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Clerk of Circuit Court
Racine County
2022CF001223

STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 2022 CF 1223

HARRY E. WAIT,

Defendant.

HARRY E. WAIT'S MOTION FOR A NEW TRIAL

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I. Introduction: In the interest of justice, this Court should grant Wait a new trial.

Under Wis. Stat. § 805.15(1), Harry Wait, by counsel, respectfully moves for a new trial. For context, the identity theft statute, Wis. Stat. § 943.201(2)(a), criminalizes misappropriating someone else’s personal information “to obtain” the following: “credit, money, goods, services, employment, or any other thing of value or benefit.” During the State’s closing argument, for the first time, it raised a novel theory, one not recognized by any court in the statute’s decades-long history. Specifically, the State claimed that Wait’s alleged “personal satisfaction” counted as “any other thing of value or benefit.” The jury then deliberated for hours before asking this Court if “personal satisfaction” counted as a “value or benefit.”¹ Rather than answering directly, this Court provided definitions of “benefit” and “valuable” that seemingly encompassed personal satisfaction without any limiting principles.² Shortly after, the jury returned a guilty verdict on count 3.

The Court’s answer was both mistaken and prejudicial. Personal satisfaction is not “any other thing of value or benefit.” Every specific thing listed in the statute—credit, money, goods, services, and employment—is something conferred by an outside party. Personal satisfaction is the opposite: it is a feeling generated in a person’s own mind. Under *Lis*, the statute covers only things that are received from an outside source—like the phone service and credit *Lis* obtained from the companies he defrauded—not abstract

¹ Dkt. 243.

² *Id.*

feelings or internal emotional states.³ In the interest of justice, this Court should set aside the verdict and grant Wait a new trial.

II. Background: Wait was convicted of identity theft based largely on an instruction that his alleged “personal satisfaction” could satisfy an essential element.

As this Court will recall, in 2022, Wait, a civic watchdog, set out to test public claims that Wisconsin’s website for requesting absentee ballots was safe and secure. Using publicly available information, he requested absentee ballots for two prominent politicians without obtaining their permission. Unfortunately, Wait did indeed identify a vulnerability: election officials sent him one of the requested ballots. Wait notably videotaped every step and surrendered the ballot to law enforcement as soon as he practically could. And he never attempted to use the ballot to vote under someone else’s name. None of those facts are disputed.

Given the circumstances, both parties knew the trial would turn on whether Wait had obtained “any other thing of value or benefit” from the misappropriation.⁴ After all, he’d extensively documented what he’d done and shared the videotapes with the public. The issue was also subject to extensive pretrial briefing. The defense proposed defining that phrase to include only things that are “readily returnable” and that have “objective worth.” Meaning: things that can be given back, like goods or money, things whose value doesn’t depend entirely on how the defendant feels about them.⁵

³ See *State v. Lis*, 2008 WI App 82, ¶ 11, 311 Wis. 2d 691, 751 N.W.2d 891.

⁴ Wis. Stat. § 943.201(2)(a).

⁵ Dkt. 226, at 12-13.

The State responded that Wait had sought fame and fortune for stealing the victims' identities.⁶ To be clear, the State didn't argue that the ballot itself was an "other thing of value or benefit." Why? Probably because it recognized that the act of misappropriation, under the identity theft statute, requires specific intent: the defendant must perform the act for the "purpose" of obtaining the thing, and here, the evidence indicated that he didn't actually want to get the ballot. That's why he notified the authorities and immediately returned it. Ultimately, the State didn't want any specific instruction on the meaning of an "other thing of value or benefit."

The State won, and the Court didn't define the phrase.⁷ At trial, however, there wasn't much to support its "fame" theory. Even accepting that Wait's videos got lots of views and that in certain social circles, he was a folk hero, the State couldn't show *why* he engaged in the course of conduct. Indeed, while the incident did garner attention eventually, that all came later, and none of it was for Wait's personal benefit. So Wait couldn't have done those actions for that purpose. Then, in closing argument, the State advanced a new theory: that Wait's alleged "personal satisfaction" was the "thing of value or benefit." The jury deliberated and asked the Court whether personal satisfaction counted. It then received the definitions described above, and the guilty verdict came shortly after.

⁶ Dkt. 233, at 1, 5.

⁷ See dkt. 242, at 20-21.

