STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2017AP452-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES E. GRAY,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING A POSTCONVICTION MOTION ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE RALPH M. RAMIREZ, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Assuming that the police obtained evidence from James E. Gray's apartment in violation of the Fourth Amendment, was its admission at Gray's trial harmless?

The circuit court concluded that Gray's live-in-girlfriend consented to the search and that the evidence was admissible under the Fourth Amendment. It did not address harmless error.

This Court should affirm based on harmless error.

2. At Gray's trial, a law enforcement officer who investigated this case inadvertently identified Gray as the subject in the surveillance videos captured on the night of the crimes. Assuming that the law enforcement officer at Gray's trial impermissibly identified Gray in the surveillance videos, was the error harmless?

The circuit court concluded that the officer could identify Gray in the surveillance videos because he knew and had contact with Gray.

This Court should affirm based on harmless error.

3. Did Gray forfeit his argument that his neighbor impermissibly identified him in the surveillance videos when he failed to object to her identification?

The circuit court did not answer that question.

This Court should answer, "Yes."

4. Did Gray waive his challenge to the circuit court's instructing the jury that a credit or debit card is personal identifying information when he failed to object to the instruction?

The circuit court did not answer that question.

This Court should answer, "Yes."

5. Did the State present sufficient evidence that Gray committed the crime of identity theft when it presented evidence that Gray, by repeatedly using the victim's credit or debit cards to purchase items, intentionally represented that he was the card holder or was acting with the cardholder's authorization or consent?

By concluding that when a person presents a credit or debit card as payment for goods, that person represents that he has the authority to use the card or is the cardholder, the circuit court answered, "Yes."

This Court should answer, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication, as the arguments are fully developed in the parties' briefs, and the issues presented involve the application of well-established principles to the facts presented.

INTRODUCTION

A jury convicted Gray of five counts of identity theft after watching five surveillance videos that showed Gray using the victim, KJ's, credit and debit card to purchase various items. Gray now challenges that verdict by raising four main arguments.

First, Gray claims that the court erred in admitting a shirt and a bifold wallet. He argues that the police obtained those items in violation of the Fourth Amendment. But even assuming the police violated the Fourth Amendment in seizing those items, any error in admitting them at trial was harmless because neither was important to the case and there was other overwhelming evidence of guilt.

Second, Gray argues that the court erred in allowing two witnesses, an officer and Gray's neighbor, to identify Gray in the surveillance videos. Gray failed to object to the neighbor's identification at trial, so he has forfeited that argument. And assuming that the court erroneously admitted the officer's identification, that error was harmless.

Third, Gray contends that the court improperly instructed the jury when it said that a credit or debit card is personal identifying information. But Gray failed to object to that instruction, so he waived that claim.

Finally, Gray claims the State presented insufficient evidence to convict Gray of identity theft because, according to Gray, the State failed to show that he intentionally represented that he was the victim or that he was acting with the authorization or consent of the victim. Gray says that mere use of someone else's credit or debit card is insufficient to meet the representation element. Gray is incorrect. By using the victim's card to complete the transactions, Gray was representing that he was the cardholder or that the cardholder had authorized or consented to the purchases. Thus, the State presented sufficient evidence when it showed videos of Gray using the victim's card for each of the transactions.

Because all of Gray's claims are meritless, this Court should affirm.

STATEMENT OF THE CASE

On September 7, 2014, a person who was later identified as Gray stole a debit and a credit card from KJ's purse and racked up over $900 worth of purchases at three Speedway gas stations, an Open Pantry, and an Advanced Auto Parts. Consequently, the State charged Gray with five counts of identity theft. (R. 3:1–3.)

A. Gray's motion to suppress

Before trial, Gray moved to suppress evidence on the grounds that the officers violated his Fourth Amendment rights when they searched his apartment without a warrant, consent, or exigent circumstances. (R. 15.) Specifically, he sought to suppress a shirt and a wallet that connected him to the crimes. (R. 15:1.)

At the suppression hearing, Assistant Chief Jason Hennen testified that after he arrested Gray at Gray's workplace, he and two other officers went to Gray's apartment to look for various items that Gray was wearing when he committed the crimes. (R. 77:4–6.) Specifically, he was looking for "a cane," a "darker-type shirt or sweater shirt," and "a wallet."[1] (R. 77:6.) He rang the telecom outside the apartment, and Constance Vaughn, Gray's live-in girlfriend, answered and came down to the lobby. (R. 77:7–8.) In the lobby, Assistant Chief Hennen asked Vaughn if they "could step inside [the apartment] to talk to her, and she escorted [them] to her apartment and led [them] into her apartment." (R. 77:8.)

Assistant Chief Hennen testified that once inside, Vaughn "wanted to sit right away" because she "has trouble standing and walking, so she sat on the couch." (R. 77:8.) Assistant Chief Hennen then "went to do a protective sweep." (R. 77:17.) During his sweep, he went into the bedroom and saw "some clothes in a closet in plain view that

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[1] The officers were also looking for and found some clothing items (a white jacket and camouflage pants) that were connected to a different identity theft case out of Menomonee Falls. (R. 77:27.)

were similar to those that Mr. Gray was seen wearing on the date when he was conducting the transactions."[2] (R. 77:8–9.)

