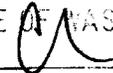


COURT OF APPEALS
DIVISION II

NO. 40258-1-II

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

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

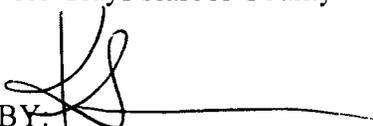
DERRICK R. EVANS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF THE CASE

Procedural History

The State agrees with the procedural history presented by the appellant.

Factual Background

The State agrees that the Findings of Fact entered by the trial court are an accurate statement of the case. CP at 10-12.

ARGUMENT

The appellant was charged with Identity Theft in the Second Degree under RCW 9.35.020(3)¹, which states:

(3) A person is guilty of identity theft in the second degree when he or she violates subsection (1) of this section under circumstances not amounting to identity theft in the first degree. Identity theft in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020(1) reads:

(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.

For purposes of RCW 9.35.020, a “person” is defined as “...any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;” RCW 9A.04.110(17); RCW 9.35.005(4).

A corporation is a “person” and can be “living or dead” as it pertains to RCW 9.35.020.

¹CP at 1-2.

The appellant argues that a corporation is not a “person” for purposes of RCW 9.35.020 because it “cannot be considered either living or dead.” Appellant’s Brief at 6. However, the plain meaning of the statutory language indicates otherwise.

The Court in *Gonzalez* presented the rules for a question of statutory interpretation as follows:

We review questions of statutory interpretation de novo. *State v. J.P.*, 149 Wash.2d 444, 449, 69 P.3d 318 (2003). When we interpret a statute, our goal is to carry out the legislature's intent. *Burns v. City of Seattle*, 161 Wash.2d 129, 140, 164 P.3d 475 (2007). The first step in interpreting a statute is to examine its plain language. *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007). Plain meaning “is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166 Wash.2d 572, 578, 210 P.3d 1007 (2009). If the statute is unambiguous after a review of the plain meaning, the court's inquiry is at an end. *Armendariz*, 160 Wash.2d at 110, 156 P.3d 201. A statute is ambiguous when it is “‘susceptible to two or more reasonable interpretations,’ but ‘a statute is not ambiguous merely because different interpretations are conceivable.’” *Estate of Haselwood v. Bremerton Ice Arena, Inc.*, 166 Wash.2d 489, 498, 210 P.3d 308 (2009) (quoting *State v. Hahn*, 83 Wash.App. 825, 831, 924 P.2d 392 (1996)).

When a statutory term is undefined, the words of a statute are given their ordinary meaning, and the court may look to a dictionary for such meaning. *Id.*

State v. Gonzalez, 168 Wash.2d 256, 263, 226 P.3d 131, 134 (2010).

Thus, the first step in this case is to look at the plain meaning of the words, and the court may look to a dictionary for such meaning. The phrase at issue is “living or dead.” “Living” is defined as “...2. In action

function or use...” American Heritage Dictionary 737 (2nd ed. 1991).

“Dead” is defined as “...5.a. No longer in existence, use or operation...”

American Heritage Dictionary 368 (2nd ed. 1991).

Clearly the plain language of these definitions can be applied to a corporation. The legislature intended to punish a person who uses the identity of a corporation whether or not that corporation is currently conducting business or is now defunct.

The appellant argues that “[t]he phrase ‘living or dead,’ can only apply to a natural person, not a corporation.” Appellant’s Brief at 8.

However, he offers no definition of this term or any authority to support the meaning he is attempting to attach to the phrase. The plain dictionary meaning of the phrase does not limit “living or dead” to a natural person.

The term “where relevant” does not render the statute ambiguous.

Only if the Court determines the statute is ambiguous should their analysis expand beyond the body of the statute. The Court should then look to the title of the statute, surrounding statutes and statutory construction to resolve the ambiguity. If the ambiguity is not resolved through statutory analysis, a review of legislative history is appropriate. The legislature is presumed to be aware of its prior enactments when it enacts new statutes. *Baker v. Teachers Ins. & Annuities Assoc. College Retirement Equity Funds*, 91 Wash,2d 482, 588 P.2d 1164 (1979).

In 2001 when the legislature amended RCW 9.35.020 it created RCW 9.35.005(4), the definition of “person” stated in RCW 9A.01.110.

Prior to 2001 RCW 9.35.020 merely stated the victim was a “person” without definition. In 2003 the legislature amended RCW 9.35.020 adding the phrase “living or dead” after “person. The legislature’s amendments of RCW 9.35.020 have consistently expanded the crime to cover victims beyond a mere individual human. There is no ambiguity, but any ambiguity is resolved by reviewing the legislative history which shows the legislature’s continued desire to expand the definition of the victim.

