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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case No. 2017AP620-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER A. MASON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION
ENTERED IN DANE COUNTY CIRCUIT COURT, THE
HONORABLE STEPHEN E. EHLKE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Under the identity theft statute, does the use of another's debit or credit card prove the defendant intentionally represented that he was the cardholder or that he was acting with the cardholder's authorization or consent?

Answered by the trial court: Yes. When an individual presents a debit or credit card, he or she purports to be the cardholder or implies that he or she is acting under the cardholder's authorization or consent.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is warranted to explain the meaning of the "representation" element of the crime of identity theft under Wis. Stat. § 943.201(2). The issue in the present case was previously raised and left unanswered in *State v. Clacks*, No. 2011AP338-CR, 2011 WL 6413811 (Wis. Ct. App. Dec. 22, 2011) (unpublished), an unpublished decision, and is likely to recur until resolved in a published decision.

INTRODUCTION

Christopher A. Mason appeals his convictions for identity theft. At trial, the State's evidence established that on September 17, 2015, Mason broke into S.H. and R.H.'s residence in Cross Plains and stole a variety of goods. Among the stolen items were S.H.'s credit and debit cards. On the date of the burglary, both cards were used to make several unauthorized purchases.

Mason claims the State failed to provide sufficient evidence of the fourth, or "representation," element of identity theft. The State maintains that the "use" of another's debit or credit card to obtain goods satisfies the "representation"

element. Furthermore, the State contends that the evidence adduced at trial shows that Mason used S.H.'s debit and credit cards to obtain goods, and therefore implied that he was S.H. or that he was acting with S.H.'s authorization or consent.

STATEMENT OF THE CASE

On September 17, 2015, S.H. and R.H. returned to their residence between 11:30 and 11:45 a.m. and noticed that the back door had been kicked in. (R. 82:64.) S.H. and R.H. proceeded into their home and discovered that various items had been stolen, including S.H.'s debit and credit cards. (R. 2:6; 82:68.) S.H. and R.H. then contacted the police. (R. 82:64.) The sheriff's department arrived, and, while surveying the scene, an officer suggested that S.H. and R.H. contact their bank and credit card company. (R. 82:65.)

The bank and credit card company advised S.H. and R.H. that the debit and credit cards were used in a series of fraudulent transactions. (R. 82:65–66.) S.H.'s debit card was first used at 9:48 a.m. at a Mobil gas station in Middleton to purchase fuel. (R. 57:Ex. 2; 82:33–34.) S.H.'s credit card had also been used in numerous, fraudulent transactions at various locations. (R. 57:Ex. 9.)

Following the information from the bank and credit card company, a detective contacted the Mobil station. (R. 82:100–01.) The detective provided the timeframe during which S.H.'s card had been used and reviewed the station's video surveillance tapes. (R. 82:101.) One tape showed a black Chevrolet parked at a gas pump. (R. 57:Ex. 17; 82:107.) The driver purchased fuel by inserting a card at the pump at the same time S.H.'s debit card had been used. (R. 57:Ex. 17; 82:107–09.) Police also recovered video evidence from a Burger King at which S.H.'s credit card had been used. (R. 82:138–39.) According to the surveillance tape, a black Chevrolet was

stopped outside the Burger King pay window at the same time S.H.'s credit card was used. (R. 57:Ex. 24; 82:140.) From the video at the Mobil station, the detective obtained a partial license plate number and notified local law enforcement to be on the lookout. (R. 82:110.)

On September 18, 2015, police officers took Mason into custody after they observed him driving a black Chevrolet that matched the description of the car seen in the surveillance videos. (R. 82:88.) A deputy later interviewed Mason and confronted him regarding the use of the stolen cards. (R. 82:91.) According to the deputy, Mason "stated that he initially found a card in an unknown store and decided to use the card, knowing that it was not his and that the card was possibly stolen." (R. 82:91–92.) Mason also indicated that he knew he did not have permission to use the cards. (R. 82:92–93.) Finding this account unbelievable, the deputy further questioned Mason, who later changed his story, stating that he received the stolen cards from someone named "Snake" as a favor. (R. 82:112.)

