

NO. 34874-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

NICK IN YOUNG PARK,

Appellant.

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

The Honorable Craddock Verser, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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STATE OF WASHINGTON
COURT APPELLANTS
THE STATE

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A. ASSIGNMENT OF ERROR

The court improperly commented on the evidence in its “to convict” instruction. CP 26.¹

Issue Pertaining to Assignment of Error

Where an essential element of the offense charged, identity theft, is that the defendant “knowingly obtained, possessed, used, or transformed a means of identification or financial information,” was it an unconstitutional comment on the evidence for the court to state in the “to convict” instruction that a certain item was such a “means”?

B. STATEMENT OF THE CASE

1. Procedural Facts

The State charged Nick In Young Park with second degree identity theft (Count 1) and forgery (Count 2). CP 1-2, 14-15. A jury found Park guilty as charged and he was sentenced to 43 months of confinement, the low end of the standard range. CP 35-45. Park timely appeals. CP 46.

2. Trial Testimony

Around 6 p.m. on June 11, 2005, John Skoczen checked into the Port Townsend Inn. RP 52, 58. He testified he remembered giving his credit card, a U.S. Bank Visa, to the front desk clerk, a 25-35 year old Asian male. RP 52-53. The next day, Skoczen realized the card was

¹ A copy of Instruction 8 is attached as Appendix.

missing and asked the clerk on duty, a different man, whether he had seen the card. RP 54. That clerk was unable to locate the card but told Skoczen he would call the clerk on duty the night before. RP 55-56. He later called Skoczen and reported the clerk who checked in Skoczen was unable to locate the card. RP 57.

Skoczen called to cancel the Visa on June 12. RP 57-58. At that time, he learned it had been used the night before at the Ichikawa Restaurant in Port Townsend. RP 58. Skoczen had not been to that restaurant. RP 54, 58. He contacted the police. RP 61. At trial, Skoczen confirmed his name appeared on the credit card receipt from Ichikawa, but the signature was not his. RP 59-60.

Skoczen testified he received a call June 13 from a man who identified himself as the hotel clerk who checked him in on June 11. RP 60. The man gave his name as Nick Park. RP 60. He told Skoczen the Visa was in his wallet and he accidentally used it at the Ichikawa Restaurant. RP 60-61. He offered to reimburse Skoczen for the charge, but Skoczen told him he had already contacted the police. RP 61. Based on the caller's voice, Skoczen was not certain it was the hotel clerk, but he thought the voices were similar. RP 63-64.

The waitress and the manager at the Ichikawa Restaurant also testified at trial. The waitress, Yoko Wilcox, recalled that a slightly built,

six-foot-tall Asian man in his twenties came into the restaurant the evening of June 11 and placed a “to go” order. RP 68. James Switz, the manager, recalled that a somewhat stocky 5’7” or 5’8” Asian man in his twenties with short hair came in around 6:20 or 6:30 that evening. RP 74-75. At trial, Switz testified he “believe[d]” Park was the man he saw at the restaurant that night. RP 87. The restaurant’s records showed a transaction under Skoczen’s name occurring at 6:34 p.m. on June 11. RP 75, 77-80.

Park did not testify. RP 105.

3. Jury Instructions

After both sides rested, the parties and the court discussed jury instructions. RP 105-110. The parties agreed the court would give most of the State’s proposed instructions, but it would substitute the defense’s proposed definitional instruction relating to the terms “identity theft,” “financial information,” and “means of identification” in the identity theft statute. CP 13 (defense proposed instruction); see also CP 25 (Instruction 7).² On Count 1, identity theft, the court gave the following “to convict” instruction:

² Instruction 7 states in pertinent part:

The term “financial information” means any of the following information identifiable to the individual that

To convict the defendant of the crime of Identity Theft in the Second Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 11th day of June, 2005, the defendant knowingly obtained, possessed, used, or transformed a means of identification or financial information of another person, to-wit: a US Bank Visa card belonging to John J. Skoczen, whether that person is living or dead;
2. That the defendant did so with intent to commit, or to aid or abet any crime; and
3. That the acts occurred in the State of Washington.

CP 26 (Instruction 8).

concerns the amount and conditions of an individual's assets, liabilities, or credit: account numbers and balances; transactional information concerning an account; and codes, passwords, social security numbers, tax identification numbers, driver's license or permit numbers; state identicard numbers issued by the Department of Licensing; and other information held for the purpose of account access or transaction initiation.

"Means of identification" means information or an item that is not describing finances or credit but is personal to or identifiable with an individual or other person including: A current or former name of the person, telephone number, an electronic address, or identifier of the individual or a member of his or her family, including the ancestor of the person; information relating to a change in name, address, telephone number, or electronic address or identifier of the individual or his or her family; a social security, driver's license, or tax identification number of the individual or a member of his or her family; or other information that could be used to identify the person, including unique biometric data.

CP 25; see also RCW 9.35.005(1), (3) (definitions).