After his sweep, Assistant Chief Hennen stated that he returned to the main room and explained "why [they] were there" and that they were looking for Gray's cane. (R. 77:8.) Vaughn responded that Gray normally kept it in the front hallway. (R. 77:8.) Assistant Chief Hennen testified that he asked Vaughn if he could "look around the apartment," and she said he could. (R. 77:8, 10–11, 17.) He did not ask Vaughn to sign a consent form. (R. 77:17.) Upon obtaining consent to search, Assistant Chief Hennen went back in the bedroom to recover the clothing. (R. 77:12.) Assistant Chief Hennen testified that another officer, Sergeant Joseph Ipavec, found a bifold wallet similar to the one used during the crimes sitting on a dresser. (R. 77:13.)

Sergeant Ipavec testified similarly. He stated that once inside the apartment, Vaughn sat on the couch while Assistant Chief Hennen performed a "protective sweep" of the residence. (R. 77:24.) After the sweep, they told her that they were looking for Gray's cane and advised her that there was a probation and parole warrant for Gray's arrest. (R. 77:24.)

According to Sergeant Ipavec, when Assistant Chief Hennen came back from the sweep, he told Sergeant Ipavec that he saw "some clothing items in the closet" that "he felt were significant to the case." (R. 77:24.) After Assistant Chief Hennen "obtained consent," Sergeant Ipavec went to the bedroom, removed the clothing items, and confirmed

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[2] Assistant Chief Hennen testified that he also saw "what appeared to be" powdered cocaine and "short-cut straws." (R. 77:9.) Although it is unclear exactly when, at some point Assistant Chief Hennen notified Vaughn of the drugs. (R. 77:18–19.)

that they were the clothes they were looking for. (R. 77:25.) Sergeant Ipavec also found a bifold wallet on the dresser. (R. 77:26.)

Vaughn testified that she received an intercom call from people with "We Energies." (R. 77:35.) When she went to the lobby, she discovered that the people at the door were actually police officers. (R. 77:36.) She took them back to her apartment, where she sat on the couch as Assistant Chief Hennen "went through the place." (R. 77:36.) Vaughn described Assistant Chief Hennen as "rather intimidating" (R. 77:37), and a "real hard ass" (R. 77:51). Vaughn stated that when Assistant Chief Hennen finished looking around, he came back into the living room, told her that Gray "was requesting his cane," and asked her where he "normally kep[t] his cane." (R. 77:36–37.) When Vaughn responded that Gray normally kept it in the front closet, Assistant Chief Hennen went to "check the front closet," but the cane was not there. (R. 77:37.)

Vaughn testified that the officers never asked for permission to look around the apartment, nor did they ask her to sign a consent form. (R. 77:40.) She also stated that Assistant Chief Hennen would not have been able to see Gray's clothes unless he "rifle[d] through them" because they were "stuffed in." (R. 77:48.) It is unclear from Vaughn's testimony exactly when the officers removed the clothes and the wallet from the bedroom. (R. 77:48–49.)

After hearing all the testimony, the circuit court denied Gray's motion. It concluded that Vaughn invited the officers into her home. (R. 77:69.) It noted that once inside, the officers performed a protective sweep of the home, including the closet because "common sense would tell you that [a closet] is a probably pretty common place for people to secret themselves." (R. 77:71.) The court reasoned because the officers found the clothes in "plain view" while conducting the protective sweep, "the Constitution" allowed

them to "retrieve those items." (R. 77:72.) The court also concluded that Vaughn, "through her words and actions," voluntarily consented to the search. (R. 77:74, 77.)

The case proceeded to trial.

B. Gray's trial

At the trial, KJ testified that around 11:00 a.m. on September 7, 2014, she went to the Elm Grove tennis club with her husband. (R. 88:90.) She left her purse unsecured in the women's locker room while she and her husband played tennis from 11:00 a.m. to about 12:00 p.m. (R. 88:90–91.) After, she collected her purse from the locker room and met her husband at the pool. (R. 88:90–91.) A few hours later, she received a call from her credit card company, asking if she had made some recent purchases. (R. 88:91.) KJ checked her wallet and discovered that her U.S. Bank card and her Capitol One MasterCard were missing. (R. 88:91–92.) She immediately canceled her cards. (R. 88:92.) KJ confirmed that she did not make the following five purchases:

1. $241.75 purchase of cigarettes on her MasterCard at a Speedway at 12340 W. Oklahoma Avenue,
2. $225.56 purchase of cigarettes on her MasterCard at a Speedway at 9130 W. Oklahoma Avenue,
3. $238.14 purchase of cigarettes on her MasterCard at a Speedway at 9111 W. National Avenue,
4. $203.80 purchase of a catalytic converter on her MasterCard at Advanced Auto Parts, and
5. $150.12 purchase of cigarettes on her U.S. Bank card at an Open Pantry.

