STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP000452-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES E. GRAY,

Defendant-Appellant.

Appeal from Decision & Final Order Denying Post-conviction Motions entered February 23, 2017 Waukesha County Circuit Court Case No. 2014 CF1072
The Honorable Ralph M. Ramirez, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JAMES A. WALRATH
State Bar No. 1012151
Law Offices of James A. Walrath, LLC.
324 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202
Tel: 414-202-2300
E-mail: jw@jaw-law.com

Attorney for Defendant - Appellant

TABLE OF CONTENTS

CASES CITED

Cases

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

Statutes

STATEMENT OF ISSUES

1. Was the seizure of evidence that was used by the prosecution at trial tainted by an unjustified and unlawful "protective sweep" of Gray's residence while Gray was in custody at the Elm Grove Police Department? Judge Foster ruled that "a search to make sure that no one else was there" in the presence of Gray's girlfriend was "a protective search – a protective sweep," but she did not expressly rule on whether the sweep was lawful (A. App. 26; R. 15 at 71). Judge Ramirez found Judge Foster did not "erroneously exercise her discretion" and that "there was a consent search." (A. App. 39-40; R. 91 at 39-40).

2. Was the evidence seized without the voluntary consent of Gray's live-in girlfriend? Judge Foster ruled that the girlfriend voluntarily consented to the search and seizures, as noted above and Judge Ramirez upheld her ruling, as noted above.

3. Was the evidence insufficient to support a jury verdict because there was no evidence that James Gray's conduct

involved an overt, affirmative representation that he was the accountholder on the credit and debit cards? Judge Ramirez ruled on post-conviction motions that "presentation [of the card] must have been done by someone who represented that they were the individual, that they had the authorization or consent to use them, or . the information or the card belonged to them." (A. App. 44; R. 91 at 44).

4. Was inadmissible testimony introduced at trial, as a substitute for in-court identifications of Gray as the perpetrator who had used the stolen financial transaction cards, through the opinions of witnesses that Gray appeared to be the person that was depicted by surveillance videos, and not by witness in-court identifications of Gray based on first-hand observation? Despite defense objections, Judge Ramirez ruled that the testimony was admissible. (R. 89 at 86-105) and ruled on post-conviction motions that the testimony was "observation identification" and not "opinion

identification" that assisted the jury and was not prejudicial. (A. App. 40; R.91 at 40).

5. Did the jury instruction improperly direct the jury to enter a verdict on the issue of whether the cards used by the perpetrator were "personal identifying information? (R. 89: 137) Judge Ramirez ruled on post-conviction motions that "common knowledge" indicates that credit and debit cards are "personal identifying information (A. App. 42; R. 91 at 42).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case to the extent that appellant's arguments do not fall under Wis. Stat. (Rule) 809.22(2)(a); however, the briefs will likely fully develop the theories and legal authorities so that oral argument would be of marginal value.

Publication is appropriate because a decision will enunciate a new rule of law (for example, as to the limits of opinion identification testimony), and will clarify an existing

rule (for example, as to when protective sweeps are permissible, and what proof is required under the fourth element in *Wis. Stat. § 943.201(2)* relating to representations by an accused about their identity).

STATEMENT OF THE CASE

On May 4, 2016, a jury found James E. Gray guilty of five felony counts of violations of Wis. Stat. § 943.201(2) for misappropriation of identification information to obtain money. Waukesha County Circuit Judge Ralph M. Ramirez entered a judgment of conviction (R. 45) on July 12, 2016 and sentenced defendant (R. 90) to serve concurrent terms of three years' initial confinement and two years' extended supervision on each count, but consecutive to existing sentences.

The core proceedings that preceded defendant's conviction included the filing of an amended complaint (A. App. 1-4; R. 3), a preliminary hearing (R. 68), and filing of a criminal information (A. App. 5-6; R. 8). Defendant filed a motion to suppress physical evidence seized from his

residence (A. App. 7-8; R. 15), which was litigated before Waukesha County Circuit Judge Kathyrn W. Foster (R. 77), and was denied for reasons stated on the record (A. App. 9-32) and by written order (A. App. 33; R. 16).

The trial commenced before Judge Ramirez on May 3, 2016, and continued on May 4 when he instructed the jury on the elements of the offense (A. App. 34-38; R. 89) and the jury rendered its verdict (R. 37).

Following extensions of time from this Court as requested by defendant's appellate counsel, a post-conviction motion was filed on January 16, 2017, and with a supporting memorandum on January 26, 2017. The motion was heard on February 23, 2017 (R. 91) and denied for reasons stated on the record (A. App. 39-45) and by written order that same date (R. 57). Defendant's notice of appeal of was timely filed on March 1, 2017 (R. 58).

STATEMENT OF FACTS

Motion Hearing Facts

On September 15, 2014 Village of Elm Grove Assistant Chief of Police, Jason Hennen, learned that Kari Weiss-Jensen had reported her wallet and several credit cards stolen and that the cards had been used to make unauthorized purchases (R. 77:4).

