COLORADO COURT OF APPEALS **2013 COA 65**

Court of Appeals No. 10CA0587
City and County of Broomfield District Court No. 09CR169
Honorable John E. Popovich, Jr., Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Eduardo Dejesus Perez,

Defendant-Appellant.

JUDGMENT VACATED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE CASEBOLT
Miller and Navarro, JJ., concur

Announced May 9, 2013

John W. Suthers, Attorney General, Kevin E. McReynolds, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Andrew C. Heher, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Eduardo Dejesus Perez, appeals the judgment of conviction entered upon jury verdicts finding him guilty of identity theft and criminal impersonation. He asserts that there is insufficient evidence to sustain his convictions, and thus, the trial court erred in denying his motion for a judgment of acquittal. We agree and therefore vacate the convictions.

I. Background

¶ 2 Defendant was charged with identity theft and criminal impersonation for using the Social Security number of another person to obtain employment.

¶ 3 The victim whose Social Security number defendant used was unemployed and receiving government assistance. She was alerted that someone was using her Social Security number when a government unemployment insurance worker called her and asked whether she was employed at a barbeque restaurant. The victim was not employed at the restaurant and informed the police that someone appeared to be using her Social Security number.

¶ 4 The police obtained from the Colorado Department of Labor a listing of the employers who had reported income under the victim's

Social Security number during the preceding five years. Based on this information, the investigating detective called the manager of the most recent employer on the list — a barbeque restaurant. The restaurant manager informed the detective that someone was, in fact, working at the restaurant using that same Social Security number.

¶ 5 The detective then went to the restaurant. Once there, the manager provided him with defendant's employment application, tax documents, and a photocopy of the Social Security card defendant had provided. All the documents listed the victim's Social Security number. The detective then arrested defendant.

¶ 6 At trial, the prosecution presented the testimony of the victim, the investigating detective, the restaurant manager, and an investigator from the Colorado Department of Labor's Fraud Investigation Unit who had prepared a wage inquiry pertaining to the victim's Social Security number. Defendant did not testify or call witnesses.

¶ 7 At the close of the evidence, defendant moved for a judgment of acquittal on both counts, arguing that the prosecution had failed to present sufficient evidence of the charges. With regard to the

identity theft charge, he contended that the prosecution had failed to prove that he knew the Social Security number belonged to an actual person as opposed to being merely fictitious. The trial court agreed that the statute imposed such a knowledge requirement, but it denied his motion, ruling that the prosecution had satisfied its burden. The trial court also denied his motion for judgment of acquittal on the criminal impersonation charge. The jury subsequently convicted defendant of both charges, and this appeal followed.

II. Sufficiency of the Evidence

¶ 8 Defendant asserts that the prosecution presented insufficient evidence to sustain his identity theft and criminal impersonation convictions. We agree.

A. Standard of Review

¶ 9 We review a sufficiency of the evidence claim "de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the convictions." *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). In doing so, we must ask "whether the evidence, viewed as a whole, and in the light most

favorable to the prosecution, is sufficient to support a conclusion by a reasonable person that the defendant is guilty of the crimes charged beyond a reasonable doubt." *Kogan v. People*, 756 P.2d 945, 950 (Colo. 1988), *abrogated on other grounds by Erickson v. People*, 951 P.2d 919, 923 (Colo. 1998).

¶ 10 We must give the prosecution the benefit of every reasonable inference that could fairly be drawn from the evidence. *Id.* However, presumption and inferences may be drawn only from facts established, and presumption may not rest on presumption or inference on inference. *People v. Ayala*, 770 P.2d 1265, 1268 (Colo. 1989) (citing *Tate v. People*, 125 Colo. 527, 541, 247 P.2d 665, 672 (1952)); *People v. Gibbons*, ___ P.3d ___, ___ (Colo. App. No. 09CA1184, Sept. 15, 2011).

¶ 11 In addition, more than a modicum of evidence is necessary to support a conviction beyond a reasonable doubt, *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983), and a criminal verdict may not be based on "guessing, speculation[,] or conjecture." *Id.* (quoting *People v. Urso*, 129 Colo. 292, 297, 269 P.2d 709, 711 (1954)).