(R. 88:94–97.) She also testified that she did not give anyone permission to use her cards to conduct the five transactions. (R. 88:97–98.)

An employee from each store also testified at trial. (R. 88:155–84, 185–211, 213–230; 89:13–44, 45–50.) During

each employee's testimony, the State introduced video surveillance from the store. (R. 88:157–63, 187–91, 216–220; 89:15–23, 46–48.) The surveillance videos showed a man with a black beret, a cane, and a brownish shirt enter the store, purchase cigarettes with a credit or debit card, and leave. (R. 3:2–3; 88:157–63, 187–91, 216–220; 89:15–23, 46–48.) In addition, the State introduced transaction logs for all but one of the various stores. (R. 88:179–81, 193–94, 217–18; 89:16–18.) The transaction logs confirmed that KJ's cards were used to complete the transactions shown in the videos. (R. 88:179–81, 193–94, 217–18; 89:16–18.)

Numerous officers also testified. Officer Raime Townsend testified that on September 8, 2014, KJ reported that her debit and credit cards had been fraudulently used in various purchases the previous day. (R. 88:106.) Working off of KJ's bank statements, Officer Townsend contacted the stores to obtain their surveillance videos. (R. 88:109.)

Sergeant Ipavec testified that about a week into his investigation, he identified Gray as the potential suspect, so he and another officer went to Gray's workplace. (R. 88:124.) Once there, Sergeant Ipavec informed Gray of their investigation and asked him if he smoked. (R. 88:124.) Gray responded that he did. (R. 88:125.) He denied being involved in any of the incidents, though he stated that he might have purchased cigarettes on September 7. (R. 88:124–25.) Sergeant Ipavec also asked Gray if he had a walking cane, and Gray answered that he used a cane from time-to-time. (R. 88:125–26.) Sergeant Ipavec testified that Gray was wearing a beret-style hat similar to the hat worn by the suspect in the videos. (R. 88:128.) The officers took Gray into custody for a probation violation. (R. 88:126.) After, Sergeant Ipavec and Assistant Chief Hennen went to Gray's apartment.

Sergeant Ipavec testified that they went to Gray's apartment to notify Vaughn that they had arrested Gray

and to look for Gray's cane. (R. 88:126–27.) Sergeant Ipavec stated that after receiving Vaughn's consent, he searched the apartment and found two items of evidentiary value. (R. 88:127–30.) Over Gray's objection, Sergeant Ipavec explained that he was specifically looking for a "brown sweater" because Gray was observed wearing a brown sweater in the surveillance videos. (R. 88:127.) He testified that he found a brown sweater consistent with the sweater Gray was wearing the day KJ's cards were used. (R. 88:127.) Sergeant Ipavec also found a "black bifold wallet" on Gray's dresser. (R. 88:129.)

Detective Craig Meyers testified that on October 3, 2014, he contacted Vaughn about the catalytic converter purchased at the Advanced Auto Parts, and she took him to where it was located. (R. 89:75–76.)

Finally, without objection, Gray's neighbor, Shelly Zais, identified Gray in court (R. 89:85), and testified that she recognized Gray in some pictures from the surveillance videos (R. 89:87–89).

After the close of evidence, the court held a verdict and instruction conference. (R. 89:119–31.) At the conference, the parties agreed to instruct the jury that to convict Gray of identity theft, it must conclude that Gray (1) intentionally used a personal identification document of KJ, (2) to obtain money, goods, services, or any other thing of value or benefit or to initial a transfer of funds, (3) without the authorization or consent of KJ and with the knowledge that KJ did not give authorization or consent, and (4) by intentionally representing that he was KJ or was acting with the authorization or consent of KJ. (R. 89:122–23, 137.) Without objection, the court also instructed the jury that a credit or debit card constituted personal identifying information. (R. 89:137.)

The jury convicted Gray of all five counts of identity theft. (R. 89:195–201.) For each count, the court imposed a concurrent sentence of five years of imprisonment, consisting of three years of initial confinement followed by two years of extended supervision. (R. 45:1–2.)

C. Postconviction proceedings

Gray filed a postconviction motion raising three main claims: (1) because the protective sweep of Gray's apartment violated the Fourth Amendment, the evidence found at his apartment was improperly introduced at trial; (2) the court erred when it admitted "inadmissible opinion identification testimony" from Sergeant Ipavec and Zais; and (3) the court improperly instructed the jury.[3] (R. 53.) After a hearing, the court ruled that the evidence obtained from Gray's apartment was properly admitted at trial because Vaughn consented to the search. (R. 91:39.) It further concluded that the witnesses were allowed to identify Gray in the surveillance pictures because they knew Gray and had contact with Gray, so their identifications assisted the jury. (R. 91:40–41.) Finally, the court determined that it properly instructed the jury, but it also noted that even if it did not, any error was harmless. (R. 91:42–44.)

Gray now appeals.

