

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH : No. CR-123-2007  
vs. :  
: CRIMINAL DIVISION  
: MONIQUE L. SHOEMAKER,  
: Defendant : 1925(a) Opinion

**OPINION IN SUPPORT OF ORDER IN  
COMPLIANCE WITH RULE 1925(a) OF  
THE RULES OF APPELLATE PROCEDURE**

This opinion is written in support of this Court's judgment of sentence issue on or about June 9, 2008 and amended through a reconsideration motion on or about October 9, 2008. The relevant facts follow.

In the spring of 2005, Defendant got kicked out of her residence. The victim, a 70 year old woman who had been Defendant's teacher and friend, graciously took Defendant into her home. Defendant resided with the victim from May 2005 into September 2005. In late July or early August 2005, Defendant filled out an online application for a Capital One credit card, using the victim's computer. Although Defendant used her own name, she used the victim's social security number on the credit card application. Capital One issued a credit card with a \$20,000 credit limit to Defendant in the name of M.L. Shoemaker. Between August 15, 2005 and October 14, 2005, Defendant incurred a total debt of \$22,053.02 in purchases, over-the-limit fees and late fees.

Defendant failed to pay the bill and in December 2006 a collection agency began calling the victim's home looking for Defendant. Although the victim knew where

Defendant was residing, she did not know her mailing address or phone number. The victim told the man from the collection agency Defendant no longer lived at the victim's residence and she would tell Defendant to call the collection agency. The victim went to Defendant's residence and told her about the phone call from the collection agency. Defendant indicated she would return the agency's call. A few days later, the victim got another phone call. She told the man from the collection agency she gave Defendant the information and Defendant indicated she would call him back. The caller indicated Defendant had not called him and said he really needed to get in touch with her. Again, the victim went to Defendant's residence and told her and her fiancé about the calls. Defendant told the victim not to worry about it, because her grandfather had paid the bill.

The collection agency kept calling the victim. Their calls got progressively nastier and more vicious. The caller asked the victim if she was M.L. Shoemaker and when she said no, the caller told the victim the card was issued under her social security number. The victim was very upset. She called her daughter, who suggested that she call the police. The next day, the victim went to the police department and reported the situation. The police charged Defendant with identity theft, theft by deception and receiving stolen property.

The police also advised the victim to get copies of her credit reports. The victim took this advice and went to a friend's attorney who helped her access her credit reports. When the attorney put the victim's social security number into the computer to access the credit reports, Defendant's name appeared, as well as various prior addresses Defendant had.

On May 22, 2008, a jury trial was held. The jury found Defendant guilty of

identity theft and theft by deception.<sup>1</sup> The Court sentenced Defendant to undergo incarceration in a state correctional institution for 15 months to 3 years.<sup>2</sup>

Defendant filed an appeal from her judgment of sentence. In her statement of errors complained of on appeal, Defendant raises three issues: (1) the verdict was against the weight of the evidence; (2) the evidence was insufficient to support the verdict; and (3) the trial court abused its discretion in imposing sentence.

Defendant first asserts that the verdict was against the weight of the evidence. In order to preserve this issue for appeal, a defendant must raise the issue with the trial court in an oral or written motion for a new trial before sentencing or in a post-sentence motion. Pa.R.Cr.P. 607(A). The only motion Defendant made after the verdict was a motion for reconsideration of sentence. Therefore, this issue is waived. *Commonwealth v. Gillard*, 850 A.2d 1273, 1277 (Pa. Super. 2004); *Commonwealth v. Washington*, 825 A.2d 1264, 1265-1266 (Pa. Super. 2003).

Defendant also contends the evidence was insufficient to support the verdict in this case. The Court cannot agree. In reviewing the sufficiency of the evidence, the Court considers whether the evidence and all reasonable inferences that may be drawn from that evidence, viewed in the light most favorable to the Commonwealth as the verdict winner, would permit the jury to have found every element of the crime beyond a reasonable doubt.

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<sup>1</sup> The Commonwealth agreed not to submit the charge of receiving stolen property to the jury, because under the facts of this case it would merge with the theft by deception charge.

<sup>2</sup> The Court's original sentence imposed a consecutive 3 months to 2 years for the theft by deception conviction; however, after argument on Defendant's motion for reconsideration of sentence, the Court amended its order to make that sentence concurrent to the 15 months to 3 years imposed for identity theft.

*Commonwealth v. Murphy*, 577 Pa. 275, 284, 844 A.2d 1228, 1233 (Pa. 2004);

*Commonwealth v. Ockenhouse*, 562 Pa. 481, 490, 756 A.2d 1130, 1135 (Pa. 2000);

*Commonwealth v. May*, 540 Pa. 237, 246-247, 656 A.2d 1335, 1340 (Pa. 1995).

Circumstantial evidence can be as reliable and persuasive as eyewitness testimony and may be of sufficient quantity and quality to establish guilt beyond a reasonable doubt.

*Commonwealth v. Tedford*, 523 Pa. 305, 322, 567 A.2d 610, 618 (Pa. 1989)(citations omitted).