C. ARGUMENT

THE INSTRUCTION CONTAINING "TO-WIT" LANGUAGE COMMENTED ON THE EVIDENCE IN VIOLATION OF PARK'S RIGHTS UNDER ARTICLE 4, § 16 OF THE WASHINGTON CONSTITUTION.

An essential element of second degree identity theft is to obtain, possess, use, or transform "a means of identification or financial information." RCW 9.35.020(1) (emphasis added). The Count 1 "to convict" instruction contained language conclusively establishing the credit card Park allegedly possessed satisfied this element. CP 26 (Instruction 8). This improper judicial comment on the evidence denied Park a fair trial.

The Washington Constitution prohibits trial courts from commenting on the evidence. Const. art. 4, § 16;³ State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). "The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses." State v. Crotts, 22 Wash. 245, 250, 60 P. 403 (1900)). Thus, it is error for a judge to instruct the jury that matters of fact have been established as a matter of law. Jackman, 156 Wn.2d at 743-44 (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

³ Article 4, § 16 provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Even if no objection is raised at trial, this constitutional violation may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); Becker, 132 Wn. 2d at 64. Moreover, a comment in violation of article 4, § 16 is presumed prejudicial because it operates to deprive the defendant of a fair trial and the State bears the burden to show that no prejudice resulted. Jackman, 156 Wn.2d at 743. "[R]eversal is required even where the evidence is undisputed or overwhelming unless it is apparent the remark could not have influenced the jury." State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974); see also Becker, 132 Wn.2d at 65 (whether State produced sufficient evidence on element is irrelevant); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (instruction requiring jury to "disregard" comments of court and counsel incapable of curing prejudice).

In Park's case, use of the "to-wit" language in the identity theft to convict instruction violated his right to a fair trial. Washington courts have criticized the use of such language in a number of cases.

In Becker, a defendant was convicted of delivering cocaine. 132 Wn.2d 54. On appeal, he challenged special verdict form language instructing the jury on a school zone enhancement. The special verdict form read:

[Were] defendant[s] . . . within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program [YEP] School at the time of the commission of the crime?

Answer:
(Yes or No)

Id. at 64.

Becker argued the language following "to-wit" impermissibly commented on the evidence by relieving the State of its burden to prove the enhancement beyond a reasonable doubt. Id. The Supreme Court agreed and reversed, noting that trial courts may not instruct juries that matters of fact have been established as a matter of law. The Court concluded that the form literally instructed the jury that YEP was a school. Id. at 64-65; see also Black's Law Dictionary 1491 (6th ed. 1990) ("to wit" means "[t]hat is to say, namely").

State v. Akers involved a similar special verdict form, with one exception. At Akers's trial, the verdict form did not refer to YEP as a "school." State v. Akers, 88 Wn. App. 891, 893, 946 P.2d 1222 (1997), aff'd in part and disapproved in part, 136 Wn.2d 641, 965 P.2d 1078 (1998). Instead, the language following "to wit" designated the specific location for the jury to consider, *i.e.*, the "Youth Education Program." Id. at 893, 895.

Relying on Becker, Akers argued that this too was a comment on the evidence. The State responded:

The verdict form asked one question, "[W]as the defendant . . . within 1000 feet of the perimeter of school grounds?" The language "to wit: [Youth Education Program]" simply designates the specific location in question for the jury to consider.

Akers, 88 Wn. App. at 896. This Court agreed and found the absence of the word "school" in Akers's instruction to be a critical distinction. Id. at 896-97. But even though it rejected Akers's "comment on the evidence" claim, this Court overturned the enhancement based on a violation of due process. Id. at 902-04. Akers asked the Supreme Court to review this Court's disposition of his comment on the evidence claim, and the Court accepted review and affirmed. Although the Supreme Court affirmed the due process claim, it expressly disapproved this Court's disposition of the "to-wit" comment claim: "[W]e find unpersuasive the Court of Appeals attempt to distinguish this form from the one we found improper in Becker." Akers, 136 Wn.2d at 644.

In other words, the Supreme Court held there was no significant distinction between the "to-wit" instructional language in Akers and Becker. The language following "to wit" was impermissible even in Akers, where the added language specified the location for the jury's consideration. Id.

Other decisions are in accord. In State v. Holt, the first element of the "to convict" instruction read, "That on or about the 5th day of September, 1985, the defendant or an accomplice sold, exhibited, or displayed lewd matter, to wit: [title of allegedly obscene material]." 56 Wn. App. 99, 104, 783 P.2d 87 (1989), review denied, 114 Wn.2d 1022 (1990). The Holt Court found that the instruction "could have been read as a direction, or as a comment by the court, that the material was in fact lewd." Id. at 105.