Hennen then went to various store locations where unauthorized purchases had occurred that Weiss-Jensen had reported, and he viewed store security videos that depicted a person making purchases at the times when Weiss-Jensen's cards were used. Hennen testified that James E. Gray then became a suspect (R. 77:5). The videos depicted a male with a cane, while wearing a distinctive-styled sweater-shirt, who used a bi-fold wallet when making purchases. Gray was arrested that same date while at work in Milwaukee and he was taken to the Elm Grove Police Department. However, none of Weiss-Jensen's items were found on Gray when he was arrested (R. 77:5-6, 21).

Hennen testified that he continued the search, as officers "were still looking for those [stolen] items" (R. 77:6,

lines 13-15). So Hennen then went with Elm Grove Sgt. Ipavec and a City of Milwaukee uniformed officer to Gray's apartment in Milwaukee where they had contact with Gray's live-in girlfriend, Constance Vaughn (R. 77:7). Gray remained in custody at the police department (R 77:21).

Vaughn testified that the police used an intercom at the lobby entrance, representing that they were utility workers, and that they wanted her to meet them and allow them to enter (R. 77:35) Hennen testified that he could not recall, but that it was possible that the officers claimed to be utility workers for that purpose (R. 77:55). Once she opened the lobby entrance door, Vaughn could see that the intercom callers were police officers, who then asked if they could speak with her in the apartment. Vaughn then proceeded without her walker (R.36) (as she was disabled (R. 77:53)) to the apartment and the officers also entered.

Hennen "initially" (R. 77:8, line 17) conducted a "protective sweep" to "make sure no one else was there" while Ipavec stayed with Vaughn (R. 24). No one else was there (R. 77:8). While conducting the sweep (R. 77:58),

Hennen entered a bedroom and saw a clothes closet with the door open where he could see clothing in plain view similar to clothing depicted in the store security videos (R. 77:8-9). But Vaughn testified that the closet was packed so tightly with clothes that Hennen could not have identified clothes in plain view. (R. 77:38, 48).

Hennen then returned to the living room and told Vaughn he was looking for Gray's cane (R. 77:8, 11, 31) and he "asked to look around" (R. 77:10, line 25). Hennen testified that Vaughn gave permission by saying it was "fine" (R. 77:11), but Vaughn testified that Hennen made no request to search before he proceeded (R. 77:37, 40, 41). She testified that no written form was presented for her to indicate her consent (R. 77: 40), which also was Hennen's testimony (R. 77:17, 34). Vaughn testified that with three police officers in her apartment and Hennen acting like a "real hard ass" (R. 77: 51), she felt that Hennen was intimidating (R. 77:27, 50). So when he said that Gray was in custody and wanted his cane (R. 77:17-18, 30), and he asked where Gray's cane was kept,

she told Hennen it was in the front closet, where he then searched (R. 77:37).

Hennen testified that while conducting a search of the apartment he did not find a cane (R. 77:12), but he did find and seize a sweater shirt in the bedroom closet that was similar to the perpetrator's clothing in the videos ((R. 77:25), a credit card wallet from a dresser (R.77:13, 49). Sgt. Ipavec testified that Vaughn was never in police custody while he, Hennen, and the city officer were in the apartment (R. 77:33).

Trial Facts

In his opening statement the prosecutor explained that the State's case was based primarily on security camera videos from five stores that showed a person involved in the transactions for each count charged (R. 88:87) and physical evidence that included a black, beret-type hat that had been taken from Gray at his arrest, a sweater and bifold wallet seized from his apartment, and a black cane retrieved from his workplace. The prosecutor explained that the physical evidence, in his view, "shored up" the State's video evidence to tie Gray to the transactions. (R.88:88).

Kari Weiss-Jensen testified that someone had stolen her Capital One Mastercard and U.S. Bank Visa debit card from her purse while she had left it unsecured at an Elm Grove tennis club. (R. 88:92-97).

After his department was notified of her theft report, Elm Grove police officer Townsend obtained the card account numbers and learned from Weiss-Jensen that there were five store locations where the cards had been used without her consent. (R. 88: 106-107). Townsend went to each store location and, along with each store's staff, viewed security camera videos that showed a male individual using the cards for various retail purchases on September 7, 2014. Townsend identified the videos as trial exhibits: Exhibit 4 showed a Speedway gas station/convenience store station transaction in West Allis (R. 88:111) (referenced in Count 1); Exhibit 5 showed a transaction at a second Speedway station in West Allis (R. 88:111) (referenced in Count 2); Exhibit 6 showed a transaction at a third Speedway station in West Allis (R. 88:111) (referenced in Count 3); Exhibit 7 showed a transaction at an Advanced Auto Parts store in Milwaukee (R.

88:118-119) (referenced in Count 4); and Exhibit 2 showed a transaction at an Open Pantry store in Wauwatosa (R. 88:111) (referenced in Count 5).

Elm Grove police sergeant Ipavec testified that after he had learned that Gray walked with a cane, he went to Gray's apartment which he shared with Constance Vaughn because he was "looking for Gray's cane" (R. 88:126). During a search of the apartment Vaughn directed him to a place where she thought the cane was located, but it was not there (R. 88:127). Physical evidence was seized including: a brown sweater (Exhibit 8) from a closet, and a black bifold wallet (Exhibit 10) (R. 88:128-129). Ipavec testified that he had also conducted surveillance of Gray, and that Gray was seen driving a gray 2000 Impala convertible (R. 88:121).