The Appellant further argues the phrase “where relevant” in RCW 9A.04.010 creates an ambiguity. It does not. The plain language of the statutes clearly includes a corporation as “a person” for the purpose of defining who may be a victim of Identity Theft. RCW 9.35.020 states “[n]o 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 9.35.005(4) reads as follows: “ ‘Person’ means a person as defined in RCW 9A.04.110. RCW 9A.04.110(17) reads as follows: “ ‘Person’, ‘he’, and ‘actor’ include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association”. Appellant argues the definition of a person is ambiguous. If true, that would mean every statute using that definition of a person, most or all of the criminal code, would also be ambiguous.

Black’s Law Dictionary defines “relevant” as follows: “[l]ogically connected and tending to prove or disprove a matter in issue; having

appreciable probative value”. Black’s Law Dictionary 7th ed. p. 1293. There is nothing ambiguous about this, phrase. The definitions in RCW 9A.04.110 apply throughout the criminal code. Logically, a corporation as a person is not relevant to the “person” who may be a victim of Indecent Liberties under RCW 9A.44 or Murder under RCW 9A.32. A corporation, however, does have personal and financial information and can suffer from its theft. Therefore, a corporation is relevant to the crime of Identity Theft. As such, the definition of “person” in RCW 9A.04.110(17) is not ambiguous as applied in this case. The rule of lenity requires that where a statute is ambiguous it must be construed in favor of the criminal defendant. *State v. Mandanas*, 168 Wn.2d 84, 87-88, 228 P.3d 13 (2010). Because the statute is not ambiguous, the rule of lenity does not apply.

RCW 9A.04.110 is not unconstitutionally vague.

The statute is presumed Constitutional unless vague beyond a reasonable doubt. *Aver*, 109 Wash.2d at 308. “The due process vagueness doctrine under the Fourteenth Amendment and article I, section 3 of the state constitution requires that citizens have fair warning of proscribed conduct.” *State v. Valencia*, ___ P.3d ____, 210 decided September 9, 2010 (citing *State v. Bahl*, 164 Wash.2d 739, 193 P.3d 678(2008)). To be constitutional, a statute must put people “on notice of the general requirement of the law“. *State v. Eckblad*, 152 Wash.2d 515, 521, 98 P.3d 1184 (2004).

Appellant argues the phrase “where relevant” is unconstitutionally vague because it is inherently subjective. A person may challenge a statute that has different regulations claiming they did not believe it applied to them. However, the statute is only unconstitutional “if it fails to define that offense so that ordinary people can understand what it proscribes.” *State v. Maxwell*, 74 Wash.App. 688, 692, 878 P.2d 1220 (1994) (citing *Spokane v. Douglass*, 115 Wash.2d 171, 178, 795 P.2d 693 (1990)).

The Court in *Maxwell* found the statute regulating motorcycle helmets to be unconstitutionally vague as it applied to appellants who believed they were exempt. The Court’s ruling incorporated the 7 ½ pages of diagrams and 4 pages of charts in the WAC referenced by the RCW to the opinion, thus demonstrating the complexity of the regulations it found to be unconstitutional. *Maxwell*, 74 Wash.App. 688. The statutes at issue here are unlike *Maxwell*. Each statute contains clear and concise statements in ordinary language.

As argued with regard to Appellant’s claim of ambiguity, the statute provides sufficient warning of the proscribed conduct. RCW 9.35.005(4) clearly references the statute where “person” is defined for RCW 9.35’s purposes. RCW 9A.04.010 contains concise language which includes corporations as a person who may be a victim where relevant and that definition logically applies to Identity Theft. RCW 9.35 and the accompanying definition are not inherently subjective, they merely require logical thought.

CONCLUSION

For the reasons stated above, the State respectfully requests that the appeal in this case be denied, and that the verdict of the trial court be affirmed.

DATED this _____ day of November, 2010.

Respectfully Submitted,

By: _____
KATHERINE L. SVOBODA
Sr. Deputy Prosecuting Attorney
WSBA # 34097

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,

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No.: 40258-1-II

v.

DECLARATION OF MAILING

DERRICK R. EVANS,

Appellant.

DECLARATION

I, *Randi M. Toyra* hereby declare as follows:

On the *17th* day of November, 2010, I mailed a copy of the **Brief of**

Respondent to Carol Elewski, Attorney for Appellant, P. O. Box 4459, Tumwater, WA 98501, and to Derrick R. Evans, c/o Randall Tremain, Community Corrections Officer, 219 Pioneer Avenue, E., Montesano, WA 98563, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this *17th* day of November, 2010, at Montesano, Washington.

Randi M. Toyra