

No. 66458-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIA LUCILLE ZIMMERMAN,

Appellant.

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

The Honorable Hollis R. Hill

BRIEF OF APPELLANT

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CLERK OF COURT
KING COUNTY

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A. ASSIGNMENT OF ERROR

The court's jury instruction 5 failed to include all of the essential elements of first degree identity theft.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires that all of the elements of the charged offense must be included in the "to-convict" jury instruction. Where the charged offense is identity theft, the underlying offense the defendant intended to commit is an essential element which must be included in the "to convict" instruction. Does the trial court's failure to include an essential element of identity theft require reversal of Ms. Zimmerman's conviction?

C. STATEMENT OF THE CASE

Demetria Zimmerman sought treatment at Harborview Hospital on March 27, 2008, and July 10, 2008. 11/30/2010RP 80-81. On both occasions, Ms. Zimmerman gave her name as "Jennifer Habben," a woman she may have met but whose name she received from a friend, Monica Hamilton, who was a friend of Ms. Habben. 11/30/2010RP 103-05.¹ Ms. Habben did not give Ms. Hamilton or Ms. Zimmerman permission to use her identity.

¹ Ms. Habben testified she may have met Ms. Zimmerman approximately 15 years prior. 11/30/2010RP 24.

11/30/2010RP 50. Harborview billed for services on each visit in excess of \$2500. 11/30/RP 79-81, 88-89. Ms. Habben received dunning notices from Harborview for non-payment. 11/30/2010RP 16-17.

Ms. Zimmerman was charged with one count of first degree identity theft. CP 1. At trial, the State introduced Ms. Zimmerman's admission to Seattle Police that she obtained Ms. Habben's name from Ms. Hamilton and admitted using Ms. Habben's name at Harborview. 11/30/2010RP 35.

Ms. Zimmerman testified she used Ms. Habben's name in order to avoid being arrested for outstanding warrants. 11/30/2010RP 103. She testified she did not intend to steal money or services from Harborview, but since she was escorted to Harborview by police officers who were also present during her treatment, she used another name to divert the officers so that they would not discover the outstanding warrants and arrest her. 11/30/2010RP 104-07.

The jury subsequently convicted Ms. Zimmerman as charged. CP 68.

D. ARGUMENT

MS. ZIMMERMAN IS ENTITLED TO REVERSAL OF HER CONVICTION FOR FIRST DEGREE IDENTITY THEFT BECAUSE THE TRIAL COURT OMITTED AN ESSENTIAL ELEMENT FROM THE "TO CONVICT" INSTRUCTION

1. The "to-convict" instruction must contain all essential elements of the charged offense. Due process requires the State prove each essential element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, § 22; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). Accordingly, the trial court must accurately instruct the jury as to each essential element of a charged crime and the State's burden of proving the elements beyond a reasonable doubt. *State v. Williams*, 136 Wn.App. 486, 493, 150 P.3d 111 (2007).

The adequacy of a "to convict" jury instruction is reviewed *de novo*. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). Because it serves as a "yardstick by which the jury measures the evidence to determine guilt or innocence," the "to convict" instruction must generally contain all elements of the charged crime. *DeRyke*, 149 Wn.2d at 910, quoting *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Even though Ms.

Zimmerman did not object to the jury instruction at trial, the omission of an element from a to convict instruction is a constitutional error that can be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); *State v. Chino*, 117 Wn.App. 531, 538, 72 P.3d 256 (2003).

2. The underlying offenses the defendant intended to commit are essential elements of identity theft which must be included in the “to convict” instruction. A person commits first degree identity theft by knowingly obtaining, possessing, using, or transferring 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 and obtains credit, money, goods, services, or anything else of value in excess of \$1500 in value. RCW 9.35.020(1), (2).² Here, the State’s theory was that Ms. Zimmerman used Ms. Habben’s name to defraud Harborview and to obstruct the police officers, both offenses that Ms. Zimmerman contends are essential elements of first degree identity theft which must be included in the to convict instruction.

² Identity theft in the first and second degree share the same underlying elements. The difference between first and second degree is the requirement the State prove for first degree the value of the goods, etc. exceeds \$1500. RCW 9.35.020(1), (2).

An apt analogy in analyzing whether something is an element, is the offense of second degree felony murder. A person is guilty of murder in the second degree when he commits or attempts to commit *any felony*, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he causes the death of another. RCW 9A.32.050(1)(b). In this context, the underlying felony is an essential element of felony murder which must be included in the to convict instruction. *State v. Bryant*, 65 Wn.App. 428, 438, 828 P.2d 1121 (1992), *citing State v. Whitfield*, 129 Wn. 134, 139, 224 P. 559 (1924).³ Following this analogy, since the State was required to prove Ms. Zimmerman intended to commit *any crime* to prove identity theft, the underlying crime she intended to commit is an element of the crime which must be included in the to convict.