Over defense objection Ipavec also stated that the person appearing in the video exhibits (R. 88:128-129, 131) was Gray, that the seized sweater (Exhibit 8) matched what Gray was wearing in the video (R. 88:127), that Gray was wearing a black beret (Exhibit 9) when he was arrested at his workplace that matched the beret that Gray was wearing in

the video (R. 88:129)[1] and that the video showed Gray using a cane (Exhibit 11), which was retrieved from his workplace (R. 88:131-132).

Store employees testified as follows: The first Speedway location's manager recalled that a male with a cane (R. 88:159), wearing a black beret and brown sweater (R. 88; 162) had swiped one card that was declined and a second card that was accepted (R. 88:160-161) to purchase Newport cigarettes. The second Speedway manager stated that the transaction video showed a man swiping a card and appearing to sign for a purchase (R. 89:22), while wearing a hat and a brown sweater similar to Exhibits 9 and 8 (R. 89:20). The third Speedway manager just identified a transaction journal showing that Weiss-Jensen's Mastercard was used, as shown in a video (Exhibit 6). The Advanced Auto Parts manager stated that a video (Exhibit 7) showed a customer using a cane and wearing a reddish-brown sweater during what

[1] Another Elm Grove officer later testified that he also participated in Gray's arrest at his workplace and that Exhibit 19 was a photo of the black beret that Gray was wearing at that time (R. 89:51, 55).

appeared to be a Mastercard credit card transaction (R. 88: 188, 191, 194) to purchase a catalytic converter (R.88:187, 192), which was marked as Exhibit 13. The manager agreed with the prosecutor that the store video (Exhibit 7) also showed a gray or beige Impala in the parking lot at that time (R. 88:195). Lastly, the Open Pantry manager stated that a video (Exhibit 2) of the transaction being investigated showed a customer who was using a cane (R. 89:47).

An Elm Grove police detective testified that he had recovered the catalytic converter (Exhibit 13) on October 3, 2014 at a location near the Gray/Vaughn apartment building and that Vaughn had taken him to that location to recover the converter. (R. 89:74-76).

Finally, there was other witness testimony that paralleled Sgt. Ipavec's assertions (R. 88: 128, 141) that the video exhibits showed James Gray as the customer in the transactions. Shelly Zais, who was a neighbor living in Gray's apartment building, testified that it was Gray who was depicted in still photographs (Exhibits 20, 21, and 22) that

had been prepared from the videos (R. 89:84, 87-89).[2] However, neither Weiss-Jensen nor any store employee made an in-court identification of Gray, by pointing to him as the person involved in the theft or the card transactions.

ARGUMENT

I. Physical evidence that was critical to the prosecution was obtained as the fruit of an unlawful, protective sweep of Gray's residence.

At trial the prosecution conceded that the physical evidence that was seized from Gray's apartment (i.e., the sweater and the bifold wallet), just following the protective sweep, and the retrieval of the black cane at his workplace, soon after the apartment sweep and search failed to turn up the cane, was critical to proving up its case. The prosecutor emphasized to the jury that the seized evidence "will help foster the case or shore up the case." (R. 88:88). Indeed, the sweater shirt was used to claim that it directly tied defendant Gray to the crimes scenes and the wallet was used to claim

[2] Zais admitted, as it related to her credibility, that she had four prior criminal convictions.

that it matched the mode by which he carried the cards that were used to commit the crimes.

Judge Foster erred when she denied the motion to suppress because the unlawful sweep tainted the subsequent apartment search. Oddly, Judge Foster never ruled that the sweep itself was lawful, despite the clarity of the defense motion (R.15, ¶ 5) that challenged "a protective sweep" in which the police "moved round into every room." Hence, it also was error for Judge Ramirez to uphold the protective sweep and search by using an abuse of discretion standard: Judge Foster, by not addressing the protective sweep issue, never exercised discretion, much less discussed and considered the Fourth Amendment law on protective sweeps.

A. The Wisconsin Supreme Court has not approved warrantless, law enforcement sweeps of residences where officers are in a home to conduct witness interviews.

James Gray was arrested at his workplace, not at his apartment. Tellingly, no officer who arrested him testified to conducting a protective sweep where he was arrested. Yet the first police incursion into the Gray/Vaughn apartment was a

protective sweep into rooms and areas beyond Vaughn's living room sofa, even though she clearly was disabled and was never arrested.

The necessary predicate for a limited, warrantless sweep is the in-home arrest of a suspect. This exception to the Fourth Amendment's requirement that a judicial search warrant must otherwise precede police of searches of homes, was explicated in *Maryland v. Buie*, 494 U.S. 325, 336–37 (1990).

> The Fourth Amendment permits a properly limited protective sweep *in conjunction with an in-home arrest* when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.

(Emphasis added.) In *Buie*, the Supreme Court also asserted that a protective sweep "occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime." 494 U.S. at 333. "[A]rresting officers are permitted . . . to take reasonable steps to ensure their safety after, and while making, the arrest." *Id*. at 334. "We also hold that *as an incident to arrest* the officers could,

as a precautionary matter . . . , look in closets and other spaces immediately adjoining the place of arrest . . . ." *Id.* (emphasis added).

