

RECEIVED

WISCONSIN COURT OF APPEALS
District IV

05-23-2017

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

Appeal No. 2017AP000620 CR
Circuit Court Case No. 2015CF002355

CHRISTOPHER A. MASON,

Defendant-Appellant.

On appeal from Judgment of Conviction
in the Circuit Court for Dane County,
the Honorable Stephen E. Ehlke, Circuit Judge, presiding.

**DEFENDANT-APPELLANT'S
BRIEF and APPENDIX**

ZICK LEGAL LLC
Vicki Zick
State Bar No. 1033516
Attorneys for Defendant-Appellant

475 Hartwig Boulevard
PO Box 325
Johnson Creek, WI 53038
920-699-9900

TABLE OF CONTENTS

Table of Authorities.....	ii
Issues Presented.....	1
Statement on Oral Argument	1
Statement on Publication.....	1
Statement of the Case.....	2
Standard of Review	6
Argument.....	6
I. The statute	7
II. Mere use of a credit card does not prove the fourth element of the identity theft statute.....	9
III. The State’s position and the circuit court’s cannot be reconciled with this Court’s <i>Clacks</i> decision	14
Conclusion.....	15
Certification.....	16
Appendix	

TABLE OF AUTHORITIES

WISCONSIN CASES

<i>State v. Baron</i> , 2008 WI App 90, 312 Wis.2d 789, 754 N.W.2d 75	11
<i>State v. Clacks</i> , 2011AP338, unpublished slip op., (WI App 2011)	14
<i>State v. Dowdy</i> , 2012 WI 12, 338 Wis.2d 565, 808 N.W.2d 691	9
<i>State v. Moreno-Acosta</i> , 2014 WI App 122, 359 Wis.2d 233, 857 N.W.2d 171	12
<i>State v. Peters</i> , 2003 WI 88, 263 Wis.2d 475, 665 N.W.2d 171	12
<i>State v. Poellinger</i> , 151 Wis.2d 493, 451 N.W.2d 752 (1990)	9
<i>State v. Rimmer</i> , 2010AP2679, unpublished slip op., (WI App 2011)	12
<i>State v. Wulff</i> , 207 Wis.2d 143, 557 N.W.2d 813 (1997)	6

OTHER MATERIALS

Wis. J.I. – Criminal 1458 (2004)	8
--	---

WISCONSIN STATUTES

943.201(2)	7
943.42(5)(a)	12

ISSUE PRESENTED

Whether mere use of another's personal identifying information proves the fourth element of the identity theft statute, namely that the user represented that he was the other individual.

Answered by the trial court: Yes. Anytime a person presents a credit card to a merchant he or she implies he or she is the owner of the card.

STATEMENT ON ORAL ARGUMENT

Because the briefs should fully cover the issue in this case, oral argument is not recommended.

STATEMENT ON PUBLICATION

Because this case would announce a new rule of law and answer the question left unanswered by the *Clacks* decision, publication is recommended.

STATEMENT OF THE CASE

This case begins in November 2015 with the filing of a criminal complaint in *State v. Christopher A. Mason*. (R2). The complaint charged Mason with burglary, with carrying a concealed weapon, with possession of THC, with two counts of misdemeanor theft, and with thirteen counts of identity theft. (R2). Allegedly, Mason had broken into a Dane County residence, had stolen a credit and a debit card, and then used these cards to make various purchases over a one-day period in September 2015. (R2:5-10).

Mason pled not guilty to the charges and demanded a trial by jury. (R75:5). Before trial began the prosecutor dismissed the THC charge and the concealed weapon charge.

(R80:3). Thus, on September 29, 2016, Mason proceeded to trial on the thirteen counts of identity theft contrary to § 943.201(2)(a), Stats., two counts of theft contrary to § 943.20(1)(a & d), and one count of burglary contrary to § 943.10. (R81:13-15).

The State's case consisted of nine witnesses: the victim, two of the victim's neighbors, two bank officers, two Dane County detectives, one City of Madison police officer, and the manager of a pawn store. The victim testified as to her losses. (R81:63-80). The neighbors testified to seeing a suspicious man in the victim's neighborhood the morning of the burglary. (R81:38:53). The bank officers testified to business records that tracked the credit card transactions before the cards were reported stolen. (R81:53-61). Law enforcement testified about their investigations and what led them to Mason. (R81:80-148). And finally, the pawn store manager testified that Mason had pawned some of the jewelry taken from the victim's house. (R81:148-55).