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[3] Gray raised other claims that he now abandons on appeal. (R. 53:3–4.)

ARGUMENT

I. Assuming that the police obtained evidence from Gray's apartment in violation of the Fourth Amendment, any error in admitting that evidence at trial was harmless.

On appeal, Gray argues that the shirt and bifold wallet confiscated from his apartment by the police should have been suppressed because they were the fruit of an unlawful protective sweep. (Gray's Br. 19–28.) Gray further contends that even if Vaughn had consented to the subsequent search, her consent was tainted by the unlawful protective sweep and was, therefore, involuntary. (Gray's Br. 28–32.) The State interprets Gray's argument to mean that Vaugh's consent was not sufficiently attenuated from the protective sweep such that it could justify the search.

Although the State disagrees with much of Gray's legal analysis of the protective sweep doctrine and therefore does not concede a Fourth Amendment violation, the State focuses on harmless error because it provides the narrowest grounds for affirmance. *State ex rel. Rupinski v. Smith*, 2007 WI App 4, ¶ 30 n.4, 297 Wis. 2d 749, 728 N.W.2d 1 (citing *State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible grounds.")).

A. Standard of review

"Whether an error was harmless presents a question of law that [an appellate court] reviews *de novo*." *State v. Echols*, 2013 WI App 58, ¶ 15, 348 Wis. 2d 81, 831 N.W.2d 768.

B. Any error in admitting the items found in Gray's home (the shirt and bifold wallet) was harmless.

A court's erroneous admission of evidence is subject to harmless error analysis. *State v. Britt*, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). "For an error to be harmless, the party who benefitted from error must show that 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 (quoting *State v. Martin*, 2012 WI 96, ¶ 45, 343 Wis. 2d 278, 816 N.W.2d 270). "In other words, 'an error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *Martin*, 343 Wis. 2d 278, ¶ 45).

This Court considers "the totality of the circumstances" to determine whether an error was harmless. *State v. Hunt*, 2014 WI 102, ¶ 29, 360 Wis. 2d 576, 851 N.W.2d 434. In doing so, it may consider several non-exhaustive factors, including: "the importance of the erroneously admitted or excluded evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted or excluded evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case." *Id.* ¶ 27 (citation omitted).

Here, the admission of the shirt and the bifold wallet was harmless for at least two reasons.

First, neither the shirt nor the wallet were important at trial. Regarding the shirt, as the prosecutor acknowledged during his closing argument, some witnesses testified that the shirt was brown, whereas other witnesses testified that the shirt was "reddish." (R. 89:150.) The prosecutor also acknowledged that the shirt appeared different depending

on the quality of the video: "You can't base anything on the color of Mr. Gray's shirt in that video unless you believe the color in the video" (R. 89:158), and "In the video, he was wearing a shirt -- the color was once again in question -- the hat, the cane. He's got all of these things" (R. 89:162). Given that, the prosecutor argued that he believed the shirt was consistent with the shirt in the videos, but he also told the jury that "even if it's not, it doesn't have to be the same shirt." (R. 89:150.) Thus, although the prosecutor regularly referred to the shirt throughout trial and closing argument, he recognized its limited evidentiary value and relied most heavily on the surveillance videos, Gray's beret-style hat, and his cane.

As for the wallet, the prosecutor discussed it twice over the course of the entire trial. During his opening statement, the prosecutor explained that the store clerk from Advanced Auto Parts would testify that Gray used a bifold wallet when he purchased the catalytic converter and that Sergeant Ipavec would testify that he found a bifold wallet on Gray's dresser. (R. 88:88.) The prosecutor elicited that testimony from Sergeant Ipavec (R. 88:129), but he never elicited the proposed testimony from the Advanced Auto Parts employee. The prosecutor did not mention the wallet during his closing argument, and Gray pointed out that the wallet was irrelevant because the jury "heard nothing about [it] that lead[ ] to James Gray." (R. 89:176.) In short, the wallet did not help, and may have even hurt, the State's case against Gray.

Second, the State had a strong case and presented overwhelming evidence of guilt at trial. If the shirt and the wallet were excised from the trial, the State still had the surveillance videos, the beret-style hat, and the cane. That evidence, in particular the videos, convinced the jury to convict Gray. During his closing argument, the prosecutor told the jury to "go back to the most obvious thing in this

case which is: Does that person committing this transaction look like James? I'm going to submit to you that this whole case – other than perhaps the Open Pantry count where the video was so poor, should be easy." (R. 89:150.) The prosecutor went on, "I looked at the video. I saw the video, and that's James Gray. That's what I think. I don't have any doubt. . . . I think you should not have any doubt as a result, because you have seen the same view." (R. 89:150–51.) Thus, here, all the jury had to do to find Gray guilty was review the surveillance videos. Because the jury would have convicted Gray based on the surveillance videos, the beret-style hat, and the cane, any error by the court in admitting the shirt and the wallet was harmless.

II. Assuming that the court erred in admitting Sergeant Ipavec's limited testimony identifying Gray as the subject in the surveillance video, the error was harmless.