In November, 2015, the State charged Mason with seventeen criminal counts including twelve counts of identity theft contrary to Wis. Stat. § 943.201(2)(a).¹ (R. 2.) Mason

¹ In addition to the twelve counts of identity theft, the State also charged Mason with one count of burglary in violation of Wis. Stat. §§ 943.10(1m)(a), 939.50(3)(f), 939.05; one count of carrying a concealed weapon in violation of Wis. Stat. §§ 941.23(2), 939.51(3)(a); one count of possession with intent to deliver THC in violation of Wis. Stat. §§ 961.41(1m)(h)1, 939.50(3)(i); and two counts of misdemeanor theft in violation of Wis. Stat. §§ 943.20(1)(a), (d), 943.20(3)(a), 939.51(3)(a). (R. 2.) Prior to trial, the prosecution voluntarily dismissed the count of carrying a concealed weapon and possession with intent to deliver. (R. 81:3.) At the close of trial, prosecution also dismissed one of the misdemeanor theft charges. (R. 83:4.)

pled not guilty to the charges and trial commenced on September 28, 2016. (R. 76:2–5; 82:1.)

At the close of the State’s case, Mason moved for a directed verdict, claiming the State failed to meet its burden. (R. 82:168.) Specifically, Mason argued that the State did not prove that Mason represented that he was S.H. or that he was acting with S.H.’s authorization or consent. (R. 82:169.) The circuit court denied the motion, believing that when an individual presents a personal identifying document, such as a debit or credit card, the individual represents that he or she is the person named on the card or has authorization from that person to use the card. (R. 83:14.)

The jury returned a verdict on September 29, 2016, finding Mason guilty of counts two and three of identity theft.² (R. 83:76.) On December 5, 2016, the court sentenced Mason to two concurrent sentences of one year of initial confinement, followed by three years of extended supervision.³ (R. 84:14.) Mason subsequently filed this appeal, challenging only his identity theft convictions.

SUMMARY OF THE ARGUMENT

Mason’s challenge to the sufficiency of the evidence on the fourth element of identity theft lacks merit. The language of the identity theft statute is clear and unambiguous. Words or conduct, such as the act of “using,” constitute a “representation,” which satisfies the fourth element under Wis. Stat. § 943.201(2). Although various types of evidence

² The jury also found Mason guilty of count sixteen of misdemeanor theft. (R. 83:76.) However, the jury was deadlocked regarding the remaining counts—count one and counts four through thirteen—which resulted in a mistrial on those counts. (R. 83:78.)

³ Judge Ehlke also sentenced Mason to nine months in the county jail, concurrent with the first two sentences, on count sixteen. (R. 84:14–15.)

may be used to establish an element of a crime, separate and distinct evidence need not be provided for each element. A single act may satisfy more than one element. In addition, the identity theft statute does not require any additional act beyond “use” under the circumstances of this case. Rather, the act of providing the debit or credit card of another person to purchase goods satisfies the “representation” element of identity theft. Here, the evidence adduced at trial sufficiently proves that Mason intentionally represented that he was the cardholder or that he was acting with the authorization or consent of the cardholder.

STANDARD OF REVIEW

In reviewing the sufficiency of the evidence to support a conviction, the court “view[s] the evidence in the light most favorable to the finding.” *State v. Poellinger*, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). “Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted.” *Id.* “[A]n 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 [reasonable jury] could have found guilt beyond a reasonable doubt.” *Id.* at 508. Thus, great deference is given to the trier of fact as the court “must examine the record to find facts that support upholding the jury’s decision to convict.” *State v. Hayes*, 2004 WI 80, ¶ 57, 273 Wis. 2d 1, 681 N.W.2d 203.

ARGUMENT

Sufficient evidence was adduced at trial to enable a reasonable jury to find Mason guilty of identity theft.

A. Applicable law.

To convict Mason of identity theft under Wis. Stat. § 943.201(2)(a), the jury was instructed that the State was required to prove the following four elements beyond a reasonable doubt:

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

(R. 83:31–32.); *see also* Wis. JI-Criminal 1458 (2004).

Courts employ statutory interpretation to determine the meaning of a statute “so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. The judicial branch yields great deference to the law, as enacted by the legislature. *Id.* Submission to the plain meaning of a statute requires that the process of statutory interpretation begin with the language of the statute, which is given “its common, ordinary, and accepted 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.” *Id.* ¶ 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.* Extrinsic sources, such as legislative history, must not be consulted unless the language is declared ambiguous and is therefore in need of further interpretation. *Id.*

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

In the present case, 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. Based on the above definition, a broad range of verbal or physical acts can constitute “representations.” An individual that uses the debit or credit card of another person implies that he is either the cardholder, or that he is acting under the cardholder’s authorization or consent. Both implications satisfy the fourth element of representation.