Physical evidence consisted mostly of photos, but three videos were also admitted. (R81:107, 122, 139). Two of the videos showed an individual using a card at a Mobil station the morning of the burglary. (R81: Exs. 17 & 26). A third one showed an individual using a card at a Burger King a short time later. (R81: Ex. 24).

Mr. Mason did not testify. At the close of the plaintiff's case defense counsel moved for a directed verdict on grounds that the State had failed to prove the fourth element of identity theft and also that it had failed to prove a false representation in the theft by false representation charge. (R81:168-72). As for the burglary and the other theft charge, counsel said generally the State had not met its burden. (R81:172).

As to the burglary and the ordinary theft charge, the court denied the motion (R81:173), but reserved its ruling on the theft by false representation charge and the identity theft charges until it could read the *Clacks* case. Trial was over for the day anyway so a decision could wait. (R81:173-75).

The next morning and before the jury returned, the prosecutor voluntarily dismissed the theft by false representation charge agreeing with defense counsel that insufficient evidence had been introduced to prove that charge. (R82:4). And after thinking about it and after reading *Clacks* and after hearing more argument the court chose not to dismiss the identity theft charges. (R82:14). Thus, when the jury returned the court instructed it on burglary, ordinary theft, and identity theft. (R82:25-33).

After seven hours of deliberation the jury returned a verdict of guilty on only two of the thirteen counts of identity theft and a verdict of guilty on the remaining theft count. (R82:75). As to the remaining counts of identity theft and as to the burglary charge, the jury was deadlocked resulting in a mistrial on those counts. (*Id.*).

About sixty days after verdict the court sentenced Mason as follows:

Identity theft: one year of initial confinement followed by three years of extended supervision on each count, concurrent with each other.

Theft: nine months in the county jail, concurrent with the identity theft counts. (R83:14-15).

Mason promptly filed a Notice of Intent to Seek Postconviction Relief and this appeal followed. (R64).

STATEMENT OF FACTS

Around 8:00 – 8:30 the morning of September 17, 2015, a suspicious black automobile with round tail lights was spotted driving slowly around a small Town of Cross Plains neighborhood. (R2:6). A neighborhood resident saw it and reported it to the Dane County Sheriff's Department. (*Id.*). Another nearby resident, a Mr. Glaze, may have seen it too, because he talked to the driver of a dark-colored car shortly before the stranger got into it and drove away. (R81:45-46). The stranger was a young black male who was well-spoken. (R81:45). Glaze spotted him peering into his living room window and when he went to the door to see what the young man was up to, the man said he wanted money; he had run out of gas. (R81:46). Glaze told him "no" and after the fellow got into the dark-colored car and drove off, Glaze called 9-1-1. (R81:47).

About an hour later a black car with round tail lights purchased some gas at the Middleton Mobil on nearby North Pleasant View Road. (R2:8). The driver, a black male with dreadlocks and a beard, paid for it with a debit card. (*Id.*) Later that morning, just before noon, S.H. called the Dane County Sheriff's Department to report that someone had broken into her home that morning and had stolen that particular debit card. (R2:5). The thief, S.H. said, had also taken a credit card, two of her TV sets, a computer, \$200 in cash, birth certificates and other family documents, along with some jewelry. (*Id.*).

Deputy Finch of the Dane County Sheriff's Department, who was investigating the matter, advised S.H. to report her cards stolen and so she did. (*Id.*). But not before her credit card was used to make the following purchases:

12:00 p.m.	Burger King	\$ 22.96
01:27 p.m.	Open Pantry	19.48
01:36 p.m.	Walgreen's	14.07
01:41 p.m.	Speedway	13.90
01:47 p.m.	Stop n Go	18.08
01:22 p.m.	PDQ	16.20
02:51 p.m.	Family Dollar	8.86
04:15 p.m.	Speedway	36.61
03:55 p.m.	Speedway	48.80
02:23 p.m.	PDQ	16.20
06:11 p.m.	Finish Line	205.07

(Ex. 9).

All totaled, including the debit card purchase, the thief had made \$447 in purchases with S.H.'s cards.