Relying on cases from other jurisdictions, Gray argues that a witness may identify a person depicted in a video or photograph only when there is some basis for concluding that the witness is more likely to correctly identify the defendant than the jury; otherwise, such an identification invades the province of the jury. (Gray's Br. 39–43.) Applying that principle here, Gray claims that Sergeant Ipavec should not have been allowed to identify Gray in the surveillance videos because the State failed to lay an adequate foundation for why Sergeant Ipavec was more likely than the jury to correctly identify Gray in the videos. (Gray's Br. 41–43.)

Although the State disagrees with Gray's recitation of identification law (specifically his reliance on outside jurisdictions), the State focuses on harmless error because it again provides the narrowest grounds for affirmance.

It is true that Sergeant Ipavec inadvertently identified Gray by calling the individual in the video "Gray" in the course of describing what he observed in the video a handful of times at trial. The following exchange is representative of how that occurred in all four instances:

> Q: Did you in searching the apartment find anything of what you consider evidentiary value in this case?
>
> A: Yes, throughout this case, we had obtained video surveillance from the different stores where the credit card was used. And in that video surveillance –
>
> [Defense counsel]: Object to the witness's characterization of the video surveillance.
>
> The Court: Overruled. You may continue.
>
> [A]: *In that video surveillance, Mr. Gray was observed wearing specific clothing*. Specifically, I was looking for a brown sweater. And as I looked into the master bedroom in the closet, *I observed a brown sweater which was consistent with the one that Mr. Gray was wearing the day the credit cards were used.*
>
> Q (By [the prosecutor]): And did you – in the search of the apartment, did you find the cane?
>
> A: We did not.
>
> Q: Now, when you -- was there anything significant about a -- about a hat that was found in this case?
>
> A: Yes, again, *in the surveillance videos Mr. Gray is observed wearing a beret-style* --
>
> [Defense counsel]: Objection to characterization of Mr. Gray being in the video.
>
> [The Prosecutor]: Let's –
>
> The Court: Overruled. You can continue.

. . .

> Q ([The prosecutor]): Did you in fact find a similar hat to the one you had seen in the videos in relationship to Mr. Gray that day?
>
> A: I did. He was wearing a hat similar to that.

(R. 88:127–28 (emphasis added); *see also* 88:137, 141.) Here, the admission of that limited testimony was harmless for the four reasons below.

First, Sergeant Ipavec's identification of Gray in the video was limited to four small instances. (R. 88:127–28, 137, 141.) In a case that covered two days, spanned 426 pages of trial transcripts, and involved 12 witnesses, Sergeant Ipavec's four statements inadvertently calling the person in the video "Gray," did not stand out. This is especially true since Sergeant Ipavec also sometimes avoided calling the person in the video "Gray" and instead referred to him as the "person" (R. 88:131), and the prosecutor consistently referred to the person in the video as the "subject" or the "person" (R. 88:128, 131).

Second, the jury heard other unobjected-to testimony from Zais, in which she, at the State's request, identified Gray as the person in the surveillance videos. (R. 89:85–89.) Specifically, Zais, based on her lengthy relationship with Gray, initialed still photographs from the surveillance videos that she believed contained Gray. (R. 89:84–89, 94.) Thus, Sergeant Ipavec's limited identification was merely cumulative of other evidence the jury heard.

Third, the prosecutor, in his closing argument, told the jury to draw its own conclusion about whether Gray was the person in the surveillance videos. (R. 89:150–51.) For example, he said, "There's a gentleman in the video conducting this transaction. The State contends it is Mr. Gray. You can draw that conclusion yourself because you can see Mr. Gray sitting over there." (R. 89:149.) And he said,

"We had Shelly Zais look at some of the photographs. She believed the person in the videos was Mr. Gray. So if she believed that, does that mean you should? No. You're allowed to make your own opinions. You can look at those photos. . . .[A]t the end of the day, it is up to you." (R. 89:163.)

Finally, as explained in the previous section, even without Sergeant Ipavec's comments referring to the person in the videos as "Gray", the State had a strong case against Gray because it had the surveillance videos. In all the videos, the same individual, identified as Gray by another witness, wearing the same beret-style hat and walking with the same cane, used one of KJ's cards (most often her credit card) to pay for the same items (cigarettes) in all but one occasion (when Gray bought the catalytic converter that was later recovered by Detective Meyers). Because the evidence overwhelmingly pointed to Gray, any error in admitting Sergeant Ipavec's statements referring to the individual in the videos as "Gray" was harmless.

III. Gray forfeited his argument that the circuit court erred in admitting Zais's identification by failing to object to her testimony.

Gray also claims that the circuit court erred when it allowed Zais to identify Gray from still photographs from the surveillance videos. (Gray's Br. 38–41.) Gray argues that Zais should not have been allowed to identify Gray in the surveillance videos because the State failed to lay an adequate foundation for why Zais was more likely than the jury to correctly identify Gray in the videos. (Gray's Br. 40–41.) This Court should not reach the merits of this claim because Gray failed to object to Zais's statements that Gray was the person in the photographs taken from the surveillance videos.