¶ 12 When interpreting a statute, our review is de novo as well. *See People v. Cross*, 127 P.3d 71, 73 (Colo. 2006).

¶ 13 "In construing a statute, our primary purpose is to effectuate the legislature's intent." *Montes-Rodriguez v. People*, 241 P.3d 924, 927 (Colo. 2010). To determine the legislature's intent, we first look to the plain language of the statute. *Bostelman v. People*, 162 P.3d 686, 690 (Colo. 2007). We read words and phrases in context and construe them according to rules of grammar and common usage. *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010).

¶ 14 If legislative intent is clear from the plain language of the statute, we do not apply other rules of statutory interpretation. *People v. Kiniston*, 262 P.3d 942, 943 (Colo. App. 2011). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quoting *People v. Nance*, 221 P.3d 428, 430 (Colo. App. 2009)).

B. Identity Theft

¶ 15 Defendant asserts that the evidence is insufficient to support the jury's verdict convicting him of identity theft. Specifically, he contends that the identity theft statute, section 18-5-902, C.R.S. 2012, requires the prosecution to prove that he knew the Social Security number at issue in fact belonged to an actual person and that it failed to present sufficient evidence of this element. We agree.

¶ 16 As relevant here, section 18-5-902 provides:

> (1) A person commits identity theft if he or she:
>
> > (a) Knowingly uses the personal identifying information, financial identifying information, or financial device of another without permission or lawful authority with the intent to obtain cash, credit, property, services, or any other thing of value or to make a financial payment . . . .

¶ 17 Under section 18-1-503(4), C.R.S. 2012, "[w]hen a statute defining an offense prescribes as an element thereof a specified culpable mental state, that mental state is deemed to apply to every element of the offense unless an intent to limit its application clearly appears." *See Cross*, 127 P.3d at 74; *see also Copeland v. People*, 2 P.3d 1283, 1286 (Colo. 2000) ("The mens rea of a statute

may speak to conduct, or to circumstances, or to result, or to any combination thereof, but not necessarily to all three."). Therefore, we must consider whether the General Assembly intended a mental state to apply to every element or only certain elements of an offense. *Cross*, 127 P.3d at 74.

¶ 18 We conclude that the culpable mental state of knowingly applies to the element concerning the personal identifying information "of another." Because section 18-5-902(1)(a) of the identity theft statute specifies "knowingly" as the culpable mental state, this mental state must apply to every element of the offense unless a legislative intent to limit its application clearly exists. § 18-1-503(4); *Cross*, 127 P.3d at 74.

¶ 19 After reviewing the statutory text and its legislative history, we find no indication that the General Assembly intended to limit the application of the culpable mental state of "knowingly" to certain elements of the offense. Moreover, the language of the statute does not reveal a clear intent on the part of the legislature to limit the application of the knowledge requirement — the mental state of "knowingly" is positioned before all elements of the offense, and the

amendments to the statute do not evidence any such intent. *Compare People v. Coleby*, 34 P.3d 422, 424 (Colo. 2001) (concluding that neither the legislative history of the violation of a protection order statute nor the language used by the General Assembly revealed an intent to limit the application of the culpable mental state of "knowingly" to only one element of the offense), *with Cross*, 127 P.3d at 76-77 (concluding that the stalking statute's mental state of "knowingly" did not apply to all elements of the offense because the addition of a provision to the statute clearly demonstrated the General Assembly's intent to limit the knowledge requirement).

¶ 20 We need not address whether the statute's mental state of "knowingly" applies to *all* elements of the offense because only the element concerning the personal identifying information "of another" is at issue in this case. Furthermore, because defendant was charged with identity theft under section 18-5-902(1)(a) and the jury was instructed only regarding that section, we also need not address whether the prosecution must prove such knowledge under section 18-5-902(1)(b)-(e), C.R.S. 2012.