The Wisconsin Supreme Court similarly restricted the scope of protective sweeps to in-home arrest situations. In *State v. Murdock*, 155 Wis.2d 217, 233, 455 N.W.2d 618, 625 (1990), the Court stated:

> [T]he arrestee in this case does not lose his constitutionally protected privacy interest in his home. However, this court concludes that *the fact of a lawful custodial arrest in the home justifies a limited infringement* of that privacy interest to include a search into closed areas within the immediate area of the arrestee.

(Emphasis added.) Later, citing and quoting from *Buie*, the Court in *State v. Sanders*, 2008 WI 85, ¶¶ 32-33, 311 Wis.2d 257, 269–70, 752 N.W.2d 713, 719 stated:

> The protective sweep doctrine applies once law enforcement officers are inside an area, including a home. Once inside an area a law enforcement officer may perform a warrantless "protective sweep," that is, "a quick and limited search of premises, *incident to an arr*est and conducted to protect the safety of police officers or others." * * *
>
> The protective sweep extends "to a cursory inspection of those spaces where a person may be found" and may last

> "no longer than is necessary to dispel the reasonable suspicion of danger and in any event *no longer than it takes to complete the arrest* and depart the premises."

(Emphasis added; citations omitted; footnote omitted.)[3]

Older Wisconsin Court of Appeals decisions followed the *Buie/Murdock/Sanders* limit on protective sweeps, such as *State v. Kruse*, 175 Wis.2d 89, 499 N.W.2d 185 (Ct.App.1993). But more recent decisions have expanded the permissible context for protective sweeps to at least one other situation: where officers are properly engaged in a community caretaking function, as discussed in *State v. Horngren*, 2000 WI App 177, ¶¶ 20-21, 238 Wis.2d 347, 357, 617 N.W.2d 508, 513. *See also*, *State v. Kucik*, 2011 WI App 1, ¶ 48, 2010 WL 4633082, at *11 (nonprecedential decision);

---

[3] Other appellate courts that have limited protective sweeps to arrest settings include: *U.S. v. Davis*, 290 F.3d 1239, 1242 n. 4 (10th Cir.2002) (not a "protective sweep" when police enter a home where no one is under arrest and there is not even probable cause to arrest anyone); *U.S. v. Johnson*, 170 F.3d 708, 716 (7th Cir.1999) (limiting "protective sweep" under *Buie* to sweeps conducted pursuant to an arrest for which there was a warrant.); *State v. Cromer*, 186 S.W.3d 333, 346 (Mo. App. 2005) ("There can be no protective sweep when 'police enter a home where no one is under arrest and there is not even probable cause to arrest anyone.'" (citation omitted.) .

and *State v. Cervantes*, 2013 WI App 41, ¶¶ 21-22, 2013 WL 500399, at *6–7 (nonprecedential decision).[4]

Here, the Elm Grove police sought to interview Constance Vaughn, believing she was a witness to where Gray had placed a cane, a sweater, and a wallet. She was not under arrest and there were no exigent circumstances, as the police were simply questioning her as a possible witness to the location of the sought-after evidence.

But there is no Wisconsin decision that approves of police sweeps incident to their conducting witness interviews. The controlling Wisconsin Supreme Court precedent set in *Murdock* and *Sanders* on warrantless protective sweeps of residences limits them to in-home arrest situations; the

[4] In dicta in a footnote in a single-judge opinion in *State v. Phillips*, 2016 WI App 57, 370 Wis. 2d 787, 882 N.W.2d 871, Judge Hruz wrote that another permissible context for protective sweeps could be where officers have justifiably entered a home under the exigent circumstances exception to the warrant requirement. Here, the prosecution never claimed that officers entered the apartment due to exigent circumstances, or for a community caretaking purpose.

precedent has never permitted such sweeps to extend to in-home witness interviews.[5]

B. The necessary factual predicate for a protective sweep did not exist.

Aside from the absence of an arrest, there were no factors present that justified a protective sweep. Such a sweep is justified only "when the [law enforcement officer] possesses 'a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer

---

[5] This Court should decline any argument from the State that this longstanding precedent should be changed. Such policy decisions effecting changes in existing law are reserved to the Supreme Court. *See*, e.g., *State v. Tabor*, 191 Wis.2d 482, 491, 529 N.W.2d 915, 919 (Ct. App.1995). This was precisely the outcome in *State v. Lemons*, 37 Kan.App.2d 641, 649, 155 P.3d 732, 738 (2007) ("[T]his court is duty bound to follow our Supreme Court precedent, absent some indication the court is departing from its previous position. . . . The Buie definition of protective sweep includes the language 'incident to an arrest.' . . . A protective sweep must be performed in conjunction with an in-home arrest . . . . Our Supreme Court adopted this definition . . . , and there has been no indication that our Supreme Court is departing from this position." (Citations omitted.)

in believing that the area swept harbored an individual posing a danger to the officer or others.'" *State v. Sanders*, 2008 WI 85, ¶ 32, 311 Wis.2d 257, 752 N.W.2d 713 (citation omitted).

