COURT OF APPEALS
DECISION
DATED AND FILED

June 6, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP452-CR **Cir. Ct. No. 2014CF1072**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES E. GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 HAGEDORN, J. James Gray appeals from a judgment convicting him of five counts of identity theft and an order denying his motion for postconviction relief. The charges stemmed from the unauthorized use of a credit card and a debit card. The State introduced surveillance videos from the various

establishments where the cards were used showing a man matching Gray's appearance wearing a beret-style hat and cane using the cards. A similar beret-style hat was recovered from Gray when he was arrested, and a black cane was discovered at his workplace. The State also introduced a shirt and bifold wallet recovered from Gray's residence. On appeal, Gray claims that the wallet and shirt were taken in violation of his Fourth Amendment rights and should therefore be excluded. He also takes issue with certain witness testimony, the sufficiency of the evidence, and the jury instructions. We reject Gray's arguments and affirm the judgment and order.

BACKGROUND

¶2 K.W. reported to police that someone had stolen her cards from her purse and made several unauthorized purchases. After viewing surveillance footage from the locations of the fraudulent purchases, police observed that the same person appeared in each video. Police suspected that person was Gray. Gray was arrested at his workplace, and police searched the residence where Gray lived with his girlfriend, Constance Vaughn.[1] This search led to the recovery of a shirt and wallet allegedly matching those used by the person in the video. Gray was charged with five counts of identity theft in connection with the unauthorized

[1] According to Vaughn's testimony, she asked police through the apartment intercom to identify who they were, and they identified themselves as being from "We Energies." Once inside, an officer conducted a "protective sweep" to "make sure no one else was there" while another officer stayed with Vaughn. During the sweep, the officer observed clothes similar to the clothing worn by the person in the security videos. According to testimony from one of the officers, he asked Vaughn if he could "look around" after the sweep, and Vaughn acquiesced. However, Vaughn denied that the officer asked permission prior to searching and testified that she felt intimidated by the officers' conduct. Because we resolve the case on other grounds, we need not address whether the intrusion into Vaughn's apartment conformed with the search and seizure provisions of our constitutions.

transactions on K.W.'s cards. Gray filed a motion to suppress any physical evidence obtained during the search of his residence on Fourth Amendment grounds. After a hearing, the motion was denied.

¶3 The case proceeded to a two-day jury trial, and the following is a brief summary of the evidence introduced. K.W. testified that someone stole her credit card and debit card when she left her purse in the locker room of an Elm Grove tennis club. She received alerts that her cards had been used fraudulently, and she confirmed that there were five unauthorized transactions made on the same day in West Allis, Milwaukee, and Wauwatosa (one with the debit card and four with the credit card). The State introduced surveillance videos from the five stores: three Speedway stores in West Allis (referenced in counts one through three), an Advance Auto Parts store in Milwaukee where K.W.'s credit card was used to purchase a catalytic converter for a vehicle (referenced in count four), and an Open Pantry convenience store in Wauwatosa (referenced in count five). It is undisputed that these videos show an individual using K.W.'s cards for the purchases.[2] The individual using K.W.'s cards in the videos was wearing a black beret-style hat and using a black cane. The individual was also wearing what appears to be a reddish-brown shirt; witnesses disagreed on the precise color and whether the shirt matched the one recovered from Gray's residence. The State also introduced the shirt and wallet recovered at Gray's residence, the beret-style hat Gray was wearing when arrested, a black cane recovered at Gray's workplace, and a catalytic converter recovered near Gray's residence. Additionally, Gray's

[2] Employees from the various stores testified, and the transaction logs were introduced for all but one of the stores.

neighbor viewed still shots from the surveillance videos and identified Gray as the individual shown. Additional facts from trial will be set forth below.

¶4 After the close of evidence, the jury convicted Gray of all five counts. Gray filed a motion for postconviction relief, which was denied. Gray appeals, and we affirm.

DISCUSSION

¶5 On appeal, Gray again takes issue with the admission of the wallet and shirt seized from his residence. He also claims that the circuit court improperly allowed a police sergeant to identify him in the security videos. Gray further argues that the evidence was insufficient to convict him of identity theft because he never explicitly represented that he was K.W., that he was authorized to use the cards, or that the cards belonged to him. Gray finally argues that the jury instructions were erroneous. We address each of Gray's arguments in turn and reject them all.