A. Standard of review

"Whether a party objected to the admissibility of evidence in a manner sufficient to preserve the issue for appeal," is a "question of law that [courts] review de novo." *State v. Peters*, 166 Wis. 2d 168, 174, 479 N.W.2d 198 (Ct. App. 1991).

B. Gray failed to object to Zais's identification; thus, he forfeited his argument challenging its admission.

The "failure to object constitutes a forfeiture of the right on appellate review." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. "[T]o preserve his right to appe[llate review] on a question of admissibility of evidence, a defendant must apprise the trial court of the specific grounds upon which the objection is based." *Peters*, 166 Wis. 2d at 174.

"The purpose of the 'forfeiture' rule is to enable the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *Ndina*, 315 Wis. 2d 653, ¶ 30 (citation omitted). The rule "also gives both parties and the court notice of the issue and a fair opportunity to address the objection," "encourages attorneys to diligently prepare for and conduct trials," and "prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.* (citation omitted).

Here, after eliciting background information about Zais's relationship with Gray, the prosecutor asked Zais to identify the person in the surveillance videos. (R. 89:84–89.) Specifically, the prosecutor asked, "There's a gentleman in [the still photographs from the surveillance videos] that's featured. Do you recognize that person?" (R. 89:86.) Zais proceeded to identify Gray as the person in the photographs

by initialing the photographs in which she recognized the person in them as Gray. (R. 89:86–89.) She initialed two of four pictures presented to her. (R. 89:87–88.)

Although Gray objected numerous times to Sergeant Ipavec's statements that the person in the videos was "Gray," he never once objected to Zais's testimony that the person in two of the four pictures was "Gray." (R. 89:84–89.) As a result, Gray forfeited his right to challenge Zais's testimony on appeal.

And regardless, the State laid a sufficient foundation for Zais's identification of Gray from the photographs from the surveillance videos. Zais testified that she has known Gray for a number of years. (R. 89:84–85, 94.) Zais was Gray's neighbor at the time of the crimes, and the two had ridden in a car together on a few different occasions. (R. 89:84–86, 104.) When asked on re-direct examination, Zais confirmed that she has "known and [has] been in close proximity to Mr. Gray [on] a number of occasions over at least a multi-year period." (R. 89:104.) Moreover, Zais indicated familiarity with Gray's beret-style hat and his cane. (R. 89:95.) Specifically, when asked how she knew it was Gray in the photographs, she replied, "Because of the fact I know him, and he's walking with his cane and the hat." (R. 89:95.)

Finally, Gray claims that the low quality nature of the photographs should cut against Zais being allowed to identify Gray. To the contrary, an identification is even more helpful to the jury when the photograph or video is of low quality. *See United States v. White*, 639 F.3d 331, 336 (7th Cir. 2011) (noting that when video quality is "not the best," a witness who knows the defendant can "provide the jury with helpful insight regarding the true identity of the man shown in the surveillance video . . . .").

In short, this Court should conclude that Gray forfeited his argument by failing to object to Zais's testimony. Nevertheless, Zais's identification was proper and helpful to the jury.

IV. Gray waived his jury instruction argument by failing to object to it.

Gray claims that the circuit court improperly instructed the jury on the first element of identity theft when it told the jury that a credit or debit card is personal identifying information. (Gray's Br. 43.) Gray believes that 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." (Gray's Br. 43.) Gray, however, waived his right to challenge that instruction when he failed to object to it.

Under Wis. Stat. § 805.13(3), a party's failure to object to the circuit court's proposed instructions at the instruction and verdict conference "constitutes a waiver of any error in the proposed instruction or verdict." *See also State v. Cockrell*, 2007 WI App 217, ¶ 36, 306 Wis. 2d 52, 741 N.W.2d 267 ("[T]he failure to object to a jury instruction the court proposes to give constitutes a waiver of any error in the proposed instruction."). "The purpose of the rule [in § 805.13(3)] is . . . to afford appellate review of the grounds for the objection." *Cockrell*, 306 Wis. 2d 52, ¶ 36 (alteration in original) (quoting *Air Wisconsin, Inc. v. North Cent. Airlines, Inc.*, 98 Wis. 2d 301, 311, 296 N.W.2d 749 (1980)).

This Court generally does not have the power to review challenges to jury instructions on appeal when a party did not properly preserve them in the circuit court. *Cockrell*, 306 Wis. 2d 52, ¶ 36. This Court may, however, grant relief based on forfeited claims of trial court error under its discretionary power to reverse in the interest of

justice or under the rubric of ineffective assistance of trial counsel.[4] *Id.* ¶ 36 n.12; *State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999).

Here, Gray failed to object to the portion of the jury instruction he now challenges. (R. 89:122–23.) In fact, when asked if he had any objection to the substance of the instruction, he responded, "I have no objection to this." (R. 89:123.) Because Gray failed to object to the instruction, he waived his argument that the jury was not properly instructed.

