STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP1588-CR, 2017AP1587-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

THEORIS R. STEWART,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
and an Order Denying Postconviction Relief,
Entered in the Milwaukee County Circuit Court,
the Honorable Dennis R. Cimpl Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

Nicole M. Masnica
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

OTHER AUTHORITIES CITED

ARGUMENT

I. No Factual Basis Exists to Support Mr. Stewart's Guilty Pleas to the Two Counts of Unauthorized Use of an Entity's Identifying Information as Charged in 14CF3197.

In its brief, the State cites various canons of statutory construction to support its position that the plain-meaning doctrine should apply to an interpretation of Wis. Stat. § 943.203(2)(a), the statute outlining the crime, "Unauthorized Use of an Entity's Identifying Information." The State contends that the statute means exactly what it says - that the provision criminalizes any intentional invocation of an organization or entity's name with the purpose of obtaining absolutely anything of value or benefit. The State writes that "'anything' implies *no exclusions*," and also that there is no requirement within the statutory scheme that one must expressly or clearly represent that they have the permission or the entity to use its namesake illegally. (State's Response Br., 12, 19). Under this exceedingly broad interpretation of the language, the State writes that Mr. Stewart's conduct falls within the bounds of the statutory language and was appropriately punished under Wis. Stat. § 943.203.

The plain-meaning doctrine, however, applies only when the language subject to interpretation is clear and *reasonable* on its face. ***State v. Peters***, 2003 WI 88, 263 Wis. 2d 475, ¶ 14, 665 N.W.2d 512; see also ***Benson v. City of Madison***, 2017 WI 65, ¶ 120 n.16, 376 Wis. 2d 35, 897 N.W.2d 16. The State's interpretation is far from reasonable as Mr. Stewart outlines below, and this court should not adopt the State's proposed broad construction of § 943.203.

A. The language of Wis. Stat. § 943.203 does not criminalize Mr. Stewart's conduct as he did not seek to obtain "anything of value or benefit."

1. The legislature did not intend for the phrase "anything else of value or benefit" within Wis. Stat. § 943.203 to mean literally anything, without restriction, as the State contends in its brief.

In its brief, the State argues that the phrase "anything else of value or benefit" within the meaning of Wis. Stat. § 943.203(2)(a) is "undoubtedly general" and that the phrase should be given its general meaning, "absent some indication to the contrary." (State's Response Br., 11; citing Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts 101* (1st ed. 2012)). The State goes on to cite several definitions of the terms "value" and "benefit," ultimately concluding that the words' meaning must be "broadly construed." (State's Response Br., 13).

In support of that argument, the State first points to the legislative history of the statute, which was also discussed in Mr. Stewart's opening brief. In 2003, the legislature acted to change the language of the identity theft scheme, which was codified in Wis. Stat. § 943.201. The pre-2003 Act 36 provision read:

> Whoever intentionally uses or attempts to use any personal identifying information or personal identification document of an individual to obtain credit, money, goods, services or anything else of value without the authorization or consent of the individual and by representing that he or she is the individual or is acting with the authorization or consent of the individual is guilty of a Class H felony.

Wis. Stat. § 943.201(2) (2001-02). In changing the language of the statute, the legislature criminalized two additional "purposes" – to avoid civil or criminal process or penalty and to harm the reputation, property, person, or estate of the individual. The new statutory provision reads as follows:

> 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.
>
> (b) To avoid civil or criminal process or penalty.
>
> (c) To harm the reputation, property, person, or estate of the individual.

The State's brief argues the legislative modification of the statute was meant to "clarify[ ] that prohibitions on the unauthorized use of information or documents extend to obtaining 'employment' or anything of 'benefit' or to avoiding 'civil or criminal process or penalty.'" (State's Response Br., 13; citing 2003 Wis. Act 36 (quotations omitted)). The State argues the identity theft scheme in previous versions of § 943.201 already prohibited the conduct implicating the two new "purposes" and the legislature was acting to clarify its intent in light of litigation questioning the meaning of the phrase "anything else of value." (State's Response Br., 13). It follows, according to that State, that

because the language of § 943.203 is "nearly identical," that the legislature intended § 943.203 be interpreted broadly as well. In the State's view, this means that § 943.203 apply to all the same circumstances as § 943.201, except that they must affect an entity instead of an individual. (State's Response Br., 13, 16).