A. Admission of the Wallet and Shirt

¶6 Gray first disputes the circuit court's decision to deny his motion to suppress any evidence obtained during the search of his residence. Specifically, he claims that the black "bifold" wallet and reddish shirt were erroneously admitted. The State argues that any error in admitting these items into evidence was harmless because they were not "important at trial," and the other evidence of guilt was "overwhelming." Gray responds that these items were "useful, of value, and important to bolstering the State's other evidence" because, he queries rhetorically, "why else would they have been readied for use as State's evidence?" Gray also points out that the State referred to these items in opening statements to

"help foster the case or shore up the case." We conclude that any error was harmless. Thus, we need not reach the question of whether the circuit court should have granted Gray's motion to suppress.[3]

¶7 Evidentiary errors are "subject to a harmless error analysis," and an error "requires reversal or a new trial only if the improper admission of evidence has affected the substantial rights" of the defendant. ***State v. Britt***, 203 Wis. 2d 25, 41, 553 N.W.2d 528 (Ct. App. 1996). An error is harmless if the party benefitting from the error shows that "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent" the alleged error. ***State v. Deadwiller***, 2013 WI 75, ¶41, 350 Wis. 2d 138, 834 N.W.2d 362 (citation omitted). Thus, the State must prove "beyond a reasonable doubt" that any error in admitting the shirt and bifold wallet "did not contribute to the verdict." ***Id.*** Our supreme court has outlined several factors to guide our analysis:

> the frequency of the error; the importance of the erroneously admitted evidence; the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence; whether the erroneously admitted evidence duplicates untainted evidence; the nature of the defense; the nature of the State's case; and the overall strength of the State's case.

Id. (citation omitted).

[3] Contrary to Gray's suggestion otherwise, the State did not "concede[] that physical evidence was illegally seized from the apartment Gray shared with Vaughn." The State clarified that it did "not concede a Fourth Amendment violation." Instead, the State merely focused its argument on harmless error "because it provides the narrowest grounds for affirmance." At any rate, we need not address the Fourth Amendment implications of the manner in which the State obtained these items.

¶8 With these factors in view, admission of the bifold wallet and shirt was undoubtedly harmless. The wallet was not a significant part of the evidence elicited during the two-day jury trial. The State mentioned the wallet once in its opening statements—informing the jury that one of the witnesses "from the Advance Auto Parts is going to specifically remember that Mr. Gray used a bifold wallet," and a "bifold wallet" was found at Gray's house. Sergeant Joseph Ipavec of the Village of Elm Grove Police Department testified that he found a "black bifold wallet" at Gray's residence. However, the witness from the Advance Auto Parts store never mentioned the wallet, and the prosecutor did not mention the wallet in his closing. Recognizing this, defense counsel specifically noted the lack of connection in his closing arguments. With no witness testimony connecting the wallet to any of the alleged crimes, we fail to see how the wallet, either by itself or in conjunction with the shirt, could have contributed to the verdict. The mere fact that the wallet was introduced as evidence does not mean that it was crucial to the State's case.

¶9 The shirt was mentioned with more frequency. However, like the wallet, it was not a significant part of the State's case. In opening statements, the State described the shirt, along with the rest of the physical evidence, as "evidence that will help foster the case." But the "primary evidence" was the "video from the five separate times the credit cards or debit card are used." The State urged the jury to look at the videos, "see the person who commits these transactions," and conclude "all five times" that the individual in the videos was "James Gray."

¶10 The videos did not reveal enough detail to determine whether the shirt worn by the individual using the cards was the same shirt recovered at Gray's residence. Testimony consistently described the shirt as merely "similar" to or "consistent" with the clothing worn by the individual in the video. The witnesses

also consistently testified they were not able to determine if the shirt in the videos was the same shirt recovered from Gray's residence. One witness testified that he could not even say from the video that the individual was "wearing a sweater-type product rather than a shirt-type product." Another averred that he "truly [could not] tell what color that shirt is." Yet another witness testified that the individual in the video was wearing "a brown-ish colored sweater" "similar" to the one recovered at Gray's residence, but admitted that he could not "tell if it's the exact same sweater." Several witnesses did not give any testimony concerning whether the shirt in evidence matched the clothing worn in the videos. The witnesses did not even agree on the color, some describing the shirt as brown or brownish, others as reddish brown, and one as burgundy. No witness testified that the shirt in evidence was in fact the same shirt in the videos.

¶11 In closing arguments, the State admitted that the shirt may not have been the one in the videos but urged the jury that "even if it's not, it doesn't have to be the same shirt." Rather, the State reiterated that the heart of the case was whether the individual in the videos could be identified as Gray based on appearance.