The court here analogized identity theft to burglary, opining that since the to convict instruction for burglary need not contain the underlying offense, the same is true for identity theft. 12/1/2010RP

³ While the State is not required to allege the specific means of the underlying offense, the State is required to prove beyond a reasonable doubt the elements of the underlying crime for felony murder. *State v. Quillin*, 49 Wn.App. 155, 164, 741 P.2d 589 (1987). Thus, as long as the State can prove the elements of the underlying felony and the elements of felony murder beyond a reasonable doubt, the State has met its burden.

4-5, 29-30. Ms. Zimmerman contends the trial court erred and the felony murder analogy is more appropriate because of the unique history of burglary in Washington and the Supreme Court's decisions treating burglary significantly different than other offenses.

In *State v. Bergeron*, the Supreme Court held that for burglary, the specific felony intended to be committed need not be included in the to convict instruction. 105 Wn.2d 1, 16, 711 P.2d 1000 (1985).⁴ In so doing, the Court rationalized the result because

the State Legislature has drastically changed the nature of the crime of burglary in this state to the point where it has become a different offense today than it was under either the common law or under our burglary statutes in 1890.

Id. at 14. The Court noted that under the common law on which Washington's burglary statute was based, the specific crime intended to be committed was required to be pleaded and proved.

Id. This continues to be the case in those states which still follow the common law. *Id.* at 15. But, the *Bergeron* Court noted that Washington's burglary offense is now a statutory offense, no longer

⁴ The trial court relied upon *State v. Cantu*, 123 Wn.App. 404, 98 P.3d 106 (2004), *reversed on other grounds*, 156 Wn.2d 819 (2006), to conclude the underlying offenses were not elements. 12/1/2010RP 4-5, 29-30. *Cantu* relied upon *Bergeron* for its holding.

based upon the common law, thus the crime intended to be committed need not be pleaded and proved. *Bergeron*, 105 Wn.2d at 15.

Given this unique nature of burglary in Washington, the trial court's analysis was incorrect: the underlying offenses are elements of the offense of identity theft. As such, these elements were required to be in the "to convict" instruction. *DeRyke*, 149 Wn.2d at 910.

3. The error in failing to include the underlying offenses in the "to convict" instruction was not a harmless error. Jury instructions that misstate an element of the charged offense may be a harmless error if the element is supported by uncontroverted evidence. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), *citing Neder v. United States*, 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Here, the evidence was controverted by Ms. Zimmerman. The State alleged Ms. Zimmerman used Ms. Habben's identity to obtain treatment at Harborview with no intent to pay, and to avoid being arrested on warrants for her arrest by lying to police officers. Ms. Zimmerman admitted misleading the police to avoid her arrest

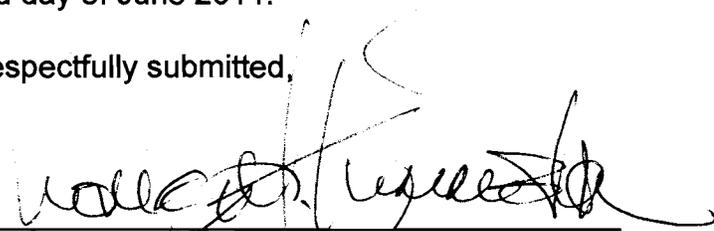
on the warrants but did so solely to avoid being arrested.⁵ Ms. Zimmerman contended the police were present when she sought medical treatment and feared being arrested at Harborview. Given this controverted evidence, had the jury been properly instructed, it could have found Ms. Zimmerman did not intend to commit theft from Harborview. As a consequence, the error in failing to properly instruct the jury was not a harmless error. *Brown*, 147 Wn.2d at 342-43.

E. CONCLUSION

For the reasons stated, Ms. Zimmerman requests this Court reverse her conviction and remand for a new trial.

DATED this 23rd day of June 2011.

Respectfully submitted,



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⁵ Although not an issue here, it is doubtful Ms. Zimmerman's conduct in giving the officer a false name would be sufficient to support a conviction for obstructing a law enforcement officer. In *State v. Williams*, ___ Wn.2d ___, 251 P.3d 877 (2011), the Supreme Court ruled false statements alone do not support a conviction for obstructing: some additional conduct is required. *Id.* at 884.

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY ECONOMIC CRIMES UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> DEMETRIA ZIMMERMAN 718000 WACC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF JUNE, 2011.

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