Similar to-wit language was challenged in State v. Jones, 106 Wn. App. 40, 21 P.3d 1172 (2001). There, the lower court's "to convict" instruction set forth the following elements for second degree unlawful possession of a firearm:

- (1) That on or about the 26th day of October, 1998, the defendant owned or had a firearm in his possession or under his control, to wit: a Dakota .45 caliber revolver;
- (2) That the defendant had previously been convicted of a felony offense [;] and
- (3) That the acts occurred in the state of Washington.

Id. at 42 (emphasis added).

This Court reversed Jones's conviction because the "to convict" did not include the implied element of "knowing possession." Id. at 43-45. But more significantly, the Court also expressed concern with the "to wit" language contained in the "to convict" instruction:

Given our holding, we need not reach Jones' argument that the "to convict" instruction could be read as directing a verdict on whether the Dakota .45 caliber revolver was a "firearm" as defined in the court's instructions. We note, however, that our courts have condemned similar instructions. Counsel would be well advised to avoid the use of "to wit" language in future "to convict" instructions.

Id. at 45 (citing Becker, Akers, and Holt, supra).

Recently, in Levy, in which the defendant was charged with first degree robbery and first degree burglary, the "to convict" instructions required the State to prove Levy had "entered or remained unlawfully in a building, to-wit: the building of [the victim];" had taken "personal property to-wit: jewelry, from the person or in the presence of another, to-wit: [names of victims];" and had been "armed with a deadly weapon, to-wit: a .38 revolver or crowbar." 156 Wn.2d at 716. Levy argued these instructions contained improper judicial comments, relieving the State of its burden to prove that certain items satisfied particular elements. Id. at 716-17. The Court noted the references to the revolver and the jewelry were not impermissible comments on the evidence because the Washington Pattern Instructions explicitly permitted instruction as a matter of law as to those items. Id. at 722. However, the Supreme Court agreed the "to-wit" references to the building and the crowbar were judicial comments in violation of article 4, §16. Id. at 721-23. However, the Court affirmed Levy's convictions because the record affirmatively

showed the “building” comment was not prejudicial, and even though the jury might have erroneously concluded the crowbar was a deadly weapon, it found Levy did not possess the crowbar. Id. at 726.

More recently, in Jackman, in which a defendant was charged with sexual exploitation of a minor and other crimes, the Supreme Court held the trial court’s references to the alleged victims’ birth dates in the instructions were comments on the evidence. 156 Wn.2d at 744. In contrast to Levy, the Court reversed Jackman’s conviction, stating “the record does not affirmatively show that no prejudice could have resulted” from the comment. Id. at 745.

Here, as in Becker, Levy, and the other cases, Park’s jury instructions contained the to-wit language Washington courts have found problematic. Moreover, as used here, this language commented on the evidence by instructing jurors an element of the crime of second degree identity theft had already been established as a matter of law. Jackman, 156 Wn.2d at 743-44.

Count 1 charged Park with second degree identity theft. CP 1-2, 14-15. To obtain a conviction, the State had to prove Park “knowingly possessed, used, or transformed a means of identification or financial information of another person, whether living or dead.” RCW 9.35.020(1). In addition, the State had to prove Park did so with intent to

commit or to aid or abet a crime and that the crime occurred in Washington. Id. Instruction 7 provided the jury with the definitions of “means of identification” and “financial information” essentially as they appear in the relevant definitional statute, RCW 9.35.005. CP 25.

But Instruction 8 removed the first element of the crime of identity theft from the jury's consideration. Element 1 of that instruction reads:

That on or about the 11th day of June, 2005, the defendant knowingly obtained, possessed, used, or transformed a means of identification or financial information of another person, to-wit: a US Bank Visa card belonging to John J. Skoczen, whether that person is living or dead.

CP 26 (emphasis added). This language conveyed the court's opinion and removed from the jury's consideration whether the U.S. Bank Visa met one of definitions set forth in RCW 9.35.005.⁴ This is an element of the crime the State was required to prove beyond a reasonable doubt. Thus, as a result of the court's comments, Park was denied a fair trial. Moreover, such judicial comments are presumed prejudicial. Jackman, 156 Wn.2d at 743. Park's identity theft conviction should be reversed.

⁴ Note 2, supra.

APPENDIX

INSTRUCTION NO. 8

To convict the defendant of the crime of Identity Theft in the Second Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 11th day of June, 2005, the defendant knowingly obtained, possessed, used, or transformed a means of identification or financial information of another person, to-wit: a US Bank Visa card belonging to John J. Skoczen, whether that person is living or dead;

2. That the defendant did so with the intent to commit, or to aid or abet any crime; and

3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 34874-8-II
)	
NICK YOUNG PARK,)	
)	
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 OCTOBER, 2006, 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.

- JUELANNE DALTZELL
JEFFERSON COUNTY PROSECUTOR'S OFFICE
P.O. BOX 1220
PORT TOWNSEND, WA 98368
- NICK YOUNG PARK
DOC NO. 794612
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

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SIGNED IN SEATTLE WASHINGTON, THIS 26TH DAY OF OCTOBER, 2006.

x *Patrick Mayovsky*