The identity theft statute does not require any additional act during which the defendant purports to be the owner of the personal identifying document. 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 the defendant did not assert himself to be the e-mail’s owner, but rather drafted the email 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 the defendant 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 found that

the defendant's actions constituted identity theft and affirmed his conviction. *Id.* ¶ 14. Specifically, this Court determined that the "use" of another's personal identifying document without actually adopting the owner's name constitutes a "representation" as a reasonable person could assume the user was the owner of the personal identifying document.

As previously noted, conduct constitutes a representation. The act of "using" is conduct, which can serve as a representation. By providing a debit or credit card, the user is purporting to be the cardholder or that the user is acting under the authorization or consent of the cardholder. The circuit court correctly recognized this when it denied Mason's motion for a directed verdict on the identity theft counts as he "believe[d] that an implicit representation that you are the cardholder is made when a person submits a card." (R. 83:14.)

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. Debit and credit cards constitute personal identifying documents as well as methods of payment by which the cardholder is held financially accountable. 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. Finances are often the most monitored portion of life. A reasonable person would therefore infer that the individual using the card is either the cardholder or is acting under the authorization of the cardholder.

In sum, this Court should find that the evidence presented at trial was sufficient to enable a reasonable jury to find Mason guilty of identity theft. Mason used S.H.'s personal identifying documents—a debit and a credit card—

without S.H.'s authorization or consent to obtain goods. Under the facts of this case, the "use" of another's debit or credit card satisfies the fourth element of identity theft. The act of "using" another's information constitutes a representation because a reasonable person would infer that a card user is either the cardholder or is acting with the cardholder's authorization or consent. Thus, the use of a debit or credit card under these circumstances establishes the "representation" element. The State need not establish additional steps to prove the defendant took the identity of the cardholder or that the defendant was operating with the cardholder's authorization or consent.

C. Mason's arguments that the evidence was insufficient are not persuasive.

Mason's first and second arguments address the same assertion that the circuit court's interpretation of the identity theft statute "reduce[d] the fourth element to a nullity." (Mason's Br. 9.) Specifically, Mason argues that permitting evidence to satisfy more than one element of the statute, namely, allowing evidence to prove both the first and fourth elements, renders the fourth element superfluous. (Mason's Br. 7, 9–10.) Asserting that evidence cannot satisfy more than one element, Mason essentially contends that distinct evidence must be presented for each element of an offense. (Mason's Br. 9–10.) Mason also asserts that "use" cannot satisfy the fourth element in all cases. (Mason's Br. 10.) Mason notes that the fourth element consists of three different representations—he or she is the individual, he or she is acting with the authorization or consent of the owner, or the personal identifying document belongs to him or her—and argues that the "use" of another's credit or debit card cannot convey each of the three representations. Wis. Stat. § 943.201(2); (Mason's Br. 10–11.) Specifically, Mason claims that if "use" implies ownership, the second and third

representations listed within the fourth element are rendered superfluous. (Mason’s Br. 11.)

However, a single act can form the basis for conviction of multiple crimes. Wis. Stat. § 939.65. The Wisconsin Supreme Court has noted “[t]he same act may be the basis for multiple prosecutions.” *State v. Pohlhammer*, 78 Wis. 2d 516, 522, 254 N.W.2d 478 (1977). Just as a single act may satisfy multiple convictions, there is no legal reason why a single act cannot satisfy multiple elements of one crime. Thus, the act of using the debit or credit card of another person to purchase goods satisfies both the first and fourth elements of “use” and “representation.”

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 completely different parts of the statute.

Further, a statute does not criminalize each of its elements standing alone. *Baron*, 318 Wis. 2d 60, ¶ 62. Rather,

each element of the statute must be satisfied. *Id.* It is the whole act, or the totality of the elements, that is criminalized. *Id.* Thus, it is further apparent that each element of a statute serves a separate purpose. The mere fact that the same communication or conduct can satisfy more than one element does not render an element redundant as each element itself is distinct.

