

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2011AP338-CR

Cir. Ct. No. 2009CF1300

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CEDRIC O. CLACKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
STEPHEN E. EHLKE, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Cedric O. Clacks appeals an amended judgment of conviction for one count of identity theft as a party to the crime. Clacks contends the evidence was insufficient to prove he is guilty beyond a reasonable

doubt of identity theft pursuant to WIS. STAT. § 943.201(2)(a) (2009-10)¹ as party to the crime. According to Clacks, the evidence was insufficient to prove the fourth element: an intentional representation that the user of the personal identification document of another person is authorized to use it. We conclude the evidence that Clacks, or one of the individuals present with Clacks, signed the electronic credit card slip is sufficient to prove a representation that he or she was authorized to use the credit card.

¶2 Clacks also contests the amount of restitution he was ordered to pay pursuant to WIS. STAT. § 973.20. Specifically, Clacks contends that because he did not steal the victim's purse, which contained a car key and the credit card, he cannot be ordered to pay restitution related to the loss of the car key. We conclude that the restitution order properly included an amount representing the cost to replace the victim's car key and key locking system.

¶3 Accordingly, we affirm the amended judgment of conviction.

BACKGROUND

¶4 The charges against Clacks stem from the theft of Sylvia Nelson's purse, which was reported at 12:08 p.m. in August 2008, and the subsequent use of her Boston Store credit card.

¶5 Nelson's purse was stolen from her shopping cart while she was in the parking lot of a local grocery store. The purse contained a Boston Store credit

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

card and Nelson's car key. The parties agree that Clacks was not the individual who stole Nelson's purse from her shopping cart.

¶6 At trial the State established that, less than an hour after Nelson's purse was stolen, her Boston Store credit card was used to purchase infant and children's clothes. About fifteen minutes later, the card was used again to purchase two Dooney and Bourke brand handbags, and a few minutes after that, it was used to buy a third Dooney and Bourke brand handbag. Several hours later, at 6:11 p.m., the card was presented a fourth time. By then Nelson had reported the theft of her card, so the credit card was declined and the fourth transaction was not completed. The State's position is that Clacks, his brother, and Andrea Fenton-Ward, the mother of Clacks' brother's child, were involved in these subsequent transactions.

¶7 A store surveillance videotape of the events surrounding the first purchase was played for the jury. The video shows a black male, who is wearing a black shirt and dark-colored shorts, purchasing infant clothes. The video shows the man handing a credit card to the sales clerk, which is then swiped by the sales clerk, and the man then signs on an electronic signature pad.

¶8 A sales clerk who was present during the fourth transaction testified at trial. The clerk testified that she knew Clacks from high school, and that Clacks was in the store at the time the fourth transaction occurred. She testified that Clacks was with a male and a female that she did not know, and that the male and female attempted to make a purchase. According to the clerk's testimony at trial, she did not remember what Clacks was wearing when he was in the Boston Store. Her testimony was contradicted by the testimony of Terry Gerrits, the loss prevention manager at the Boston Store. He testified that he interviewed the sales

clerk on the day the purchases were made. Gerrits testified that he asked the sales clerk whether she recognized a man who had been in the store that day “wearing a black t-shirt and black jam shorts and tennis shoes,” and the clerk responded that Clacks was wearing those items when she observed him in the store that day.

¶9 Fenton-Ward also testified. She testified that she went to Clacks’ and his brother’s house one evening in August 2008. While she was at their house, she noticed two Dooney and Bourke brand handbags that she had not seen before. She also testified that she went to the Boston Store that evening with Clacks and his brother. While at the store, she picked out a Dooney and Bourke brand handbag and gave it to Clacks, who was going to buy it for her with a credit card. She testified that Clacks presented the credit card to the clerk for the purchase, but that the transaction could not be completed.

¶10 Clacks was found guilty of one count of identity theft for financial gain, one count of fraudulent use of a credit card, and one count of theft by acquisition of a credit card, all as a party to a crime. At a restitution hearing, the court granted the State’s request that Clacks pay restitution of \$641.44, which included an amount of \$455.47 to cover the cost of replacing Nelson’s stolen car keys and the car’s key locking system.