The facts in *Kruse*, where the Court found that the State had not met its burden that justified a protective sweep, are strikingly similar to the current facts:

> The mere fact that the police had reasonable information that a woman lived in the apartment with Kruse, without more, is insufficient to create a reasonable suspicion that their safety was endangered. Also, the officers did not testify that they feared for their safety . . . . They browsed through the apartment without their weapons drawn and without first searching the area within Kruse's immediate reach. We conclude that the state has failed to demonstrate that the officers had a reasonable suspicion based on articulable facts that Kruse's bedroom closet harbored an individual who threatened their safety.

State v. Kruse, 175 Wis.2d 89, 98, 499 N.W.2d 185, 189 (Ct. App.1993).

The discussion in *State v. Cervantes*, 2013 WI App 41, 2013 WL 500399 (as a non-precedential, unpublished decision) is instructive. Although police approached Cervantes's apartment, and then grabbed and arrested him after he answered the door, the Court described a factual

setting very similar to the police encounter with Vaughn: "[T]he police had no reasonable belief that there was another individual in the apartment. They heard no talking nor saw anything suspicious when the door was opened**.** . . ." *State v. Cervantes*, 2013 WI App 41, ¶¶ 16-17, 2013 WL 500399, at *5. See also, *United States v. McMillian*, 786 F.3d 630, 637 (7th Cir. 2015) (officers did not reasonably believe that the area swept harbored an individual posing a danger to the officer or others).

Here, there were no specific and articulable facts known to the law enforcement officers that justified a protective sweep of the residence. Even if they harbored some sort of general apprehension of danger from others, it was neither specified nor articulated at the suppression hearing. The police only claimed that the sweep was conducted "to make sure that no one else was there" (R. 88: 24) without any claim that they had reason to believe someone else was there, or that there was a risk of danger from such a person. There were three officers with Vaughn, who was disabled and seated on a sofa; and Gray had been arrested at another

location and detained at the police department. A protective sweep was not justified by Assistant Chief Hennen's "mere inchoate and unparticularized suspicion or hunch" of danger." *Buie*, 494 U.S. at 332.[6]

II. Constance Vaughn's "consent" to search the apartment was the product of the unlawful sweep and was not voluntary consent.

A. Vaughn's acquiescence was tainted by the sweep so that the seized evidence was the fruit of an illegal police search.

The evidence obtained during the subsequent apartment search should have been suppressed because Vaughn's consent, such as it was, was not sufficiently attenuated from the taint of the unlawful sweep. In *State v.*

---

[6] If a more hypothetical and vague justification justified protective sweeps, the door would be open to sweeps before all in-home witness interviews, a result particularly eschewed by the Cervantes court and, for example, in United States v. Schultz, 818 F. Supp. 1271, 1274 (E.D.Wis.,1993) ("This Court does not read Buie as giving carte blanche authority for law enforcement officers to conduct protective sweeps in all such cases. If it did, the requirement for reasonable suspicion based on specific and articulable facts, would be meaningless."

Richter, 2000 WI 58, ¶ 45, 235 Wis.2d 524, 612 N.W.2d 29, the Court set forth three factors for determining this issue: (1) the temporal proximity of the official misconduct and seizure of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

The *Cervantes* decision again offers persuasive guidance for applying the three factors here. First, even the testimony by Elm Grove officers established that there was virtually no break between the end of the sweep and the commencement of a full search, after Hennen asked if he could "look around." In *Cervantes* the court noted that "consent to search was given almost immediately following the illegal seizure, arrest and protective sweep." 2013 WI App 41, ¶ 28. Second, there were no intervening circumstances that detached the sweep from the police request to search, except for Hennen explaining that the police were looking for Gray's cane. In *Cervantes* the court noted that "after the completion of the protective search, nothing occurred except Cervantes', being asked for consent to search. No explanation

was given to Cervantes about his options; he was only told that police were investigating a complaint." 2013 WI App 41, ¶ 29. Third, as will also be noted below, the police first enlisted Vaughn's cooperation by a misrepresentation that they were utility workers, and then compounded that by falsely stating that they were looking for Gray's cane because he had requested it following his arrest. When those deceits are coupled with the fact that the police immediately invaded other areas of the apartment as part of a witness interview, the misconduct obviously was purposeful, and not inadvertent. In *Cervantes* the court was critical of the immediacy of the arrest, which was "further aggravated when the police swept his apartment after he was arrested." 2013 WI App 41, ¶ 30. The result here should be the same as in *Cervantes*: "In sum, the exclusionary rule must be applied, and the evidence found during the search must be suppressed as the "fruit of the poisonous tree," as explained in the landmark case of *Wong Sun*, 371 U.S. at 477–78." 2013 WI App 41, ¶ 31.

B. Vaughn did not provide voluntary consent to search and to seize evidence.

In determining whether Vaughn's consent was voluntary, when assessing the totality of the circumstances, this court should consider: (1) the use of police misrepresentation, deception or trickery to entice the giving of consent; (2) the use of threats or physical intimidation; and (3) the characteristics of the Vaughn, such as her intelligence, education, physical and emotional condition and prior experience with the law. *See State v. Phillips*, 218 Wis.2d 180, 198-202, 577 N.W.2d 794, 802-804 (1998).