¶12 In addition to the limited reliance on the shirt and bifold wallet, the strength of the State's overall case without the shirt and wallet underscores that any error in admitting these items was harmless. First, as emphasized repeatedly by the State in its opening and closing arguments, the video evidence strongly linked Gray to the crime committed. When compared to the still shots taken of Gray when he was arrested,[4] our review of the videos confirms a striking—even

[4] These still shots were admitted as evidence.

obvious—resemblance. The State accordingly made the videos the centerpiece of its case. Second, in light of the similarity between Gray and the individual in the videos, the testimony of Shelly Zais was particularly damning.[5] Zais testified that Gray's girlfriend (Vaughn) was her "downstairs neighbor" and that she was "familiar" with Gray. Zais explained that she had known Gray since 2012, and Gray had driven in a vehicle with her on multiple occasions. Zais readily identified Gray in court. Viewing still shots taken from the surveillance footage, Zais also identified Gray as the individual in the videos.[6] Zais explained that she based her conclusion on Gray's appearance ("when you look at him, that's James Gray") as well as the presence of the hat and cane in the videos, which she associated with Gray. Third, the physical evidence, though circumstantial, provided yet another link between Gray and the individual captured in the surveillance footage. When Gray was arrested, he was wearing a hat similar to the one worn by the individual in the videos. Gray admitted to police that he had a cane that he used "from time-to-time for back issues," but did not answer when asked where the cane was. A black cane was ultimately recovered from Gray's

[5] On appeal, Gray argues that the circuit court impermissibly allowed Zais to testify that she recognized Gray from the still shots taken from the surveillance videos. However, the State points out that Gray did not object to this identification testimony at trial. Gray's only response is that his counsel had raised a similar objection to Ipavec's testimony, which had been overruled, and counsel thought objecting to Zais's testimony would have been "futile." We are unpersuaded to disregard Gray's forfeiture of this argument. "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." ***State v. Ndina*** 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612. The testimony of Ipavec and Zais raises separate issues regarding admissibility, particularly as it relates to the foundation for each witness's testimony. Gray tacitly admits this by raising separate arguments attacking the foundation of each witness's testimony. We see no reason why Gray could not or should not have raised his arguments below. Therefore, we will disregard Gray's argument that Zais should not have been allowed to testify.

[6] In Exhibit 20, Zais identified Gray in three of the five photographs she was asked to review by writing her initials on the exhibit. Zais initialed two out of the four pictures she was asked to review. Finally, she identified Gray in one of the photographs in Exhibit 22.

workplace. Two witnesses noted distinctive marks on the cane in the surveillance footage that matched the cane recovered from Gray's workplace. Ipavec testified that there were "distinctive markings on the cane" visible in the videos that were "consistent with the tape marks" on the cane in evidence.[7] Ipavec identified a barcode sticker, a "weight limit" sticker, and a third sticker indicating that the cane "was made in China." Another witness, who reviewed the surveillance footage from Advance Auto Parts, testified that the cane in the footage had "stickers" "in the same general area" as the cane in evidence, although he could not "make it out very well."

¶13 One final piece of physical evidence is particularly noteworthy given the circumstances of its recovery. Officer Craig Mayer recovered a catalytic converter matching the brand and model of the one purchased at the Advance Auto Parts location with K.W.'s card. Mayer went to Vaughn's residence and asked her where to find the catalytic converter, making clear that the question had to do with Gray and the fraudulent credit card purchases. After making a phone call, Vaughn led Mayer to the converter. The converter was recovered "[s]itting on the sidewalk" not "too far away" from where Gray lived with Vaughn.

¶14 The State's case against Gray was overwhelming, and in no way did it depend on the shirt recovered from Gray's residence. The video footage and Zais's identification were clearly the centerpiece of the case. The videos reveal a man making the fraudulent purchases who, from our review, is unmistakably the same individual in Gray's arrest photographs. And witness testimony indicated

[7] Although Gray argues that Ipavec's testimony identifying him as the person in the videos should not have been allowed, he makes no objection to the other observations Ipavec made with respect to the videos.

that the cane recovered from Gray's workplace bore more than a passing similarity to the one in the footage. Furthermore, the fact Vaughn was able to locate the catalytic converter when asked is nothing short of compelling circumstantial evidence that Gray was the purchaser. A man with a striking resemblance to Gray was observed purchasing a matching catalytic converter with the victim's credit card, and Gray's girlfriend knew exactly where to find the converter when asked. The importance of the shirt and wallet pales in comparison to this evidence. Thus, we are convinced that any error in admitting these items was harmless.