DISCUSSION

¶11 On appeal, Clacks contends the evidence was insufficient to find him guilty beyond a reasonable doubt of identity theft as a party to the crime. Clacks also contends that he should not be required to pay restitution for the cost of replacing Nelson’s car key and key locking system because he did not steal Nelson’s purse.

I. Sufficiency of the Evidence

¶12 When we review a challenge to the sufficiency of the evidence to support a verdict, we uphold the verdict unless the evidence, viewed most favorably to the conviction, including all reasonable inferences drawn in favor of the verdict, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt based on the evidence. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Whether the evidence viewed most favorably to the verdict satisfies the legal elements of the crime constitutes a question of law, which we review de novo. *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530 (citation omitted).

¶13 The identity theft statute, WIS. STAT. § 943.201(2)(a), makes it a crime to “intentionally use[] ... any personal identifying information ... of an individual” “for ... the ... purpose[] [of] obtain[ing] credit, money, goods, services, employment, or any other thing of value or benefit” “without the authorization or consent of the individual and by representing that he or she ... is acting with the authorization or consent of the individual” The jury was instructed that in order to convict Clacks of this crime, it had to determine that the State had proved these elements beyond a reasonable doubt:

1. The defendant intentionally used a personal identification document of Sylvia M. Nelson. “Personal identification document” means an individual’s card or plate that can be used to obtain money, goods, services, or any other thing of value or benefit or to initiate a transfer of funds.

2. The defendant intentionally used a personal identification document of Sylvia M. Nelson to obtain anything else [sic] of value or benefit.

3. The defendant acted without the authorization or consent of Sylvia M. Nelson and knew that Sylvia M. Nelson did not give authorization or consent.

4. The defendant intentionally represented that he was acting with the authorization or consent of Sylvia M. Nelson.

See WIS JI—CRIMINAL 1458 (2004). Because Clacks was charged as party to the crime of identity theft, the jury was also instructed that Clacks could be convicted either if he directly committed the crime or if he intentionally aided and abetted others to do so.

¶14 Clacks does not dispute there is sufficient evidence in the record to establish the first three elements of identity theft. However, he contends there is insufficient evidence to prove the fourth element—that Clacks or any of the other people involved with him in the transactions intentionally represented that they were acting with Nelson’s authorization or consent.

¶15 Specifically, Clacks contends that handing the credit card to a sales clerk to make a purchase and signing the electronic credit card slip cannot, by itself, prove that Clacks or the others involved represented that the card was being used with the cardholder’s authorization or consent. This is so, according to Clacks, because handing the credit card to the salesperson to make a purchase and signing the electronic credit card slip is evidence of *use* of the credit card, and thus constitutes the first element. Clacks contends there must be some evidence of an intentional representation by either him or one of the others that is “over and above” the act of using the card. Otherwise, asserts Clacks, the fourth element would be superfluous because it would automatically be proven in every case where the first element of the offense is proved.

¶16 The State responds that there is no requirement that distinct evidence be presented to prove each element of a crime. In addition, the State argues that

the evidence of the signing of the electronic receipt is evidence of the fourth element and is not necessary to prove the first element.

¶17 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.

¶18 The first element of the offense is the intentional use of Nelson's personal identification document by Clacks or one of the others involved. There was evidence that Nelson's Boston Store credit card was presented by Clacks or one of the other individuals to the sales clerk as payment. This satisfies the first element.

¶19 With respect to the fourth element—the intentional representation that the individual using the card was authorized to do so—there was evidence that Clacks or one of the others involved signed the electronic receipt for each of three transactions. Signing the receipt is a representation that the individual presenting the card is authorized by Nelson to incur a charge on the account. Clacks does not contend that a “representation of authorization” within the meaning of the fourth element must be words and may not be conduct. His position is that, even if a representation can be conduct, it cannot be conduct that is necessary to prove use of Nelson's personal identification. However, beyond asserting that signing the electronic receipt is evidence of the first element, Clacks does not develop an argument explaining why that evidence is necessary to prove use of Nelson's personal identification document. We conclude the evidence of signing the electronic receipt is not necessary to prove the first element and that it is sufficient to establish the fourth element.

