

Original

FILED
COURT OF APPEALS
NOV 17 2011
8:57 AM
STATE OF WASHINGTON
BY Chm
CLERK

No. 33955-2-II

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

STATE OF WASHINGTON, Respondent,

v.

JAMES B. ALLENBACH, Appellant.

REPLY BRIEF OF APPELLANT

Kyra K. LaFayette, #36671
Steven W. Thayer, P.S.

Attorney for Appellant

TABLE OF CONTENTS

REPLY TO BRIEF OF RESPONDENT.....1

INSTRUCTIONAL ERROR OF CONSTITUTIONAL
MAGNITUDE MAY BE RAISED FOR THE FIRST TIME ON
APPEAL.....1

THE INVITED ERROR DOCTRINE DOES NOT PRECLUDE
REVIEW WHERE INSTRUCTIONAL ERROR OCCURRED
DUE TO INEFFECTIVE ASSISTANCE OF
COUNSEL.....3

FAILURE TO INSTRUCTION THE JURY ON ALL ELEMENTS
OF THE CRIME CHARGED CONSTITUTED A MISSTATEMENT
OF THE LAW WHICH CANNOT BE CHARACTERIZED AS
HARMLESS.....7

THE STATE’S RELIANCE ON *STATE V. BALDWIN* IS
MISPLACED.....8

CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

<u>State v. Baldwin</u> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	8, 9
<u>State v. Brown</u> , 147 Wn.2d 330, 341, 58 P.3d 889 (2002).....	8
<u>State v. Byrd</u> , 72 Wn. App. 774, 868 P.2d 158 (1994), <u>affirmed</u> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	1
<u>State v. Fisher</u> , 131 Wn. App. 125 126 P.3d 62 (2006).....	2, 3
<u>State v. Johnson</u> , 119 Wn.2d 143, 147, 829 P.2d 1078 (1992).....	2
<u>State v. Leyda</u> , 122 Wn.App. 633, 94 P.3d 397 (2004).....	2, 3
<u>State v. Leyda</u> , ___ P.3d ___, WL 2036983 (2006).....	2
<u>State v. Rodriguez</u> , 121 Wn. App. 180, 87 P.3d 1201 (2004).....	6
<u>State v. Wadsworth</u> , 139 Wn.2d 724, 734, 991 P.2d 80 (2000).....	1
<u>State v. Walden</u> , 131 Wn.2d 469, 478, 932 P.2d 1237 (1997).....	7, 8

STATUTES

RCW 9.35.020

RCW 9.94A.120 (2000)

RCW 9.94A.390 (2000)

REPLY TO BRIEF OF RESPONDENT

- I. Instructional error of constitutional magnitude may be raised for the first time on appeal.

As previously cited, State v. Byrd, 72 Wn. App. 774, 782, 868 P.2d 158 (1994), affirmed, 125 Wn.2d 707, 887 P.2d 396 (1995), held an issue of constitutional magnitude may be raised for the first time on appeal despite the fact that it was not raised in below. Instruction No. 6 failed to inform the jury of an essential element of identity theft. Because this was an error of constitutional magnitude, failure to except does not preclude review of this issue.

The definition of financial information is an essential element of identity theft. The state argues that the word “financial information” in the to-convict instruction is sufficient to satisfy the essential elements of identity theft. (Resp. Br. p. 14). Accepting such a position would render the legislature’s definition of financial information meaningless. It is the function of the Legislature to define the elements of a crime. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). An “essential element is one whose specification is necessary to establish the very illegality of the

behavior.” State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). By reviewing the statutory definition under RCW 9.35.020 it is apparent that the term “financial information” specifically delineates illegal behavior. The proscribed documents are: (1) account numbers and balances, (2) transactional information concerning an account, and (3) other account access devices. There could be endless possibilities that a juror may consider to be financial information, and without the statutory elements designed by the legislature it would be impossible to determine illegal conduct under the identity theft statute. In further support of our position, the definition of financial information reveals that only nonpublic documents fall within the purview of the statute, which is also necessary to establish the legality of the behavior.