The next day, September 18th, City of Madison police officers notified Deputy Finch that they had spotted a vehicle fitting the description of the mysterious black car and the driver fit the description of the man pumping gas in the video from the Middleton Mobil. (R2:6). They had the fellow in custody due to outstanding warrants. (*Id.*). His name was Christopher A. Mason. (*Id.*). At the time of the stop police recovered marijuana from Mason's person and a 7-inch knife from beneath his driver's seat. (R2:8).

With this information Deputy Finch went to speak to Mason. (R2:6). Mason acknowledged buying gas with a debit card, but denied stealing the card. (R2:6-7). Mason told Finch he found the debit card along with a credit card on the floor of a gas station. (R2:7). He said later he received the cards from a man he knew by the name of Snake. (R2:9). When shown the video from the Middleton Mobil, Mason acknowledged it was him pumping gas, but he continued to deny committing any burglary. (R2:7).

Later, when questioned about pawning jewelry at University Coin and Jewelry in Middleton, Mason first denied that too. (R2:8). But pawn store records showed that on September 18th the store bought a green stone ring, two blue stone rings, a pendant and two heart-shaped necklaces from a man identified as Christopher Mason. (R2:7). The rings and necklaces belonged to S.H. (*Id.*).

STANDARD OF REVIEW

The determination of whether the evidence satisfies the legal elements of the charge constitutes a question of law that this Court reviews independently. *State v. Wulff*, 207 Wis.2d 143, 151-54, 557 N.W.2d 813 (1997). If this Court determines that the evidence is insufficient, it must reverse the conviction and remand to the circuit court with instructions to enter a judgment of acquittal. *Id.* at 145.

ARGUMENT

In this appeal, Mason argues that the circuit court should have granted his motion for a directed verdict and dismissed all thirteen counts of identity theft. The reason therefore is that at the time the State rested its case, it had failed to introduce any evidence of the fourth element of identity theft, namely that Mason had used S.H.'s credit card while representing that he was S.H. It is Mason's position that without an authorizing signature or some other evidence showing that Mason held himself out to be S.H., the State not only failed to meet its burden of proof on the fourth element, but more importantly it failed to prove identity theft.

The State's position at trial was that mere "use" of a credit card proves the fourth element. (R82:9). It argued that anytime you use a financial transaction card, you're

representing yourself as being the person who is the holder of the card. (*Id.*).

The circuit court, much like the State, took the view that anytime you present a credit card you are implying that you are the owner of the card.

If I walk up with the card and hand it to you to use to buy services, and I say nothing, I am implicitly saying I am this person without expressly saying it. (R82:12)

I'm denying the motion to dismiss those counts. I do believe that an implicit representation that you are the card holder is made when a person submits a card, and I think there is enough evidence from which a jury drawing reasonable inferences from the record could conclude that either nothing was said or something was said affirming that you're the person. (R82:14).

Mason submits that the position of the State and the circuit court cannot be reconciled with the rule that a statute should be read so that no part of it is rendered surplusage. If the "use" necessary to satisfy the first element in all cases satisfies the fourth element, then the fourth element is superfluous.

He further contends that the State's position and that of the trial court cannot be squared with this Court's *Clacks* decision.

1. The Statute

The statute at issue 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.

Wis. Stats. § 943.201(2) (underline added).

On its face, the statute requires the State to prove four elements:

- (1) that the defendant used the credit card of another;
- (2) to obtain something of value;
- (3) without the owner's consent; and
- (4) by representing that he is the owner.

The jury instruction for this charge states the same:

**1458 UNAUTHORIZED USE OF AN INDIVIDUAL'S
PERSONAL IDENTIFYING INFORMATION OR
DOCUMENTS -- § 943.201(2)**

Statutory Definition of the Crime

Section 943.201(2) of the Criminal Code of Wisconsin is violated by one who 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, [to obtain credit, money, goods, services, employment or anything else of value or benefit] [to avoid civil or criminal process or penalty] [to harm the reputation, property, person, or estate of the individual] without authorization or consent of the individual and by representing that [he or she is the individual] [he or she is acting with the authorization or consent of the individual] [that the information or document belongs to him or her.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements are present.

1. The defendant intentionally used ... personal identifying information ... of
2. The defendant intentionally used ... personal identifying information ... to obtain credit, money, goods, services
3. The defendant acted without the authorization of (name of individual) and knew that (name of individual) did not give authorization or consent.
4. The defendant intentionally represented that he was (name of individual).