B. Identification Testimony

¶15 Gray next argues that the circuit court erroneously allowed Ipavec to testify that Gray was the individual appearing in the surveillance videos. The State urges us to find that any error was harmless. The State points out that Ipavec's identification occurred in passing and "was limited to four small instances." And in light of Zais's unobjected-to identification of Gray in the still shots, the State maintains that any inadvertent identification by Ipavec was merely cumulative. We agree with the State.

¶16 When asked whether he found anything of "evidentiary value" during his search of Gray's residence, Ipavec testified that "Gray was observed wearing specific clothing" in the video surveillance, and he "observed a brown sweater" in Gray's closet "which was consistent with the one that Mr. Gray was wearing the day the credit cards were used." Ipavec was also asked about the significance of "a hat that was found in this case," and he responded that "in the surveillance videos Mr. Gray is observed wearing a beret-style" hat. Ipavec later described the cane visible in the videos and its distinctive marks and mentioned in passing that he was "watching Mr. Gray with the cane." Finally, Ipavec described

the shirt found at Gray's residence as "consistent with the sweater that Mr. Gray was wearing in the surveillance videos."

¶17 In context, Ipavec's description of Gray being the individual in the video was not very significant. The primary thrust of the testimony concerned the physical evidence recovered, not whether the individual in the videos was Gray. Additionally, any identification offered by Ipavec was duplicative of Zais's identification described above. And unlike Ipavec, Zais testified in response to specific questions concerning the identity of the individual in the videos, which she answered based on knowing Gray for several years. Her testimony was much stronger than Ipavec's. Furthermore, we observe that the State did not rely on Ipavec's identification in its arguments. Instead, as noted above, the primary focus was how the footage compared to Gray's appearance in court and in the photographs taken when he was arrested. Finally, we again stress the strength of the State's case absent this allegedly problematic testimony. The video evidence, Zais's identification, the hat and cane, and the catalytic converter are all damning evidence of Gray's involvement in the fraudulent purchases.

C. Sufficiency of the Evidence

¶18 Gray argues that the evidence at trial was insufficient to prove that he intentionally represented that he was K.W. or that he was acting with her authorization or consent when he used the cards. Whether the evidence is sufficient to sustain a verdict is a question of law we review de novo. ***State v. Smith***, 2012 WI 91, ¶24, 342 Wis. 2d 710, 817 N.W.2d 410. We consider the evidence in the light most favorable to sustain the conviction, and we will "reverse the conviction only where the evidence 'is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable

doubt.'" ***Id.*** (citation omitted). Gray's argument also raises questions of statutory interpretation, which are likewise questions of law. ***State v. Wiedmeyer***, 2016 WI App 46, ¶6, 370 Wis. 2d 187, 881 N.W.2d 805, *review denied*, 2016 WI 98, 372 Wis. 2d 280, 891 N.W.2d 411.

¶19 WISCONSIN STAT. § 943.201(2) (2015-16)[8] criminalizes the intentional, unauthorized "use [of] the personal identifying information or document of another for purposes of obtaining" anything of value. ***State v. Ramirez***, 2001 WI App 158, ¶10, 246 Wis. 2d 802, 633 N.W.2d 656. The statute provides:

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

Sec. 943.201(2). We have explained that the crime has four elements:

> (1) the defendant's intentional use of the personal identifying information or document; (2) the defendant's use of such information to obtain credit, money, goods, services, or anything else of value; (3) the defendant's use

[8] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

> of such information without the authorization or consent of the other person; and (4) the defendant's intentional representation that he or she was the other person or acted with such person's authorization or consent.

Ramirez, 246 Wis. 2d 802, ¶10.

¶20 Gray admits that "it could be argued that the five videos showed that a person was 'using' [K.W.]'s credit and debit cards" under the first element of the crime. However, under the fourth element, he claims that WIS. STAT. § 943.201(2) required the State to prove he made "overt and affirmative representations that he was [K.W.], or that he had her authority to use the cards, or that the cards belonged to him." Merely using a credit or debit card, he reasons, is not an intentional representation that (1) he was K.W., (2) he had K.W.'s authorization to use the cards, or (3) the cards belonged to him. He supports his interpretation of the statute with three arguments. First, he insists that allowing the act of using the card to satisfy both the first and fourth elements of the crime renders the fourth element mere surplusage. Second, he insists that *all three* types of representations outlined in § 943.201(2) must be proved. Thus, he maintains that one act—swiping a credit or debit card—cannot "simultaneously convey three completely different messages to the merchant." Third, he complains that allowing mere unauthorized use of a credit or debit card to be prosecuted under § 943.201(2) "would ignore just exactly what … § 943.201 criminalizes." He argues that § 943.201 criminalizes identity theft, not the unauthorized use of a credit or debit card. He points to WIS. STAT. § 943.41—which he says prohibits "the fraudulent, unauthorized *use* of credit and debit cards"—and claims that the legislature intended this statute to cover the allegations at issue here. All of these arguments lack merit.