The state’s reliance on State v. Leyda, 122 Wn.App. 633, 94 P.3d 397 (2004), and State v. Fisher, 131 Wn. App. 125 126 P.3d 62 (2006), is misplaced for several reasons. (Resp. Br. p. 16). First, Leyda decided whether the unit of prosecution violated double jeopardy and whether value was an essential element of identity theft in the second degree. Id. Neither are on point. Second, the Washington Supreme Court reversed the Court of Appeals decision in part. State v. Leyda, ___ P.3d ___, WL 2036983 (2006).

The court held that dividing Leyda’s single course of proscribed conduct into multiple offenses violated double jeopardy. Id. Third, Fisher also addressed the appropriate unit of prosecution under the identity theft statute. 131 Wn. App. At 129. Leyda and Fisher are of limited use in the case at bench.

II. The invited error doctrine does not preclude review where instructional error occurred due to ineffective assistance of counsel.

First, we respond by noting that defense counsel did not offer, or participate in crafting, Instruction No. 6, as the state suggests.¹ (Resp. Br. p. 13). The transcript reads:

THE COURT: Right. Okay. Let’s go to the next instruction: “the term ‘financial information’ means any of the following. Identifiable to the individual that concerns the amount and conditions of an individual’s assets, liabilities or credit.” And then: “account numbers and balances.” Well, there’s an account number on a check, so we can leave that in. Strike “balances.” “Transactional information.” I think we can strike that, concerning an account. “Codes, passwords, Social Security numbers, tax identification numbers, driver’s license or permit numbers.”

MR. DAVID: You can delete the rest.

1

Defense counsel submitted proposed jury instructions, but did not offer an instruction defining financial information. CP 13.

THE COURT: Everything.

MR. DAVID: With the exception of: "and other information (indiscernible) for purposes of account access."

THE COURT: Well, what is it, what's the other information?

MR. DAVID: The account --oh, it's in there already.

THE COURT: So: "The term 'financial information' means any of the following information identifiable to the individual that concerns the amount and conditions of an individual's assets, liabilities or credit account numbers." Now, again, usually an identity theft we think of a situation where someone has obtained an account number of a certain person which allows them to access their account. Here we've got possession of a check which has an account number on it. Okay, well, now we know what the State's theory is, those two corrected instructions. Again, I'm -- I'm gonna take it under advisement --

MR. DAVID: Okay.

THE COURT: -- and let the two of you work on that for me.
RP 137.

The court finalized jury instructions the following day:

THE COURT: ...Next we're on No. 5, which would be the to-convict on identity theft second degree. So you can put a 5 on that.

MR. HARP: Okay.

THE COURT: So I'm not sure that -- I haven't decided yet whether

to give it in that form. Go to the definition of “financial information.” And we did this yesterday, but I want to do it again. “Means any of the following information identifiable to the individual; concerns the amount and conditions –“ Well, the check doesn’t concern the amount, right?”

MR. DAVID: Correct.

THE COURT: Does it concern the conditions of an individual’s assets, liabilities or credit? I guess those are –

MR. DAVID: I don’t think it really matters.

THE COURT: How about that whole thing comes out? Because we’re talking about that concerns the account numbers and – account numbers.

MR. HARP: Boy. Hmm.

THE COURT: And held for the purpose of account access or transaction initiation.

MR. DAVID: Account numbers, delete all the way down through –

THE COURT: Okay.

MR. DAVID: “Account numbers or other information held for purposes –.”

THE COURT: Yes.

MR. DAVID: “Of –“

THE COURT: So this is the way it’ll read, how it’ll read: “The term ‘financial information’ means any of the following information identifiable to the individual that concerns -“ And then strike “the amount and conditions of an individual’s assets, liabilities or credit.” Leave “account numbers.” Strike out “and balances, transactional information concerning an account and codes, passwords, Social

Security numbers, tax identification numbers, driver's license or permit numbers, state identocard numbers issued by the Department of Licensing." That concerns account numbers – okay, "and other information," strike that. So we'll leave in: "– held for the purpose of account access or transaction initiation."

MR. DAVID: Okay.

THE COURT: I'll have that retyped. RP 197-198.

THE COURT: The attorneys and I have gone over jury instructions. Mr. David, do you take exception to any of these instructions I've finalized?

MR. DAVID: No.

THE COURT: Or to my failure to give any of your proposed?

MR. DAVID: No.

THE COURT: Mr. Harp, do you take exception to any of these instructions?

MR. HARP: No, Your Honor.