Mason contends that under this interpretation of the statute, “the fourth element is always proven by the first.” (Mason’s Br. 10.) However, the statute also criminalizes attempted use and possession with intent to use. *See* Wis. Stat. § 943.201(2). The incorporation of these different possibilities permits the application of the identity theft statute in a variety of scenarios and case-specific circumstances where an individual’s identity has been stolen. While “use” may not constitute “representation” in one case, it may in another, just as it does in the present case. Due to the purpose of each individual element, the use of evidence of a singular act to satisfy more than one element does not nullify or render an element superfluous.

In his third argument, Mason claims that “[w]ithout proving stolen identity, all one is really proving is fraudulent use of a credit card.” (Mason’s Br. 12.) Mason argues that identity theft does not exist if an individual merely steals and uses another’s personal identifying document. *Id.* Instead, Mason asserts that an individual must take an additional step—entering a PIN number, forging the owner’s name on a receipt, verbally declaring to be the owner, etc.—to represent himself as the owner of the personal identifying document. *Id.*

In support of this argument, Mason cites several cases where the State has successfully prosecuted under the identity theft statute, including *Baron* and *Moreno-Acosta*, and contends that in these cases, the assumption of another’s identity has been readily apparent. (Mason’s Br. 12.)

However, the defendants in these cases did not take an “extra step” beyond the use of another’s information, as Mason claims. (Mason’s Br. 13.) Instead, the defendants used a personal identifying document of another person to obtain employment or to harm the reputation of the individual, just as Mason used S.H.’s debit and credit cards to obtain goods.

Like the defendant in *Baron*, who used a co-worker’s email to harm his co-worker’s reputation, Mason used S.H.’s debit and credit cards to obtain goods. The *Baron* court determined that the identity theft statute was satisfied despite the fact that the defendant had not directly purported to be his co-worker. A recipient of an email from the co-worker’s account would reasonably infer that it was the co-worker that sent the email rather than the defendant. Like the defendant in *Moreno-Acosta*, Mason utilized S.H.’s debit and credit cards without taking S.H.’s name.

These cases are analogous to the present case because a reasonable person would infer that the cards used in the transactions belonged to Mason or that he was acting with the cardholder’s authorization or consent. Thus, from *Baron* and *Moreno-Acosta*, it is apparent that courts have found the requisite “representation” to satisfy the fourth element of identity theft from evidence that the defendant used another’s personal identifying document or information because a reasonable individual would infer that the defendant was the owner or that he was acting with the owner’s authorization or consent.

Mason also cites this Court’s unpublished decision in *State v. Clacks* as persuasive authority for the proposition that “representation” requires something more than the use of another’s personal identification document. (Mason’s Br. 14.) In *Clacks*, the defendant made purchases with a stolen credit card and subsequently signed receipts for those purchases. *Clacks*, 2011 WL 6413811, ¶ 4. The defendant

made a similar argument, contending that the evidence was insufficient to prove the “representation” element. *Id.* ¶ 15.

Mason argues that *Clacks* is distinguishable from the present case because the State introduced evidence that the defendant had signed a receipt from one of the fraudulent transactions. (Mason’s Br. 14.) However, this Court held that “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,” disregarding *Clacks*’ contention that “the fourth element would be superfluous because it would automatically be proven in every case where the first element of the offense is proved.” *Clacks*, 2011 WL 6413811, ¶¶ 15, 17. Thus, while this Court concluded that the evidence of the signed receipt was “sufficient to establish the [representation] element,” this Court did not conclude that such evidence is required. *Id.* ¶¶ 17, 19. Without evidence that Mason had signed a receipt, the jury still determined that all four elements of identity theft were present. The fact that Mason had used the cards was enough for a reasonable jury to infer the requisite representation. Therefore, *Clacks* fails to offer any persuasive support for Mason’s contentions.

While an additional act such as signing a receipt, entering a personal identification number (PIN), or checking an authorization box would also satisfy the fourth element, the sole use of the card constitutes a representation. Therefore, evidence of “use” is sufficient in proving the “representation” element of identity theft. As “use” satisfies the fourth element, it is unnecessary to require evidence of any additional act in order to prove the defendant took on the identity of the owner.

CONCLUSION

For the aforementioned reasons, the State respectfully requests that this Court affirm the judgment of conviction.

Dated at Madison, Wisconsin this 1st day of August, 2017.

Respectfully submitted,

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⁴ The Department of Justice would like to acknowledge the assistance of Extern Anicka Purath in the preparation of this brief.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 4,144 words.

Dated this 1st day of August, 2017.

WARREN D. WEINSTEIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 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 1st day of August, 2017.

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Assistant Attorney General