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WISCONSIN COURT OF APPEALS
District IV

08-10-2017

**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 a Judgment of Conviction
in the Circuit Court for Dane County,
the Honorable Stephen E. Ehlke, Circuit Judge, presiding.

DEFENDANT-APPELLANT'S REPLY BRIEF

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

In its response the state cites to the *Baron* case for authority that “using” a credit card can satisfy the first as well as the fourth element of the identify theft statute. (Resp. Br. at 8). The state says that in *Baron* the supreme court determined that “mere use” satisfied both elements. (*Id.*). Mason totally disagrees.

By way of reminder, in the *Baron* case Baron used Fisher’s password to access Fisher’s email account. *State v. Baron*, 2009 WI 58, ¶4, 318 Wis.2d 60, 769 N.W.2d 34. After accessing the account, Baron found various emails suggesting Fisher might be engaged in an extramarital affair. *Id.* Baron then mischievously cut and pasted Fisher’s secret emails into a new email, and using Fisher’s email account, sent the new email to Fisher’s acquaintances with a subject line that said “What’s [Fisher] been up to.” *Id.* Baron did so to embarrass Fisher. *Id.* ¶5. On these facts Baron was guilty of identity theft.

Now the state claims that Baron, in his mischief, never pretended to be Fisher. (Resp. Br. at 8, [*Baron*] *did not assert that he was [Fisher]*). Taking this position, of course, allows the state to then argue that *Baron* stands for the proposition that Baron’s “mere use” of Fisher’s account satisfied both elements of the statute, because in the case Baron was found guilty of identity theft. (*Id.*). The state then uses this argument to make its point in Mason’s case, that mere use can satisfy both elements.

But the state misreads the case. The state has overlooked the fact that by using Fisher’s email account Baron

used Fisher's name to represent that he was Fischer. The fourth element comes into being in the *Baron* case by the particular nature of email. That is, the recipient either recognizes the sender by name or by email address, depending on the email program being used. Either way, the name or the address is unique to the sender, which in the case allowed Baron to masquerade as Fisher.

In fact, the *Baron* court stated explicitly that by doing what he did Baron represented that he was Fisher, clarifying that Baron had stolen Fisher's name. *Baron*, 2009 WI 58, ¶7. Baron pretended to be Fisher and that is how he committed identity theft.

In his concurrence, Justice Prosser fleshes out the necessity of taking on another's identity even further. For example, he says that if a person were to send documents from his own computer under his own name, he would have a defense under this statute. *Id.* ¶80. He says further that if a person distributed information anonymously he also would have a defense. *Id.* The point Justice Prosser is making is the crime is incomplete unless the sender also masquerades as the owner of the account, *to wit*, represents that he is the owner of the information being sent. *Id.* ¶81, [*Baron*] *intentionally misrepresented his role as the sender of the message.*

If one were to adopt the state's argument then Justice Prosser's would be incorrect. That is, according to the state, sending Fischer's private emails, even anonymously, would not be a defense because, according to the state, just using them always satisfies the fourth element. Using would complete the crime in all cases, contrary to Justice Prosser's point.

Justice Prosser makes the point in *Baron* that Mason makes in this appeal. Merely using a credit card does not satisfy the fourth element because nothing in Mason's use caused Mason to take on the identity of S.H. On the facts of Mason's case he did not say to anyone that he was S.H. He did he sign a receipt as S.H. Mason's identity remained anonymous, which as Justice Prosser points out, is a defense to the crime of identity theft. Without taking on the identity of the owner of the credit card the crime of identity theft is incomplete.

Thus, *Baron* does not support the state's position. Rather, read carefully, the *Baron* decision supports Mason's contention in this appeal that one must take on the identity of the victim to be guilty of identity theft.

The state also cites to the *Moreno-Acosta* case to support its argument that "merely using" another's personal identifying information can satisfy the fourth element. (Resp. Br. at 8-9). The state says that in *Moreno-Acosta* this Court specifically determined that the "use" of another's personal identifying document without actually adopting the owner's name constitutes a representation. (*Id.* at 9).

First of all, *Moreno-Acosta* does not say this at all. In its brief, the state offers no citation for this passage and Mason submits this particular passage is not contained anywhere in the decision.

Second, the issue in *Moreno-Acosta* was whether a defendant had to know that the personal identifying information he had stolen belonged to a real person. *State v. Moreno-Acosta*, 2014 WI App 122, ¶1, 359 Wis.2d 233, 857 N.W.2d 908. This was the issue in the case. Therefore, the court's opinion contains very little detail about the facts that

supported Moreno-Acosta's conviction in the circuit court. In other words, the issue on appeal was not one of sufficiency of the evidence. Consequently, the basic facts were contained in one short paragraph:

Moreno-Acosta, an undocumented immigrant worker, was accused of identity theft for using Kimberly Herriage's social security number to obtain employment at a McDonald's restaurant in Delavan, Wisconsin. At the jury trial, Herriage identified her social security number on a photocopy of a social security card that was in Moreno-Acosta's employment file. She testified that she did not know Moreno-Acosta and had never seen him before. She further stated that she had never given him permission to use her social security number. Rita Butke, the manager of the McDonald's where Moreno-Acosta worked, testified and identified that same social security number from the social security card Moreno-Acosta provided.

Moreno-Acosta, 2014 WI App 122, ¶2.

This was the sum total of the facts set forth in the court of appeals' opinion. One can infer that Moreno-Acosta obtained a phony social security card using his own name, but using Ms. Herriage's number. Apparently, Moreno-Acosta presented the phony card to Ms. Butke so that he could get a job at McDonalds. But we know little more than this. We could be missing important facts.

For example, if Moreno-Acosta signed the card one could argue that, by signing, he represented to Ms. Butke that the number printed on the card was his number, a representation that would satisfy the fourth element (*represented that the information or document belonged to him or her*). If Moreno-Acosta told Ms. Butke "this is my social security card," this representation too could prove up the fourth element. If he said "this is my social security number," this could possibly prove it up too. Each of these acts would go beyond merely using Ms. Herriage's social security

number. These additional acts could satisfy the necessary fourth element – representing that Ms. Herriage’s social security number was his own.

The point is, we do not have enough factual information to conclude what evidence supported the defendant’s conviction in the circuit court. We certainly cannot conclude based on the limited facts we are given that Moreno-Acosta did nothing more than “use” Ms. Herriage’s social security number to complete the crime of identity theft.

In summary, the *Baron* case supports Mason’s contention that one must do more than just “use” another’s credit card to commit identity theft. He or she must do something extra to satisfy the fourth element because the fourth element is how the unauthorized user steals the owner’s identity.

As for the *Moreno-Acosta* case, we do not know enough about the facts to say one way or the other whether Moreno-Acosta did something extra to satisfy the fourth element. All we know is that he was convicted of identity theft and the issue on appeal was not whether the evidence was sufficient to support his conviction.

CONCLUSION

For the foregoing reasons and for the reasons set forth in his first brief, defendant Christopher Mason respectfully asks this Court to reverse his judgment of conviction on the two counts of violating § 943.20(2)(a), Stats.

Dated this ___ day of August 2017.

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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 1,287 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 August 2017.

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