The physical evidence here was seized based upon entry into the residence by deceit (when law enforcement officers at first claimed to be utility company employees engaged in an inspection), without prior advice and notice to the occupant of her right to refuse entry to or a search of the premises by law enforcement officers, without advising her that Mr. Gray had been arrested, when no written consent-to-search form was used, and without obtaining the unequivocal

consent of Vaughn (given her clearly disabled condition).[7] The Fourth Amendment requires that the State prove, by clear and positive evidence, that a consent search was the result of a free, intelligent, unequivocal and specific consent without duress or coercion, actual or implied. *See Gautreaux v. State*, 52 Wis.2d 489, 492, 190 N.W.2d 542, 543 (1971). The Supreme Court in *Schneckloth v. Bustamonte* underscored that consent may not be coerced "by explicit or implicit means, including "subtly coercive" police questions "as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 2049 (1973).

Contrary to Judge Foster's findings (A. App. 29-32; R. 77: 74-77), the police deception and the three officers intimidating presence (including "hard ass" demeanor), when coupled with Vaughn's disabled condition, led to Vaughn's acquiescence to a search which was not voluntary.

[7] Assistant Chief Hennen noted that: "she wanted to sit right away. She has trouble standing and walking so she sat on the couch." (R. 77: 8).

III. The evidence was insufficient to prove the crimes charged because there was no evidence that Gray made any overt and affirmative representations that he was Weiss-Jensen, or that he had her authority to use the cards, or that the cards belonged to him.

The jury instruction with regard to the fourth element of the offense requires proof of an intentional representation by one of two kinds of identification: either "personal identifying information" or a "personal identification document." The fourth element requires proof that an individual using one of these two forms of identification then represented themselves in one of three ways: that the individual was the person described in the identification, or was authorized by that person to use the card, or that the information or document belonged to the individual.

The statute at issue, Wis. Stats. § 943.201(2), reads as follows:

> 943.201(2) Whoever, for any of the following purposes, intentionally uses, attempts to use, or possesses with intent to use any personal identifying information or personal identification document of an individual, including a deceased individual, without the authorization or consent of the individual and by representing that he or she is the individual, that he or she is acting with the authorization or consent of the

> individual, or that the information or document belongs to him or her is guilty of a Class H felony:
>
> (a) To obtain credit, money, goods, services, employment, or any other thing of value or benefit.

By its very terms, the statute requires that there be proof that the accused made at overt, affirmative representation of the kind described in the three alternatives. While it could be argued that the five videos showed that a person was "using" Weiss-Jensen's credit and debit cards (the first element of the offense), there was no proof that other conduct of the person (even if proven to be Mr. Gray) met the fourth element. The statute clearly contemplates that the actor using the cards must also engage in an overt, affirmative representation regarding their ownership of the cards, or their having permission to use them.

The prosecution, however, only presented evidence of the card's use when witnesses testified that the videos showed a purchaser "swiping" the cards, or, in one instance, a

purchaser appearing to sign a receipt.[8] At the post-conviction motion hearing, the trial court conflated the evidence that the credit and debit cards were "used" (going to the first element of the offense) with the fourth required element that there either be an overt misrepresentation of the users identity or a false representation as to authorization to use the cards.

The trial court also was mistaken when it stated that use of the cards was sufficient to constitute an implied misrepresentation of the type required by the fourth offense element. (A. App. 44, R. 91: 44).

But the legislature clearly has required proof beyond a perpetrator's use of a card. First, a statute should be read so that no part of it is rendered surplusage. *State v. Dowdy*, 2012 WI 12, ¶31, 338 Wis.2d 565, 808 N.W.2d 691. The trial court's reading reduced the fourth element to a nullity. If "using" the card proved both the first and the fourth elements, then the fourth element would perforce be proven in every

[8] Evidence that a receipt was signed, however, did not show that any representation as to the identity or authorized capacity of the signer was made. Without evidence as to the actual content of the receipt, the signer

case once the first element was proven. If Judge Ramirez's rationale were correct – that a person implies he or she is the card owner when he or she presents the card – that would make the representation element duplicative of the first element.

Second, to assume that use of a card or presentation of a card satisfied the fourth element in all cases would ignore the structure of the statute in which the fourth element consists of three distinct types of representations, not just one: the actor must have represented: (1) that he or she is the individual having the card account; or (2) that he or she was acting with the authorization or consent of that individual; or (3) that the information or document on the card belonged to him or her. When a customer (or fraudster) does nothing more than swipe a credit card, it does not simultaneously convey three completely different messages to the merchant. Moreover, if one swipe implicated all three itemized actions

---

could simply have placed a mark or an "X" without any representation as to the signer's purported identity or capacity or authorization.

by an offender, one must ask: why would the legislature have itemized three different acts of misrepresentation.

Third, a contrary view, would ignore just exactly what Wis. Stat. §943.201 criminalizes. Its core function is to prohibit the unauthorized use of someone's identity without their consent for financial gain. The legislature enacted a different misdemeanor statute, Wis. Stat. § 943.41, to criminalize the fraudulent, unauthorized ***use*** of credit and debit cards. This is demonstrated by the ruling in *State v. Baron*, 2008 WI App 90, ¶10, 312 Wis.2d 789, 754 N.W.2d 75 (what is criminalized by the identity theft statute is the act of using someone's identity without their permission). Further, in *State v. Moreno-Acosta*, 2014 WI App 122, ¶2, 359 Wis.2d 233, 857 N.W.2d 908, and *State v. Peters*, 2003 WI 88, ¶¶1-3, 263 Wis.2d 475, 665 N.W.2d 171, the defendants did more than just use personal identifying information; they purported by overt, affirmative representations to be persons other than themselves.