¶21 We see absolutely no reason why presenting a credit or debit card cannot be an implied representation that the presenter is either (1) the owner of the card or (2) authorized to use the card. The statute makes no mention of explicit representations, only intentional ones. Once the jury concluded that Gray was the individual in the videos, the videos provided ample evidence to convict Gray. The jury could conclude that Gray intentionally used the cards, and therefore impliedly represented that he was, at the very least, authorized to use them. Though we are unaware of any Wisconsin case explicitly addressing whether a person makes any representations by virtue of using a credit or debit card, other jurisdictions have rejected Gray's position that the mere use of a credit card carries no representations. *See, e.g.*, ***People v. Garrett***, 203 Cal. Rptr. 3d 369, 373 (Cal. Ct. App. 2016) (explaining that "[b]y using a stolen credit card, a thief must falsely represent that he or she is the proper owner of the credit card or has the consent of the owner to use it"); ***State v. Jones***, 734 S.E.2d 617, 622 (N.C. Ct. App. 2012) ("[W]hen one presents a credit card or credit card number as payment, he is representing himself to be the cardholder or an authorized user thereof."). We find the reasoning in these cases persuasive and in line with the plain language of the statute.

¶22 We briefly respond to the specific arguments Gray makes in support of his preferred interpretation of the statute. Gray's argument concerning surplusage confuses the concept of surplusage. The fact that one act *may* in certain circumstances go to prove multiple elements has nothing to do with surplusage. WISCONSIN STAT. § 943.201(2) criminalizes a wide variety of identity theft crimes. But Gray myopically focuses in on its application to credit card fraud and therefore misses the point. Intentionally using identification information and making the statutorily required representations are distinct elements. The

State must prove both elements to secure a conviction. As with many crimes, the same act may satisfy two different elements. And in this case, Gray's act of using the cards can be taken as proof of both elements. This is not a surplusage problem.

¶23 Gray's argument that the act of swiping a card cannot be three different representations fares no better. The statute requires the State to show that the defendant intentionally represented (1) he or she is the owner of the information, (2) he or she had the authorization of the owner to use the information, *or* (3) that he or she owned said information. Gray's argument ignores the "or" in the statute. The State need not prove all three, only one.

¶24 Finally, Gray's argument that there is a statute that better fits his crime is a nonstarter. Gray may wish that he was charged under WIS. STAT. § 943.21 (a misdemeanor), but that has nothing to do with whether the identity theft statute also applies to his crime. It is common for multiple charges to apply to the same wrongdoing. Whether Gray could have been charged under § 943.21 instead of WIS. STAT. § 943.201(2) is immaterial; what charge to bring is left to the discretion of the prosecutor. The question here is whether § 943.201(2) may be applied to fraudulent use of a credit card, and we conclude it can, provided the four elements are satisfied.

D. Jury Instructions

¶25 Gray finally takes issue with the jury instructions. He claims that the circuit court improperly instructed the jury that a "credit card or debit card is personal identifying information." The State responds that Gray "waived" this argument because he failed to lodge any objection to the instruction. *See* WIS. STAT. § 805.13(3) (providing that failure to object to jury instructions "at the

conference constitutes a waiver of any error in the proposed instructions or verdict"). We agree and decline to address this newly raised issue.

CONCLUSION

¶26 The errors alleged here—assuming they were errors—were harmless. At bottom, this was a case about video identification, and the State's argument focused on that fact. The wallet was barely mentioned and had limited probative value. The shirt was mentioned more often but did not form a significant part of the State's case. Similarly, Ipavec's testimony identifying Gray in the videos was insignificant when compared to the body of evidence introduced over a two-day trial, and was duplicative of other, stronger identification testimony and the jury's own view of the videos. Furthermore, the State's case absent the allegedly problematic evidence was strong, to put it mildly. Thus, we conclude that none of these alleged errors, either alone or in conjunction, contributed to the guilty verdict. We also conclude that the evidence was sufficient to convict Gray. We find no support in the statutory language for the notion that a defendant must expressly represent that he or she is the person listed on the card or is authorized to use the card by the owner. The jury could conclude that Gray's actions of using the cards carried an implied representation that he was authorized to use them. We finally conclude that any challenge to the jury instructions was waived when Gray failed to object at trial. For these reasons, we affirm.

By the Court.—Judgment and order affirmed.

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