II. Restitution

¶20 The circuit court ordered Clacks to pay restitution totaling \$641.44. Clacks challenges \$455.47 of this order, which is the amount he was required to pay to replace Nelson’s car key and key locking system. Clacks contends that the conduct for which he was convicted was not a substantial factor in causing the loss of Nelson’s car key because the crimes for which he was convicted were all based on conduct that occurred after the theft of the purse. The State’s position is that the timing of the events in this case gives rise to the reasonable inference that Clacks was involved in a course of events leading up to and including the use of the credit card, and that this course of events included the theft of the purse, which was a substantial factor in the loss of Nelson’s car keys.

¶21 WISCONSIN STAT. § 973.20(2)(b) provides that “[i]f a crime considered at sentencing resulted in damage to or loss or destruction of property,” and return of the property is “impossible, impractical or inadequate,” the restitution order may require that the defendant pay the owner the reasonable repair or replacement cost of the property. Whether an item included in the restitution order comes within the limits of WIS. STAT. § 973.20 is a question of law, which we review de novo. *State v. Longmire*, 2004 WI App 90, ¶12, 272 Wis. 2d 759, 681 N.W.2d 534 (citation omitted).

¶22 Before a circuit court may order restitution, the victim must establish “a causal nexus ... between the ‘crime considered at sentencing’ and the disputed damage.” *State v. Canady*, 2000 WI App 87, ¶9, 234 Wis. 2d 261, 610 N.W.2d 147 (citation omitted). A court may take into consideration “all facts and reasonable inferences concerning the defendant’s activity related to the ‘crime’ for which [he] was convicted, not just those facts necessary to support the elements of

the specific charge” *State v. Madlock*, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999).

¶23 We conclude the facts and reasonable inferences concerning Clacks’ activity related to the crime for which he was convicted support a reasonable inference that Clacks was involved with the theft of the purse for the following reasons. First, there is the timing of the incidents. The theft was reported at 12:08 p.m., and the first purchase with the Boston Store credit card was made thirty-eight minutes later. Although Clacks did not actually remove the purse from Nelson’s shopping cart, there was evidence, which the jury necessarily credited, that he was involved with the purchases made with the Boston Store credit card. The surveillance video of the first transaction, which shows a black male wearing a black shirt and dark shorts, is consistent with the description of Clack’s clothing that the sales clerk gave to Gerrits. Because of the close proximity in time between the theft of the purse and the first purchase made with the card, it is reasonable to infer that Clacks participated in the plan to steal the purse.

¶24 In addition to the timing evidence, the testimony of Nelson and Fenton-Ward supports the reasonable inference that Clacks was involved in the theft. Nelson testified that the person who stole her purse from her shopping cart was around twelve to fourteen years old. Fenton-Ward testified that Clacks’ brother was fifteen years old at the time the charged crimes occurred. Furthermore, in addition to the short amount of time between the theft of the purse and the first purchase made with the credit card, Fenton-Ward’s testimony also indicated that Clacks and his brother were together in the evening when the last purchase was made. This lends support to the inference that Clacks and his brother were together during the events that occurred that day. Finally, Fenton-

Ward's testimony established that Clacks' brother has a young child. It is reasonable to infer that the infant clothes purchased with Nelson's credit card were for Clack's brother's child.

¶25 Because we conclude it is reasonable to infer that Clacks participated in stealing the purse, we conclude the evidence establishes a causal nexus between his actions and the loss of Nelson's car key. Accordingly, we affirm the restitution order, including an amount sufficient to replace Nelson's car key and key locking system.

CONCLUSION

¶26 The amended judgment of conviction is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