And regardless, the identity theft statute specifically defines a personal identification document as an "individual's card" if "it can be used, alone or in conjunction with another access device, to obtain money, goods, services, or any other thing of value or benefit, or if it can be used to initial a transfer of funds." Wis. Stat. § 943.201(1)(a)2. Thus, because a credit or debit card clearly qualifies under the statute, the court was not wrong to instruct the jury on that point.

V. The State presented sufficient evidence at trial to enable a reasonable jury to find Gray guilty of identity theft.

Finally, Gray contends that the State failed to present sufficient evidence to convict him. (Gray's Br. 33.) Specifically, he claims that because the State presented no evidence that Gray made "any overt and affirmative representations that he was [KJ], or that he had her

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[4] Gray has never claimed that the real controversy was not fully tried because of the challenged instruction nor has he claimed his counsel was ineffective. Accordingly, this Court should not grant relief under its discretionary power to reverse in the interest of justice or under the rubric of ineffective assistance of trial counsel.

authority to use [her] cards," the State failed to satisfy the representation element of the crime of identity theft. (Gray's Br. 33.) Gray is wrong. In using KJ's card to complete the transactions, Gray was representing that he was KJ (the cardholder) or that KJ had authorized or consented to the purchases. Thus, the State presented evidence sufficient to meet the representation element when it showed videos of Gray using the victim's card for each of the transactions.

A. Standard of review

Whether the evidence is sufficient to sustain a guilty verdict is a question of law subject to this Court's de novo review. *State v. Smith*, 2012 WI 91, ¶ 24, 342 Wis. 2d 710, 817 N.W.2d 410.

That said, when reviewing a sufficiency of the evidence claim, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it." *Id.* "This high standard translates into a substantial burden for a defendant seeking to have a jury's verdict set aside on grounds of insufficient evidence." *State v. Hanson*, 2012 WI 4, ¶ 31, 338 Wis. 2d 243, 808 N.W.2d 390.

B. Using the debit or credit card of another person to purchase goods satisfies the representation element of identity theft.

The circuit court instructed the jury that to convict Gray of identity theft under Wis. Stat. § 943.201(2)(a), the State needed to prove the following four elements beyond a reasonable doubt:

1. Gray intentionally used a personal identification document of another;
2. To obtain goods or anything else of value or benefit;
3. That Gray acted without the authorization or consent of the owner and knew that the owner did not give authorization or consent; and
4. That Gray intentionally represented that he was the owner or was acting with the authorization or consent of the owner.

(R. 89:137–38.); *see also* Wis. JI–Criminal 1458 (2004).

Here, Gray alleges that the State failed to prove the representation element: that Gray intentionally represented that he was the cardholder or was acting with the authorization or consent of the cardholder. To decide this issue, this Court must interpret the identity theft statute.

"The purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State v. Ziegler*, 2012 WI 73, ¶ 42, 342 Wis. 2d 256, 816 N.W.2d 238 (citation omitted). Statutory interpretation "begins with the language of the statute." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). "[E]xcept for technical or specially-defined words, statutory language is given its common, ordinary meaning." *Id.* ¶ 45.

"[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in

relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46. Furthermore, the language of a statute is read in a manner that gives reasonable effect to each word in order to avoid surplusage. *Id.* If the language of a statute is clear and unambiguous, the statute is applied according to its plain meaning and the inquiry ceases. *Id.*

Here, the plain meaning of the statutory language in question—"representing that he or she is the individual [or] that he or she is acting with the authorization or consent of the individual"—is unambiguous. Wis. Stat. § 943.201(2). "Representation" is defined as "[a] presentation of fact — either by words or by conduct." *Representation*, Black's Law Dictionary (10th ed. 2014).

The act of using another's debit or credit card constitutes a representation because the individual using the card of another implies that he is either the cardholder or that he is acting with the cardholder's authorization or consent.

Furthermore, the act of using another's information need not be coupled with any additional act or expression to satisfy the identity theft statute. For example, in *State v. Baron*, 2009 WI 58, 318 Wis. 2d 60, 769 N.W.2d 34, the defendant accessed a coworker's email account and discovered a number of e-mails allegedly showing that the co-worker was having an extramarital affair. *Id.* ¶ 4. The defendant organized the e-mails into a single message and sent it to various individuals from his co-worker's account. *Id.* The defendant did not assert that he was his co-worker. Instead, the defendant addressed the messages with subject lines that were written in the third-person. *Id.*

The Wisconsin Supreme Court determined the defendant utilized his co-worker's personal identifying

information without consent and represented that he was his co-worker despite the fact that the defendant did not assert himself to be the e-mail's owner, but rather drafted the e-mail in third-person. *Id.* ¶ 50. The court concluded that the identity theft statute was applicable to the defendant and noted the "identity theft statute is limited in that it applies only when one has stolen another person's identity and proceeds to use that identity with the intent to [obtain something of value; avoid civil or criminal process or punishment; or] harm the individual's reputation." *Id.* ¶¶ 49, 57. Thus, the court determined that "use" satisfied both the first and fourth elements of the identity theft statute.