The State continues, concluding that in the passage of 2003 Act 36, "the Legislature could have taken steps to show that it intended to limit the general language to items similar to credit, money, goods, or services," but it did not. (State's Response Br., 16). Therefore, the State says, the language of § 943.203 should be interpreted broadly and not limited to purposes implicating a pecuniary interest. (State's Response Br., 16).

Wis. Stat. § 943.203. The language of the statute reads:

> Whoever, for any of the following purposes, intentionally uses, attempts to use, or possesses with intent to use any identifying information or identification document of an entity without the authorization or consent of the entity and by representing that the person is the entity or is acting with the authorization or consent of the entity is guilty of a Class H felony:
>
> (a) To obtain credit, money, goods, services, or anything else of value or benefit.
>
> (b) To harm the reputation or property of the entity.

This argument has obvious problems. The State contends that in passing 2003 Act 36, the legislature was aware that there was litigation challenging the meaning of the phrase "anything of value" in the previous version of § 943.201 and was acting to preempt future legal challenges by specifically prohibiting conduct in which an individual was

seeking employment or favor in a civil or criminal proceeding. It's clear the legislature added additional language to cover instances of conduct at issue in ***State v. Peters***, 2003 WI 88 (misrepresentations to obtain lower bail) and ***State v. Ramirez***, 2001 WI App 158, ¶ 2, 246 Wis. 2d 802, 633 N.W.2d 656 (misrepresentations to obtain employment).

But the legislature, while being aware of the legal challenges to the language in question and taking specific action to include provisions to prohibit misuse of an individual's identity for non-pecuniary interests, chose not to employ the same language to § 943.203 to prohibit similar conduct against an entity. To assume that the legislature had meant to do this when they had the opportunity to make this clear for prosecutors and defendants alike and chose not to is without any foundation. Had the legislature wanted the statutory provisions to apply to all the same instances of conduct, they would have simply mimicked the language when creating § 943.203, as it was all done in the same piece of legislation. The State only briefly addresses this issue and attempts to write-off the differences in language between the two statutes as meaningless, assuming without support that because the language of the two statutes is "substantially similar," the statutes cover all of the same types of conduct. (State's Response Br., 18).

Further, the legislature could have defined the phrase "anything else of value" as the State does here and make it clear that it applies to any possibly construction of the words "value" or "benefit," but it did not. Instead, the legislature added provisions to expand the reach of § 943.201. And importantly, as noted above, it did not include the same provisions and language in § 943.203.

Moreover, had the legislature envisioned the identity theft statute found in Wis. Stat. § 943.203(2) to apply in instances of misrepresentation of military service, there would have been no need to enact the new statute regarding misrepresentations of military service. The State misconstrues this argument in its brief, arguing that there was no "statutory canon that says that the plain language of a statute may be disregarded because a lesser crime exists to cover the conduct in question." (State's Response Br., 17). Mr. Stewart never argued that this is how the law should be interpreted. Instead, this argument was included in the postconviction motion and opening brief because it clearly shows the legislature did not envision misrepresentations of military service for the purpose of affecting a criminal proceeding to be covered by § 943.203. Had this been the legislature's original intent, there would have been no need to create a new statutory provision prohibiting identical conduct.

Notably, when the legislature enacted Wis. Stat. § 946.78, twelve years after the creation of § 943.203, the legislature chose to criminalize this behavior as a Class A misdemeanor. The legislature did not utilize the phrase "anything else of value or benefit" in § 946.78. In that provision, they prohibit misrepresentations of military service with the intent to obtain a "tangible benefit." The legislature specifically defined the term "tangible benefit" and included "an effect on the outcome of a criminal or civil court proceeding" within that definition. Wis. Stat. § 946.78(1)(b). This shows that the legislature, when intending to broadly construe the purpose of the crime outside of pecuniary interests, chose to not use the phrase "anything else of value or benefit," but rather employed a different phrase, "tangible benefit."

2. The State's argument that even if the phrase "anything else of value or benefit" must be something of monetary or pecuniary interest, that Mr. Stewart's conduct is still prohibited by the statute, is not supported by the record.

The State argues that even if this court agrees that the phrase "anything else of value or benefit" is limited to things of financial or monetary value, there is a factual basis to support Mr. Stewart's guilty plea because he faced the possibility of a $20,000 fine by entering his plea. The State continues, contending "[t]hat a person obtains a financial benefit by avoiding a $20,000 loss is common sense." (State's Response Br., 18). This is an "advantage relating to money," and therefore § 943.203 applies to Mr. Stewart's conduct according to the State. (State's Response Br., 18).