Wis. J.I.- Criminal 1458 (2004) (underline added).

2. Mere use of a credit card does not prove the fourth element of the identity theft statute.
-

For a criminal conviction to satisfy due process, the State must prove each essential element of a charged crime beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

There is no dispute that the statute contains four elements. The only issue here is whether mere “use” proves the fourth element. For several reasons Mason says “no.”

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. To read the statute as the trial court did, or as the State did, is to reduce the fourth element to a nullity. If “using” the card proves both the first and the fourth elements, then the fourth element will be proven

automatically in every case as soon as the first element is proven, making the fourth element wholly unnecessary. It becomes surplusage.

Even assuming the circuit court's rationale is correct – that a person implies he or she is the card owner when he or she presents the card -- then it begs the question as to why the legislature bothered to add the fourth element to begin with. In other words, if a representation of ownership is always implicit in the act of presenting the card, then the legislature really had no reason to even add the fourth element. The fourth element is always proven by the first.

But the legislature did add the fourth element. Thus, assuming again that the circuit court is correct – that presenting always implies ownership – then the legislature must have envisioned that some act beyond presenting the card was necessary to prove the fourth element. As discussed more fully below, Mason submits that what the legislature had in mind was the signing of a receipt, entering a PIN, entering a CVV code, checking an “authorization” box on a touchscreen, clicking the “I accept” button on a terms and conditions screen, or any number of like kind of steps whereby the user of the card represents that he is authorized to use the card or is the owner of the card.

Second, to assume using the card or presenting the card satisfies the fourth element in all cases seems a bit ambitious. The fourth element consists of three distinct and different representations, not one:

1. represented that he or she is the individual;
2. represented that he or she was acting with the authorization or consent of the individual; or

3. represented that the information or document belonged to him or her.

It is difficult to imagine that by doing nothing more than quietly swiping a credit card one can convey three completely different messages to a merchant.

Even assuming *arguendo* that with one swipe you can convey these three different messages, then this too begs the question as to why the legislature would bother to itemize these three acts of misrepresentation. In other words, if just using the card implies you are the card owner in all cases, then identity theft is proven in all cases with the first option. There is no reason to have options two and three; they just become surplusage.

But again, the legislature did specifically list these three representations, suggesting further that some other act is necessary to prove element four. For example, forging the card owner's signature on a credit card receipt would qualify as the first kind of representation. It would suggest to the merchant that the signer is the owner of the card.

Entering a debit card PIN would qualify as the first representation too as well as the second - acting with authorization. After all, one would not have the owner's debit card and PIN both if the owner did not consent to the user's use of the card. The whole point of a confidential PIN is to keep unauthorized users from using the card.

Providing a CVV (credit card verification value) number to an online merchant is an example of how one would make the third kind of representation. It would represent to the merchant that the user has the credit card in

his or her possession and has not just stolen the credit card number.

Third, and perhaps most important, what this statute criminalizes is the whole act of using someone's identity without their consent. *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 whole act of using someone's identity without their permission*). Without proving stolen identity, all one is really proving is fraudulent use of a credit card.¹ The conduct being punished by § 943.201(2), Stats. is the stealing of someone's identity, not the defrauding of a merchant with a stolen credit card. So it follows that the user of the card must take some additional step to take on the identity of the owner. As above, in the case of a debit card it might be entering the owner's PIN. In the case of a credit card it might be forging the owner's name on a receipt. But it must be some act that says "I am the owner" of this information. It must be an act where the user takes on the identity of the owner and pretends to be him or her.

In cases where the State has successfully prosecuted under this statute the assumption of another's identity has been readily apparent. In *State v. Moreno-Acosta*, 2014 WI App 122, ¶2, 359 Wis.2d 233, 857 N.W.2d 908, the defendant stole another's social security number, put it on a phony social security card to masquerade as a United States citizen, and used the card to obtain employment. In *State v. Baron*, 2008 WI App 90, ¶2, the defendant stole another's email address and used it to send emails that appeared to come from the

¹ Fraudulent use of a financial transaction card ... is committed by one who, with intent to defraud another, uses a financial transaction card that is stolen for the purpose of obtaining money, goods, services, or anything else of value. Wis. J.I.-Criminal 1497 (2004); *See also* Wis. Stats. § 943.42(5)(a)

owner of the address. In *State v. Peters*, 2003 WI 88, ¶¶1-3, 263 Wis.2d 475, 665 N.W.2d 171, the defendant stole another's name and used the other's identity to avoid warrants and obtain lower bail. In *State v. Rimmer*, Nos. 2010AP2679 & 2010AP26880, unpublished slip op. ¶2, (WI App Nov. 22, 2011), the defendant stole another's driver's license information to obtain credit cards in that person's name to make purchases. In each of these examples, the defendants did more than just steal personal identifying information. They used the stolen information to masquerade as that other person.