In addition, a defendant represents himself as the owner of a personal identifying document even if he uses the document without actually adopting the owner's name. In *State v. Moreno-Acosta*, 2014 WI App 122, 359 Wis. 2d 233, 857 N.W.2d 908, the defendant used another individual's social security number to obtain employment. *Id.* ¶ 2. The defendant did not, however, use the name of the true owner of the social security number. *Id.* Instead, the defendant utilized the victim's personal identifying information, without her authorization or consent, while continuing to refer to himself by his own name. *Id.* ¶¶ 2–3 (noting that the social security number was included within "Moreno-Acosta's employment file"). This Court determined that the defendant's actions constituted identity theft, reasoning that the "use" of another's personal identifying document without actually adopting the owner's name constitutes a "representation" because a reasonable person could assume the user was the owner of the personal identifying document.

These principles make sense, as it would be absurd to require evidence that the suspected identity thief announced orally to the store clerk that he or she is the named cardholder or has the named cardholder's permission to use

the credit card to buy goods. A prospective buyer of retail goods in a department store does not typically announce orally that he or she is the named cardholder, as opposed to simply presenting the credit card along with the items to be purchased. As one court has observed in the context of the federal crime of money laundering: "To hold that a government [undercover] agent must recite the alleged illegal source of each set of property at the time he attempts to transfer it in a 'sting' operation would make enforcement of the statute extremely and unnecessarily difficult" because "'legitimate criminals,' whom undercover agents must imitate, undoubtedly would not make such recitations before each transaction." *United States v. Arditti*, 955 F.2d 331, 339 (5th Cir. 1992), *cert. denied*, 506 U.S. 998 (1992), and *cert. denied*, 506 U.S. 1054 (1993).

As applied here, a reasonable person would infer that a card user is either the cardholder or is acting with the cardholder's authorization or consent when the card user presents a debit or credit card for payment. This is because, when using a debit or credit card, the user is representing that he is the individual who is responsible for the payment or that the cardholder authorized his use. Here, the representation element of the identity theft statute is met because Gray represented that he was KJ or that he was acting with KJ's authorization or consent when he used her credit and debit cards to purchase goods. Consequently, this Court should hold that the evidence presented at trial was sufficient to enable a reasonable jury to find Gray guilty of identity theft.

C. Gray's arguments are not persuasive.

Gray argues that Wis. Stat. § 943.201(2)(a) "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." (Gray's Br. 34.) Gray provides no legal support for that position. Furthermore, as noted above, the supreme court's decision in *Baron* demonstrates that the stand-alone act of using another's information can satisfy the identity theft statute.

Gray also argues that interpreting the statute as the State suggests would "reduce[ ] the fourth element to a nullity." (Gray's Br. 35.) Gray essentially contends that distinct evidence must be presented for each element of an offense. But there is no legal reason why a single act cannot satisfy multiple elements of one crime, especially when a single act can form the basis for conviction of multiple crimes. Wis. Stat. § 939.65. *See also State v. Pohlhammer*, 78 Wis. 2d 516, 522, 254 N.W.2d 478 (1977) ("The same act may be the basis for multiple prosecutions.")

In addition, using the same evidence to satisfy more than one element of a crime does not eliminate the purpose of each element or render one of the elements superfluous. For example, the first element of the identity theft statute states that it is a crime to "intentionally use[ ], attempt[ ] to use, or possess[ ] with intent to use any personal identifying information or personal identification document of [another]." Wis. Stat. § 943.201(2). On the other hand, the fourth element denotes the aspect of representation, which is satisfied if the defendant "represent[ed] 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." *Id.* The statutory language makes it clear that the first and fourth elements address separate components of the act of identity theft. While a single act may prove multiple elements, each element serves a distinct purpose and is not reduced to a nullity by the submission of one act that proves two or more elements. In other words, while the evidence may be the same, the evidence is proving different parts of the statute.

Finally, Gray argues that if the representation element encompasses use, then identity theft is no different than the crime of fraudulent use of a credit card. (Gray's Br. 37.) It does not, however, matter that Gray's conduct underlying the identity theft statute also constitutes fraudulent use of a credit card. Under Wis. Stat. § 939.65, "if an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions" – so long as double jeopardy permits, *Mack v. State*, 93 Wis. 2d 287, 301, 286 N.W.2d 563 (1980), and so long as the choice is not based "upon an unjustifiable standard such as race, religion, or other arbitrary classification." *State v. Cissell*, 127 Wis. 2d 205, 215, 378 N.W.2d 691 (1985), *cert. denied*, 475 U.S. 1126 (1986); *see also United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979).

In sum, this Court should affirm because the State presented sufficient evidence Gray committed the crime of identity theft.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying the postconviction motion.

Dated this 10th day of November, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,624 words.

Dated this 10th day of November, 2017.

_____
JENNIFER R. MCNAMEE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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 Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 10th day of November, 2017.

_____
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