¶ 21 Accordingly, we hold that, to convict a defendant of identity theft under section 18-5-902(1)(a), the prosecution must prove that the defendant knew the personal identifying information, financial identifying information, or financial device he or she used was, in fact, the information or device of another.

¶ 22 Our conclusion is supported by the United States Supreme Court case of *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). Although the *Flores-Figueroa* Court's interpretation of the federal aggravated identity theft statute is not binding on our interpretation of the Colorado identity theft statute, the case is helpful because it interprets a similar statute. *See People v. Rivera*, 56 P.3d 1155, 1163 (Colo. App. 2002) ("Interpretations of federal law are persuasive in interpreting like state statutes.").

¶ 23 In *Flores-Figueroa*, the defendant challenged his federal conviction for aggravated identity theft. 556 U.S. at 647. The statute at issue there provides that an individual commits aggravated identity theft if, during (or in relation to) the commission of certain crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person*." 18 U.S.C. § 1028A(a)(1) (2006) (emphasis added).

¶ 24 For six years, the defendant in *Flores-Figueroa* had worked under a false name, using a Social Security number and an alien registration number that did not belong to a real person. *Id.* at 648-49. He then presented his employer with new counterfeit Social Security and alien registration cards; these cards, unlike the previous cards, used his real name and the numbers on both cards were in fact numbers assigned to actual people. *Id.* at 649. Subsequently, his employer reported this false documentation to federal law enforcement officials. *Id.*

¶ 25 In denying the defendant's motion for a judgment of acquittal, the district court had ruled that the aggravated identity theft statute did not require the government to prove that the defendant knew the numbers on the counterfeit documents had been assigned to actual people. *Id.* The Eighth Circuit Court of Appeals affirmed. *Id.*

¶ 26 Before the Supreme Court, the defendant asserted that the statute required the government to prove that he knew the "means of identification" belonged to an actual person. *Id.* at 648. The Supreme Court concluded that the statute imposed such a requirement. *Id.* at 647. The Court reasoned that "[a]s a matter of

ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime." *Id.* at 650. It also stated that "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 652.

¶ 27 In considering the statute's legislative history, the Court noted that the examples of identity theft given by Congress "all involve instances where the offender would know that what he has taken identifies a different real person." *Id.* at 655. These instances included "dumpster diving," computer hacking, stealing paperwork likely to contain personal information, and accessing information that was originally collected for an authorized purpose. *Id.* The Court opined that, in these classic cases of identity theft, proving mens rea is generally not difficult. *Id.* at 656. However, it acknowledged that in many circumstances — such as where an undocumented immigrant provides an employer with a false identification document to obtain employment — it may be difficult to prove beyond a reasonable doubt that a defendant knew the means of identification belonged to a real person. *Id.* at 655.

Nevertheless, the Court concluded that any "concerns about practical enforceability are insufficient to outweigh the clarity of the text." *Id.* at 656.

¶ 28 Here, the Colorado identity theft statute and the federal aggravated identity theft statute are similarly structured. In both statutes, the culpable mental state of "knowingly" precedes the language "of another." Although the federal statute uses the language "of another person," while the Colorado statute omits "person" and simply states "of another," this difference is immaterial because "of another" is statutorily defined as "that of a natural person, living or dead, or a business entity." § 18-5-901(11), C.R.S. 2012.

¶ 29 Moreover, Colorado courts, like the Supreme Court, ordinarily interpret a phrase in a criminal statute that introduces the elements of a crime with the mental state of "knowingly" as applying that mental state to each element of the offense. § 18-1-503(4); *Cross*, 127 P.3d at 74.

¶ 30 Finally, Colorado precedent accords with the Court's conclusion that any concerns about the practical enforceability of the identity theft statute cannot overcome the plain language of the

statute. *See, e.g., Hall v. Am. Standard Ins. Co.*, 2012 COA 201, ¶ 19 ("[W]hen the statutory language is clear and unambiguous, we need not look beyond its plain terms and must apply the statute as written."). Accordingly, we find the Supreme Court's interpretation of the federal statute helpful and persuasive here.