The jury found Defendant guilty of identity theft and theft by deception. In order to obtain a conviction for identity theft, the Commonwealth must prove the following elements beyond a reasonable doubt that: (1) the defendant knowingly possessed or used through any means, identifying information of another person; (2) the defendant did so with the person's consent; and (3) the defendant did so to further an unlawful purpose, that is to obtain property or services valued at more than \$2,000. 18 Pa.C.S.A. §4120; Pa.SSJI (Crim) 15.4120. The Crimes Code definition of identifying information means "...any fact used to establish identity, including, but not limited to, a name, birth date, social security number, driver's license number, nondriver governmental identification number, telephone number, checking account number, savings account number, student identification number, employee or payroll number, or electronic signature. The evidence presented by the Commonwealth showed that Defendant knowingly used Nancy Machinski's social security number to obtain a credit card with a credit limit of \$20,000 from Capital One. Ms. Machinski testified that she did not give Defendant permission or consent to use her social security number. Including late fees and over-the-limit fees, Defendant obtained property and/or services valued at \$22,053.02. Although the defense attempted to claim that the social security

number was not knowingly used, but rather was automatically entered when Defendant used Ms. Machinski's computer to apply for the card, the Commonwealth presented evidence from Christine Hayward, a computer network engineer for Lycoming County, that the auto-fill feature did not work in the manner suggested by defense counsel. N.T., May 22, 2008, at pp. 107-116. Therefore, the Court finds the Commonwealth established identity theft beyond a reasonable doubt.

To prove theft by deception, the Commonwealth must establish that Defendant obtained or withheld property of another by deception. 18 Pa.C.S.A. §3922(a). The Commonwealth can prove the deception by showing that Defendant intentionally did any of the following: (1) created or reinforced a false impression, including false impressions as to law, value, intention or other state of mind; (2) prevented another from acquiring information which would affect his judgment of a transaction; or failed to correct a false impression which the deceiver previously created or reinforced, or which the deceiver knows to be influencing another to whom he stands in a fiduciary or confidential relationship. 18 Pa.C.S.A. §3922(a). When Defendant knowingly used Ms. Machinski's social security number, she created a false impression of her creditworthiness. She also prevented Capital One from acquiring information regarding her actual credit history, which affected Capital One's willingness to issue a credit card to Defendant. In reliance on the credit history associated with Ms. Machinski's social security number, Capital One issued a credit card to Defendant. The value of the purchases made with and the services provided through the credit card exceeded \$22,000. Defendant did not have income or property to pay Capital One. In fact, her fiancé testified that at the time she got the card, she was not employed. N.T., May 22, 2008, at p. 74.

The defense asserted to this claim was that Defendant intended to re-pay Capital One. Defendant told various people that her grandfather would pay off the card. Ms. Machinski knew Defendant and her family for years and she was not aware of a grandfather who would be able to make repayment on Defendant's behalf. Defendant's ex-husband, ex-mother-in-law and fiancé also testified that they had never met such a person. Although Defendant's fiancé testified that she briefly had employment with Hope Enterprises after she obtained the card and she lost that employment due to difficulties with her pregnancy, when her fiancé expressed concerns to Defendant regarding her ability to pay the money back, Defendant did not say she would pay the money back through her employment; she said her granddad would pay it. N.T., May 22, 2008, at pp. 72, 76, 78. Credibility is solely within the province of the jury as finder of fact. Based on the evidence presented, the jury could reject the defense contention that Defendant had a grandfather who would pay off the credit card and reasonably find that from the time Defendant opened the credit card account she did not intend to re-pay Capital One.

Defendant's final issue on appeal is that the trial court abused its discretion in imposing sentence. The Court cannot agree. Due to the value of the property and services involved in this case, both charges were felonies of the third degree with statutory maximums of 7 years incarceration and/or up to \$15,000 in fines. Defendant had a prior record score of zero. The offense gravity score (OGS) for identity theft was 7. The standard guideline range for this offense was 6 to 14 months incarceration. The Court sentenced Defendant to 15 months to 3 years incarceration in a state correctional institution. The sentence was in the aggravated range due to the age of the victim, Defendant's breach of the victim's trust and kindness, Defendant's lack of remorse, the impact the crime had on the victim and

Defendant's post-crime manipulation/deceit. The victim was 70 years old. The victim thought of Defendant like family. Defendant had no place to stay, so the victim opened her home to Defendant and let Defendant use her computer. Instead of repaying the victim's kindness, Defendant breached her trust, took her social security number and created financial havoc for the victim. The victim testified about how devastated she was by Defendant's conduct and how dealing with the situation ruined her Christmas. Defendant did not express any remorse for her actions or concern for the victim's plight; she was only concerned with how her sentence would affect herself and her children. After the victim realized Defendant had used her social security number to obtain the credit card, Defendant continued to lie to the victim and manipulate her by telling her not to worry that she or her grandfather would pay off the credit card. At no time prior to sentencing did Defendant ever make any payment toward the outstanding credit card debt. Given these facts and circumstances, the Court believed a state sentence slightly in the aggravated range was appropriate.<sup>3</sup>

DATE: \_\_\_\_\_

By The Court,

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Kenneth D. Brown, P. J.

cc: Mary Kilgus, Esquire (ADA)  
Robert Cronin, Esquire (APD)  
Work file  
Gary Weber, Esquire (Lycoming Reporter)

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<sup>3</sup> The OGS for theft by deception was 5, resulting in a standard guideline range of RS-9. Although the Court initially sentenced Defendant to a consecutive 3 months to 2 years incarceration for this offense, upon consideration of Defendant's post-sentence motion, the Court ran this sentence concurrent to the sentence for identity theft and made Defendant eligible for the community corrections program.

Superior Court (original & 1)