (1992). Because Aguayo-Ramirez's nervous behavior was not atypical any inference he intended to use the licenses to commit a future crime based on that behavior is nothing more than speculation or assumption. Speculation or assumption cannot support an inference. Vasquez, 178 Wn.2d at 16 (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191 (1911).

Moreover, the other evidence mitigates against an inference of intent to commit a future crime. Evidence showed the licenses were stolen from Sambrano's car two months earlier. Despite the passage of time between when the licenses were stolen and when they were found in Aguayo-Ramirez's possession they had not been used for any criminal or

fraudulent purpose. Further, there was no evidence whatsoever Aguayo-Ramirez ever used or attempted to use the licenses or information on the licenses to commit any crime.

The Vasquez Court noted the legislature has defined inferences that may arise from some crimes. Vasquez, 178 Wn.2d at 8, n.1. But, for those crimes where possession and intent are both elements and there are no defined inferences, an inference cannot be based on mere possession. Vasquez, 178 Wn.2d at 8. Under the identity theft statute possession and intent are both elements, and the legislature has not defined inferences that may arise from the crime. Aguayo-Ramirez may have had not discernable legitimate reason for possessing the licenses, but that mere possession is insufficient to infer an intent to use the licenses or the information on the licenses to commit a crime in the future. See, Vasquez, 178 Wn.2d at 12 (where the Vasquez Court rejected the Court of Appeals analysis that the only value to Vasquez of the forged social security and resident cards was to permit him to falsely represent his right to legally be in the United States finding that such a presumption impermissibly relieves the State from its burden to prove intent beyond a reasonable doubt).

In sum, Aguayo-Ramirez's statement to the arresting officer, his nervousness, and the other surrounding facts and circumstances do not "plainly indicate" his intent to use the licenses to commit a future crime

“as a matter of logical probability.” On this record, a rational juror could have found beyond a reasonable doubt Aguayo-Ramirez knowingly possessed Stille’s and Sambrano’s means of identification but not the element he intended to use that information to commit a future crime. The second degree identity theft convictions should be reversed.

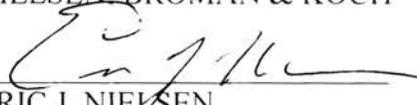
D. CONCLUSION

For the above reasons, this Court should reverse Aguayo-Ramirez’s identity theft convictions and order those convictions be vacated.

DATED this 26 day of November, 2013.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 70325-1-1
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JUAN AGUAYO-RAMIREZ,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 26TH DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] JUAN AGUAYO-RAMIREZ
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TUKWILA, WA 98168

SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF NOVEMBER 2013.

x *Patrick Mayovsky*

NOV 27 2013
COURT OF APPEALS
DIVISION ONE