The State's argument assumes that Mr. Stewart was at a real risk of being ordered to pay a $20,000 fine. This conclusion is without any basis as no party asked for a fine to be included as part of his sentence. (34:27-28). Furthermore, the State's continued assertions that Mr. Stewart's misrepresentations about his education history had any effect on the judge in his sentencing hearing, regarding confinement or a fine, is questionable and certainly not supported by the record. It is abundantly clear that the sentencing court did not approve or see purpose in the use of incarceration and criminal prosecution in matters of child-support enforcement. This is clear from the sentencing court's words, which are as follows:

> Let's put it in common sense terms. Sure he should be punished and we should stop him from doing this. I'm not saying it isn't important, but in the scheme of things it is not as grave as many things we see here and to say, we should lock him up, what he should be doing, he should be in Tennessee working and sending money up here. That is where he should be…
>
> …This is not a crime that this court is going to put him further behind the eight-ball by putting him and locking him up…
>
> Here you have a criminal charge against you….That may stop him from working, may stop him from making enough money to pay for the support…
>
> We all do these things. We stack it up and do the righteousness. Let's put this all here. Let's penalize, let's punish and then we will feel much better about what we are doing, I guess. But this court has to look at, it would not depreciate the seriousness of this offense to place him on probation.

(34:41-42).

Moreover, the criminal complaint underlying his conviction, upon which the court relied for a factual basis, did not allege that Mr. Stewart was acting to avoid any sort of financial penalty related to this offense. The State alleged in the complaint that Mr. Stewart was acting to avoid confinement, specifically the condition time being requested by the State as part of its sentencing recommendation. There was no allegation or admission in the record related to a possible financial penalty in the form of a fine underlying this offense and therefore, this cannot be the factual basis supporting Mr. Stewart's conviction.

B. Mr. Stewart was neither representing that he was one of the entities in question nor that he was acting with their authorization or consent, and the State's argument that the statute does not require the representation be "express" fails.

At the very end of its response, the State briefly addresses Mr. Stewart's argument that his conduct was not prohibited by § 943.203 because he did not represent to the PSI writer that he had the permission of the entities in question to disclose the information in question. The State contends that Mr. Stewart's "challenge appears to rest on the faulty premise that he needed to intentionally represent that he was acting with the express authorization of the universities in order to be prosecuted." (State's Response Br., 19).

Unlike the its arguments throughout the rest of the brief, which relied heavily on the plain-meaning of the terms involved, the State provided no legal argument or analysis for this conclusion. The State's argument is essentially that § 943.203 covers all situations in which an individual uses the name of entity in any context without first obtaining permission of the entity ahead of time to get any benefit, tangible or intangible. (State's Response Br., 19). According to the State, it doesn't matter if the conduct involved is the type in which you'd first need to obtain permission from the entity to employ its namesake. Invoking the State's logic, it follows that if you use the name of an entity without the permission of the entity, regardless of whether or not your intent is illicit, and you use that name to obtain any benefit, you are guilty of a Class H felony under § 943.203.

This is not a reasonable interpretation of the language of this statute and cannot be what the legislature intended.

II. The Court Erred in Entering Restitution Orders in 14CF3197 and 14CF5128, as Payment Toward the Existing Child Support Obligations Must Be Made Under Wis. Stat. § 948.22(7)(b).

The State declined to address this argument in its brief and therefore, it should be presumed that the State is in agreement that the restitution order be converted to a court order under § 948.22(7)(b). See ***State v. Chu***, 2002 WI App 98, ¶ 10, 253 Wis. 2d 666, 643 N.W.2d 878, citing ***Charolais Breeding Ranches v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

CONCLUSION

For the foregoing reasons, Mr. Stewart respectfully requests that this court reverse the judgment and order of the circuit court, order that his pleas be deemed withdrawn, and remand this matter to the circuit court for further proceedings consistent with this court's opinion. Regarding the issue of repayment of the child support obligation, Mr. Stewart asks this court to order that the court remand this matter to the circuit court for correction of the judgments of conviction.

Dated this 5th day of February, 2018.

Respectfully submitted,

NICOLE M. MASNICA
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,671 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 5th day of February, 2018.

Signed:

Nicole M. Masnica
Assistant State Public Defender
State Bar No. 1079819

Office of the State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
masnican@opd.wi.gov
Attorney for Defendant-Appellant