But in our case here we are missing this extra step – the step where Mason assumes the identity of S.H. We have no forged credit card receipts. We have no evidence that Mason entered a confidential PIN. We have no witness that says Mason said “I am S.H.” So at best, we have proof of elements one, two and three, but proof of four is still missing. In other words we do not have proof of identity theft.

As this Court said in the *Baron* case mentioned above:

[T]he identity theft statute neither prohibited Baron from disseminating information about Fisher nor prevented the public from receiving that information. Instead, the statute prohibited Baron from purporting to be Fisher when he sent the emails.

State v. Baron, 2008 WI App 90, ¶14.

In summary, to hold that mere use of another's credit card proves the fourth element creates surplusage in the statute, whereas the interpretation that pays homage to all the words in the statute, is that something more than mere use must be shown to prove identity theft. The prosecution must show some other act whereby the user takes on the identity of

the rightful owner to prove the fourth element. Whether it be proof of a forged signature, or evidence of an entered PIN, or a false statement from the defendant, it still must be something more than the passive act of swiping a credit card.

3. The State's position and the circuit court's cannot be reconciled with this Court's *Clacks* decision.

In 2011, this court issued an opinion in *State v. Clacks*, 2011AP338, unpublished slip. op., (WI App Dec. 22, 2011).² In the case, Clacks argued just as Mason does here, that the statute requires some evidence of an intentional misrepresentation over and above the act of merely using the card to prove identity theft. *Id.* ¶15.

What distinguishes *Clacks* from Mason's case, however, is that in *Clacks* the State had introduced evidence that Clacks had signed a credit card receipt. *Id.* ¶19. In fact, in deciding the case this Court made this very point in response to Clacks' argument:

We conclude it is unnecessary to decide whether Clacks is correct that the fourth element must be proved by evidence in addition to that necessary to prove the first element. Even if we assume for purposes of discussion that this is true, we agree with the State that there is additional evidence in this case. *Id.* ¶17.

Thus, even though this Court left for another day the question Mason presents in this case, it nonetheless agreed that signing the credit card receipt is the kind of evidence that proves the fourth element.

² Coincidentally, *Clacks* was decided by the Honorable Stephen E. Ehlke, the same judge who presided over Mason's case.

Signing the receipt is a representation that the individual presenting the card is authorized by [the owner] to incur a charge on the account.

Clacks, 2012 WI App 11, ¶19.

By comparison, Mason's case does not contain any evidence comparable to the signed receipt in *Clacks*.

Insofar as the circuit court had read *Clacks* and was aware that the question presented here was not answered in *Clacks*, it never mentioned the importance of the receipt in the *Clacks* decision and the absence of any receipt in this case. (R82:5). Mason submits the signed receipt makes all the difference. It explains why *Clacks* was guilty of identity theft and Mason is not.

CONCLUSION

For the foregoing reasons, the defendant, Christopher A. Mason, asks this Court to reverse his judgment of conviction on the two counts of violating § 943.20(2)(a), Stats.

Dated this _____ day of May 2017.

ZICK LEGAL LLC
Attorneys for defendant-appellant

Vicki Zick
SBN 1033516

475 Hartwig Boulevard
P.O. Box 325
Johnson Creek, WI 53038
920 699 9900
920 699 9909 FAX
zwlawvz@tds.net

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stats. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 3,828 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding appendix, if any, which complies with the requirements of s. 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 _____ day of May 2017.

ZICK LEGAL LLC
Attorneys for defendant-appellant

Vicki Zick
State Bar No. 1033516

475 Hartwig Boulevard
P.O. Box 325
Johnson Creek, WI 53038
920 699 9900
920 699 9909 FAX
zwlavvz@tds.net