THE COURT: Do you take exception to my failure to give any of your proposed?

MR. HARP: No, Your Honor. RP 207-208.

Assuming arguendo defense counsel did participate in crafting the instruction on financial information, the invited error doctrine does not preclude review in this case. In State v. Rodriguez, the court explained when

error is invited:

Under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm. *Here, however, defendant maintains that any error that occurred was the result of ineffectiveness of counsel and therefore the invited error doctrine does not apply.* Review is not precluded where invited error is the result of ineffectiveness of counsel. 121 Wn. App. 180, 184, 87 P.3d 1201 (2004).

In the case at bench, defense counsel either failed to except or agreed to an instruction that relieved the state of its burden to prove every element beyond a reasonable doubt. Counsel's performance was deficient because there is no conceivable tactic or strategy justifying an instruction reducing the state's burden of proof. As a result, the invited error doctrine does not preclude review.

III. Failure to instruct the jury on all elements of the crime charged constituted a misstatement of the law which cannot be characterized as harmless.

A misstatement of the law is presumed prejudicial. State v. Walden, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). "An instructional error is harmless only if it 'is an error which is *trivial*, or *formal*, or *merely academic*,

and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case.*” Id. at 478. Omitting an element from jury instructions is harmless error if (1) the missing element is supported by uncontroverted evidence, and (2) the court concludes beyond a reasonable doubt that the verdict would have been the same absent the error. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). In this case, the state failed to present any evidence of account balances, the missing element, therefore it cannot be said that there was uncontroverted evidence. Moreover, it is impossible to determine whether the jury found Allenbach violated the means of identification or financial information prong, and as a result the error cannot be considered harmless.

IV. The state’s reliance on State v. Baldwin is misplaced.

The state cites Baldwin for the proposition that the identity theft statute is not vague, and therefore constitutional. (Resp. Br. p. 19). However, in Baldwin, the Supreme Court actually decided whether former RCW 9.94A.120 (2000) and former RCW 9.94A.390 (2000) (sentencing guidelines) are unconstitutionally vague “as applied” to Baldwin’s identity theft convictions. Id. at 457. Baldwin argued that the sentencing statutes did

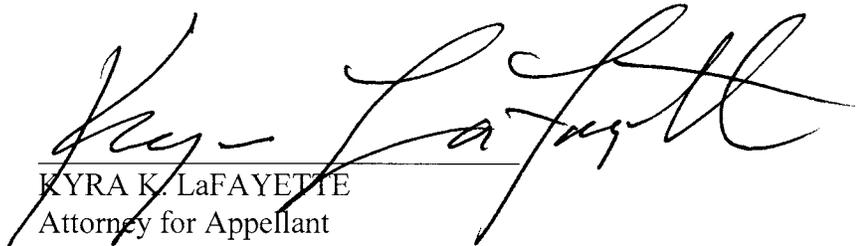
not protect against arbitrary application of an exceptional sentence for identity theft. The court held “the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of *sentencing guidelines*.” *Id.* at 459 (emphasis added). Since the issues in this case have nothing to do with the sentencing guidelines Baldwin has no application.

CONCLUSION

Based on the foregoing argument and authorities, defendant’s conviction and sentence on both counts should be reversed, and this case remanded for a new trial.

DATED this 4th day of August, 2006

Respectfully submitted,



KYRA K. LaFAYETTE
Attorney for Appellant

FILED
COURT OF APPEALS

06 AUG -7 PM 12:52

STATE OF WASHINGTON

BY Chum
DEPUTY

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	
)	No. 33955-2-II
Plaintiff,)	
)	
vs.)	
)	DECLARATION OF SERVICE
JAMES B. ALLENBACH,)	
)	
Defendant/Appellant)	
_____)	

I declare that on August 4, 2006, a true copy of Appellant's Reply Brief was sent to the following named persons in the manner indicated:

MIKE KINNIE
James David (via courier delivery)
Deputy Prosecuting Attorney
1013 Franklin Street
Vancouver, WA 98660

James Allenbach (via first-class mail)
DOC #948595
P. O. Box 900
Shelton, WA 98584

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

Signed at Vancouver, Washington this 4 day of August, 2006.

Betty Olesen
Betty Olesen, Legal Assistant
STEVEN W. THAYER, P.S.