No proof of an overt misrepresentation by Gray of his identity was presented at the trial. Accordingly, the evidence

was wholly insufficient to prove his guilt on the five counts charged.

IV. Inadmissible and unreliable opinion testimony was introduced as an improper substitute for in-court identification testimony.

The prosecution introduced inadmissible opinion identification testimony from Sgt. Ipavec and Shelly Zais. Obviously, neither claimed to be a crime incident witness who could identify Gray as the perpetrator. Instead, after having viewed surveillance videos and/or photographs of the card purchase transactions, both testified that Gray appeared to be the person depicted in the videos and photos. Hence, their testimony was used as a substitute for the more customary sort of "in-court identification testimony" given by crime victims or witnesses who point out the defendant in the courtroom. This substitute, opinion identification testimony invaded the province of the jury, and was incompetent lay opinion testimony, contrary to Wis. Stats. §§ 904.01, 904.03, and 907.01.

A. No foundation was laid for the admission of Shelly Zais' opinion identification.

Generally, a lay witness witness may testify regarding the identity of a person depicted in a surveillance video or photographs, but only if there is some basis for concluding that the witness is more likely to identify correctly the defendant from the photograph than is the jury; otherwise, such testimony invades the province of the jury. *United States v. White,* 639 F.3d 331, 336 (7th Cir. 2011). S*ee also Wadlington v. State*, 302 Ga.App. 559, 561, 692 S.E.2d 28 (2010) ("[I]t is well-established that a witness cannot identify a person depicted in a video as being the defendant if it is within the ability of the jurors to decide this issue for themselves."). The Illinois Supreme Court recently explained how a majority of courts treat this issue:[9]

> We adopt a totality of the circumstances approach and agree with the above authorities that the following factors should be considered by the circuit court in determining whether there is some basis for concluding the witness is more likely to correctly identify the defendant: the witness's general familiarity with the

[9] It does not appear that that Wisconsin appellate courts have decided when such substitute opinion identifications are admissible.

> defendant; the witnesses' familiarity with the defendant at the time the recording was made or where the witness observed the defendant dressed in a manner similar to the individual depicted in the recording; whether the defendant was disguised in the recording or changed his/her appearance between the time of the recording and trial; and the clarity of the recording and extent to which the individual is depicted.

People v. Thompson, 2016 IL 118667, ¶ 51, 401 Ill. Dec. 5, 17, 49 N.E.3d 393, 405 (2016).

The entire premise behind the admissibility of this opinion evidence is questionable. Its admissibility depends on the trial court's conclusion that the witness has better observation skills than the jury has. This would require that the court somehow assess the perception skills of jurors and compare them to those of the witness – a process that is totally unworkable, and never actually precedes a court's decision to allow the opinion testimony. At any rate, regardless of the predictable lack of an empirical basis for this approach, the four criteria set out above did not favor the admission of Zais' testimony because: (1) Zais did not claim to have a continuous relationship with Gray that would strengthen her familiarity with him; (2) Zais did not claim

that she had previously seen Gray in attire, and particularly on September 7, 2014, that was similar to the person depicted in the video/photographs: (3) the person in the videos did not appear to be wearing a disguise; and (4) the clarity of the video/photographs made it difficult for Zais to reach her opinions. (R. 89: 84-89). Accordingly, there was no basis to conclude that Zais was more qualified to look at the video/photo evidence and conclude that the person depicted there was Gray, than any of the jurors who sat in the same courtroom that he did for two days. The Zais opinion testimony should have been excluded.

B. No foundation was laid for the admission of Sgt. Ipavec's opinion identification.

The *Thompson* decision also explained the majority view on opinion identification testimony when offered through a police witness. The added danger in those situations is that the opinion testimony will be given more weight by the jury in deference to the witness's official status, which has nothing to do with observational skills.

> We hold, therefore, that when the State seeks to introduce lay opinion identification testimony from a law enforcement officer, the circuit court should afford the defendant an opportunity to examine the officer outside the presence of the jury. This will provide the defendant with an opportunity to explore the level of the witness's familiarity as well as any bias or prejudice. Moreover, it will allow the circuit court to render a more informed decision as to whether the probative value of the testimony is substantially outweighed by the danger of unfair prejudice. Although a witness may identify himself as a law enforcement officer, his testimony involving his acquaintance with the defendant should consist only of how long he knew the defendant and how frequently he saw him or her. Moreover, to lessen any concerns regarding invading the province of the jury or usurping its function, the circuit court should properly instruct the jury, before the testimony and in the final charge to the jury, that it need not give any weight at all to such testimony and also that the jury is not to draw any adverse inference from the fact the witness is a law enforcement officer if that fact is disclosed.

People v. Thompson, 401 Ill. Dec. at 19, 49 N.E.3d at 407.