¶ 31 A recent Illinois Appellate Court decision interpreting that state's identity theft statute also provides support for our conclusion. *People v. Hernandez*, 967 N.E.2d 910 (Ill. App. Ct. 2012). In *Hernandez*, the court held that "the Illinois identity theft statute required the State to prove defendant knew the personal identifying information that she used was that 'of another person.'" *Id.* at 920. In reaching its conclusion, the court relied on an Illinois statutory construction law pertaining to mental states in criminal offenses, *id.* at 918, similar to the Colorado statute. The court reasoned that the word "knowingly" is positioned before all the elements of the offense, and therefore, in accordance with the statute, that mental state applies to all subsequently listed elements. *Id.* The court also relied on *Flores-Figueroa* to support its determination, concluding that, given the similarity of the state and federal statutes, the Supreme Court's reasoning regarding the

knowledge requirement was applicable to the Illinois statute. *Id.* at 918-19.

¶ 32 The Illinois identity theft statute at issue in *Hernandez* closely parallels the Colorado identity theft statute, and both prescribe knowingly as the culpable mental state. *Cf. State v. Garcia*, 788 N.W.2d 1, 2-3 (Iowa Ct. App. 2010) (concluding that the Iowa identity theft statute did not require the State to prove that the defendant knew the identification was of another person because the Iowa statute, unlike the federal aggravated identity theft statute, did not contain the word "knowingly"). In addition, the statutory construction law the *Hernandez* court employed in its analysis is equivalent to Colorado's section 18-1-503(4). Thus, we find *Hernandez* instructive. *People v. Weiss*, 133 P.3d 1180, 1187 (Colo. 2006) ("Although not binding as precedent, we may look to decisions of other jurisdictions for persuasive guidance on matters that are of first impression to us.").

¶ 33 Having decided that the identity theft statute requires the prosecution to prove that defendant knew the Social Security number he used belonged to another person, we now address

whether the evidence presented at trial is sufficient to sustain his conviction. After reviewing the record, we conclude that it is not.

¶ 34 Under section 18-1-501(6), C.R.S. 2012,

> A person acts "knowingly" . . . with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists. A person acts "knowingly" . . . with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result.

¶ 35 Here, the manager of the restaurant where defendant worked testified that the restaurant's payroll system rejects incorrect or incomplete payroll forms, and therefore, an employee would not be paid unless the form is correct and complete. The manager also testified that the restaurant does not check the name or sex of an employee against the Social Security number he or she has provided. In addition, she stated that she was not aware of any system that allowed employers to verify Social Security numbers.

¶ 36 The trial court admitted a wage inquiry for the victim's Social Security number. The inquiry spanned approximately five years, and it listed the amount of wages each employer reported under the number for each quarter of the year. Based on the wage inquiry, an

investigator from the Colorado Department of Labor's Fraud Investigation Unit testified that, during those five years, at least six restaurants reported paying wages to someone using the victim's Social Security number. The victim, who lived in Broomfield, testified that she never worked at any of these restaurants located in the greater Denver area. In addition, the trial court admitted defendant's employment application for the barbeque restaurant, which noted that defendant had worked at three of the restaurants listed on the wage inquiry during the relevant period.

¶ 37 There was also evidence that defendant used a counterfeit Social Security card, which included his name and the victim's Social Security number, to obtain employment at the barbeque restaurant. Defendant also completed a federal tax withholding form, Form W-4, using the victim's Social Security number.

¶ 38 The People argue that, in light of this evidence, a rational juror could find beyond a reasonable doubt that defendant was aware that the Social Security number he used belonged to an actual person and was not simply a random series of nine numbers. We are not persuaded.

¶ 39 The evidence presented establishes that defendant used the victim's Social Security number. However, even when viewed in the light most favorable to the prosecution, it does not prove that defendant was aware the number belonged to another person. We must give the prosecution the benefit of every reasonable inference, but a criminal verdict based on "guessing, speculation, or conjecture" cannot stand. *Kogan*, 756 P.2d at 950.