None of these procedural safeguards were implemented by the trial court: defense counsel was no allowed first to examine Sgt. Ipavec regarding his conclusions outside the jury's presence; and the jury was not instructed at this juncture that no added weight should be given to his

identification opinion. These omissions compounded the error the resulted by admitting Sgt. Ipavec's opinion testimony.

V. The instructions improperly directed a jury verdict on the issue of whether Gray had used Weiss-Jensen's "personal identifying information."

The jury instructions directed the jury to find that a credit card or debit card is personal identifying information (R. 89: 137), contrary to the due process protections against mandatory, conclusive evidentiary presumptions under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 5 and 8 of the Wisconsin Constitution. The instruction was, in effect, a directive, that the jury had no choice but to find that, as to the "use" element of the offense, the defendant used "personal identifying information," an elemental fact in the offense. A jury instruction that directs a jury to accept as true such a fact amounts to a mandatory conclusive presumption on an elemental fact, which is unconstitutional under *State v. Tomlinson*, 2002 WI 91, ¶¶ 52-64, 254 Wis.2d 502, 532–37,

648 N.W.2d 367, 382–84 (2002) and S*tate v. Kuntz*, 160 Wis.2d 722, 737, 467 N.W.2d 531 (1991).

Tomlinson explained that an evidentiary presumption in a jury instruction may have the effect of relieving the State of its obligation to prove the charges beyond a reasonable doubt. When the trial court instructs the jury that it must find an elemental fact if the State proves certain other predicate facts, the State then is relieved of its burden of persuasion because the element will be removed from the jury entirely if the State proves the predicate facts. Accordingly, the court noted, a mandatory conclusive presumption in a jury instruction is impermissible. *Id.* at 737, 467 N.W.2d 531.

In *Tomlinson* the trial court erred by instructing the jury that a "bat" was a "dangerous weapon" within the meaning of the dangerous weapon penalty enhancer statute; and in *Kuntz*, involving an arson trial, the court erred by instructing that a "mobile home" was a "building" under the arson statute. There is no material difference between the instructions defect in those cases and here where the court mandated that the jury conclusively find that "a credit card or

debit card is personal identifying information." (A. App. 37; R. 89: 137).

The analysis must then turn to determining whether that error was harmless. *State v. Harvey*, 2002 WI 93, ¶ 43–45, ____Wis.2d ____, 647 N.W.2d 189. Under the harmless error rule for erroneous jury instructions, the court must ask if it appears "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. . . .'" *Harvey*, 2002 WI 93, ¶ 44 ¶ 62 (citation omitted), or, stated elsewhere in *Tomlinson*, whether the court is "convinced *beyond a reasonable doubt* that the error did not play *any role* in the jury's verdict. . . ." *State v. Tomlinson*, 2002 WI 91, at ¶ 64. (Empasis added.)

Here, the mandatory conclusive presumption had to have contaminated the jury's verdict on each of the five counts because of the way the trial court based its instructions on the language in the criminal information. That document accused Gray of using Weiss-Jensen's "personal identifying information" (A. App. 5-6; R. 8). The court focused the jury on that particular part of the information: "The defendant is

charged with five separate counts of unauthorized use of an individual's personal identifying information or document." (R. 89: 134). The court then read each count from the information that accused Gray of using "personal identifying information." (R. 89: 134-136) and referred to the same critical component in the statute. (R. 89: 136). It then infused reversible error into this case by equating the concept of "personal identifying information" with the concept of "personal identifying document." (R. 89: 137, lines 6-8, 20, 23-24) while directing that, as to the first element of the offense, "a credit or debit card is personal identifying information." (R. 89: 137, lines 7-8). By framing the first element of the offense in this way, the jury's verdict, of necessity, had to have been founded on this mandatory conclusive presumption. Each verdict was fatally contaminated so that Gray's convictions cannot stand.

CONCLUSION

For the foregoing reasons, appellant Gray respectfully requests that the decision and order of the circuit court be

reversed and this matter should be remanded either with instructions that the charges be dismissed or that a new trial be granted.

Dated this 24th day of August, 2017.

Respectfully submitted,

JAMES A. WALRATH
State Bar No. 1012151
Law Offices of James A. Walrath, LLC.
324 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202
Tel: 414-202-2300
E-mail: jw@jaw-law.com

Attorney for Defendant - Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,328 words.

Dated this 24th day of August, 2017.

Signed:

JAMES A. WALRATH
State Bar No. 1012151
Law Offices of James A. Walrath, LLC.
324 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202
Tel: 414-202-2300
E-mail: jw@jaw-law.com

Attorney for Defendant - Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of August, 2017.

Signed:

JAMES A. WALRATH
State Bar No. 1012151
Law Offices of James A. Walrath, LLC.
324 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202
Tel: 414-202-2300
E-mail: jw@jaw-law.com

Attorney for Defendant - Appellant

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 24th day of August, 2017.

Signed:

JAMES A. WALRATH
State Bar No. 1012151
Law Offices of James A. Walrath, LLC.
324 E. Wisconsin Ave., Suite 1400
Milwaukee, WI 53202
Tel: 414-202-2300
E-mail: jw@jaw-law.com

Attorney for Defendant - Appellant