¶ 40 There is no evidence regarding how defendant obtained the victim's Social Security number. Moreover, although the victim lived in Broomfield and defendant worked at restaurants in the greater Denver area, there is no evidence that defendant knew or ever met the victim.

¶ 41 In addition, no evidence was presented at trial that an employee must submit a valid Social Security number in order to receive wages. The Form W-4 defendant completed does not state that a person must possess a valid Social Security number in order to receive wages from employment. Furthermore, the wage inquiry exhibit does not discuss the relationship between a Social Security number and tax withholdings.

¶ 42 However, even if one could infer from the evidence that an employee must present an actual Social Security number to receive pay, there is no evidence or inference that defendant had any knowledge of this requirement. There also is no evidence that the employers verified that the Social Security number defendant provided was valid or that defendant was aware of any verification process. To the contrary, the restaurant manager testified that the restaurant does not verify an applicant's Social Security number and that she was not aware of any verification process available to employers.

¶ 43 The People argue that the fact that numerous employers paid defendant during a five-year span proves that he knew the Social Security number belonged to an actual person. This inference, however, is easily refuted by the facts of *Flores-Figueroa*, where the defendant remained employed for six years using a Social Security number that did not belong to an actual person. 556 U.S. at 648-49.

¶ 44 Although *Flores-Figueroa* did not address sufficiency of the evidence, the Court stated that proving a defendant knew the means of identification belonged to another person could be

particularly difficult where, as here, a person uses the identifying information of another to obtain employment. *Id.* at 655-56. The Court noted that such an instance is often distinguishable from a classic identity theft case — dumpster diving, hacking computers, or stealing paperwork likely to contain personal information — where the offender would know that what he has taken identifies an actual person. *Id.* at 655.

¶ 45 Federal courts of appeals cases addressing sufficiency of the evidence challenges under the federal aggravated identity theft statute further support our conclusion. These courts have held that "a defendant's repeated and successful testing of the authenticity of a victim's identifying information prior to the crime at issue is powerful circumstantial evidence that the defendant knew the identifying information belonged to a real person as opposed to a fictitious one." *United States v. Doe*, 661 F.3d 550, 562-63 (11th Cir. 2011) (citing *United States v. Gomez-Castro*, 605 F.3d 1245, 1249 (11th Cir. 2010); *United States v. Holmes*, 595 F.3d 1255, 1258 (11th Cir. 2010)).

¶ 46 For example, in *Doe*, the court held that the evidence was sufficient to prove that the defendant knew the name and Social

Security number he used in applying for a passport belonged to an actual person. *Id.* at 563-64. Although there was no direct evidence of the defendant's knowledge, before submitting a passport application he repeatedly and successfully tested the authenticity of the identifying information by using the victim's original birth certificate and Social Security card to obtain driver's licenses in two jurisdictions, and he opened a bank account and obtained a debit card using the same information. *Id.*

¶ 47 Here, there is no evidence that defendant either subjected the victim's Social Security number to the level of government scrutiny described above, or possessed or used multiple forms of the victim's identifying information. *Compare United States v. Valerio*, 676 F.3d 237, 244-45 (1st Cir. 2012) (holding that the evidence was sufficient to prove the defendant knew the means of identification belonged to a real person where the defendant possessed a birth certificate listing the victim's name and place of birth along with the victim's parents' names and places of birth; received credit reports with the victim's name; and subjected the victim's Social Security number to repeated government scrutiny), *with United States v. Gaspar*, 344 F. App'x 541, 542-43 (11th Cir. 2009) (holding that the government

failed to prove the defendant knew the birth certificate she used to apply for a passport belonged to another person even though the defendant had previously used the birth certificate to obtain a driver's license and an identification card).

¶ 48 At oral argument, the People relied upon *Weber v. Leaseway Dedicated Logistics, Inc.*, 5 F. Supp. 2d 1219, 1222 (D. Kan. 1998), *aff'd*, 166 F.3d 1223 (10th Cir. 1999) (unpublished table disposition), for a different result. They asserted that the case makes clear that a "valid" Social Security number is required for all employment, and that a defendant is presumed to have known that law. We conclude that the case is inapposite.

¶ 49 In *Weber*, an applicant for an over-the-road trucking job refused to provide a Social Security number on his work application, asserting religious reasons. When the defendant refused to hire him, he brought a religious discrimination claim under the federal Civil Rights Act, 42 U.S.C. § 2000e. The district court agreed with the defendant that the Internal Revenue Service "require[s] an employee to have a social security number," citing 26 U.S.C. § 6721. *Id.*

¶ 50 Even if we assume the correctness of that assertion, however, neither the case nor the cited statutory provisions bear upon or lead to an inference that defendant was aware here that the Social Security number at issue was that "of another." Furthermore, the People did not request an instruction to the jury on this law, nor did they assert or argue in the trial court that defendant was presumed to know it, and we surely cannot sustain a conviction requiring proof beyond a reasonable doubt concerning an element of an offense simply upon the People's mention of such a presumption on appeal. *See Jolly v. People*, 742 P.2d 891, 896 (Colo. 1987) (in a criminal case, the prosecution must prove each element of an offense beyond a reasonable doubt).

¶ 51 Accordingly, we conclude that the evidence here was insufficient to support the jury's verdict on the identity theft charge.

C. Criminal Impersonation

¶ 52 Defendant next contends that the evidence is insufficient to support his criminal impersonation conviction because the prosecution failed to prove that he assumed a false or fictitious identity or capacity. The People do not assert on appeal that

defendant assumed a false or fictitious identity. Accordingly, we address only defendant's contention as it relates to false capacity. We agree the evidence is insufficient.

¶ 53 The statutory provision at issue provided, at the time of the offense involved here, that:

> (1) A person commits criminal impersonation if he or she knowingly:
>
> . . .
>
> (b) Assumes a false or fictitious . . . capacity, legal or other, and in such . . . capacity he or she:
>
> . . .
>
> (II) Performs any other act with intent to unlawfully gain a benefit for himself, herself, or another or to injure or defraud another.

§ 18-5-113, C.R.S. 2012. Subsection 3 of section 18-5-113, which provides that "using false or fictitious personal identifying information . . . shall constitute the assumption of a false or fictitious . . . capacity," was added in 2011 and was not in effect at the time of this offense.

¶ 54 "[O]ne assumes a false or fictitious capacity in violation of the criminal impersonation statute when he or she assumes a false

legal qualification, power, fitness, or role." *Montes-Rodriguez*, 241 P.3d at 929.

¶ 55 Here, there is no evidence that defendant assumed a false capacity. Specifically, the prosecution presented no evidence from which a rational juror could find beyond a reasonable doubt that a Social Security number provided defendant with the false legal qualification, power, or fitness required to obtain employment. There is no evidence that defendant's employers could not have hired him without a "valid" Social Security number. While the People provide support for their assertion in the answer brief by reference to the IRS Tax Guide and federal statutes, this information was not presented at trial.

¶ 56 The facts here are analogous to the facts of *Montes-Rodriguez*. There, the defendant was charged with criminal impersonation for using a false Social Security number in an application for an automobile loan. *Id.* at 926. The court concluded that there was insufficient evidence to prove the defendant assumed a false capacity because the prosecution presented no evidence that a Social Security number is legally required in order to obtain a car loan. *Id.* at 930. The court distinguished lack of practical capacity

to obtain a loan from a lack of legal capacity, noting that evidence of lack of practical capacity alone is not sufficient to sustain a criminal impersonation conviction. *Id.*

¶ 57 Here, while there may be evidence that the employers would not have hired defendant unless he had a Social Security number, there was no evidence that a Social Security number is legally required for employment. Thus, we conclude that the evidence is not sufficient to prove defendant assumed a false capacity. Accordingly, there is insufficient evidence to support defendant's conviction for criminal impersonation.

¶ 58 In light of our above conclusions, we need not address defendant's other contentions.

¶ 59 The judgment of conviction for identity theft and criminal impersonation is vacated, and the case is remanded to the trial court for entry of a judgment of acquittal.

JUDGE MILLER and JUDGE NAVARRO concur.