III. Legal Standard.

Wisconsin courts recognize two types of jury instruction challenges.⁸ First, a defendant can argue that an instruction wasn't legally accurate.⁹ If the defendant is right, a circuit court will set aside a guilty verdict absent harmless error, i.e., unless the State can show, beyond a reasonable doubt, that the error didn't affect the outcome.¹⁰ Second, and similarly, a defendant can argue that, within the context of the whole jury trial, a technically accurate instruction confused or misled the jury.¹¹ Under this type of challenge, a defendant has two doctrinal routes to reversal:

- “[T]he instruction was ambiguous and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt.”¹²
- “[T]here was a reasonable likelihood that the jury applied the instruction in a way that denied the defendant a meaningful opportunity for consideration by the jury of his defense ... to the detriment of the defendant’s due process rights.”¹³

Here, the Court can and should set aside the verdict under either or both theories.

IV. Argument.

Because “personal satisfaction” is not “any other thing of value or benefit,” this Court’s supplemental jury instruction was legally inaccurate and misleading. It effectively foreclosed the defense’s theory entirely and allowed the jury to convict Wait based on the self-satisfaction he gained from getting the ballot—nothing more. In

⁸ *State v. Cross*, 2025 WI App 72, ¶ 29, 419 Wis. 2d 186, 30 N.W.3d 431.

⁹ *Id.* (quoting *State v. Gonzalez*, 2011 WI 63, ¶ 29, 335 Wis. 2d 270, 802 N.W.2d 454 (lead opinion)); see also *id.*, ¶ 30.

¹⁰ See *id.*, ¶ 30.

¹¹ *Id.*, ¶ 29 (quoting *Gonzalez*, 335 Wis. 2d 270, ¶ 29 (lead opinion)); see also *id.*, ¶ 31.

¹² *Gonzalez*, 335 Wis. 2d 270, ¶ 24 (lead opinion) (quoted source omitted) (cleaned up).

¹³ *Id.* (lead opinion) (quoted source omitted).

addition, even if the instruction was *correct* in that it correctly stated the law, the jury likely applied it in a way that relieved the State of its burden. That is, the real issue in controversy was never tried. For these reasons, this Court should set aside the verdict and order a new trial.

A. “Personal satisfaction” is internally generated; an “other thing of value or benefit” must come from the outside.

The identity theft statute’s list of specific things is a good starting point. When a statute lists specific examples and then adds a general catchall, the catchall only covers things of the same kind – not things of a fundamentally different kind.¹⁴ That’s especially true when the catchall uses the word “other,” like the statute at issue here, because “other” suggests that the specific things proceeding the catchall share the same properties.

The list of specific things is as follows: credit, money, goods, services, and employment.¹⁵ These are the things that precede the phrase “other thing of value or benefit,” and notably, each of them is a thing that comes from someone else—e.g., a lender, a merchant, or an employer. In contrast, “personal satisfaction” is internally generated—it stems from a person’s own mind. That’s not true of credit, money, goods, services, and employment. All of those things depend, to varying degrees, on an external party, and contemplate something less abstract and amorphous than emotional gratification.¹⁶ Indeed, it’s hard to think the Court in *Lis* comes to a different conclusion

¹⁴ *Milwaukee J. Sentinel v. DOA*, 2009 WI 79, ¶ 44, 319 Wis. 2d 439, 768 N.W.2d 700.

¹⁵ Wis. Stat. § 943.201(2)(a).

¹⁶ *Cf. State v. Aleck*, 520 P.2d 645, 648 n.2 (Wash. 1974) (discussing the word “reward” in a kidnapping statute).

if the State's theory had been that the father was *personally satisfied* by not having to pay the debt as opposed to the non-payment itself was a thing of value or benefit.

The identity theft statute's structure confirms this interpretation. Courts presume that the Legislature doesn't add words in a statute for rhetorical flourish: a properly interpreted statute shouldn't contain any redundancy.¹⁷ Here, the Legislature created three separate purpose prongs in Wis. Stat. § 943.201(2):

subsection (a) covers acting to obtain "credit, money, goods, services, employment, or any other thing of value or benefit" (it's the only subsection directly at issue in this case);

subsection (b) covers acting to avoid "civil or criminal process or penalty"; and

subsection (c) covers acting to harm someone else's "reputation, property, person, or estate."

If the catchall in (a) already covered every conceivable advantage, at a minimum, there would have been no reason to create (b), and even (c) becomes suspect. After all, avoiding legal liability is a thing of value or benefit in some broad sense. But the Legislature treated those as separate categories. Reading the catchall in (a) to swallow other subsections is, therefore, problematic.

Additionally, if meaning is still in doubt, any ambiguity must be resolved in Wait's favor.¹⁸ When interpreting criminal statutes, the tie goes to the runner because a fair justice system requires that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is

¹⁷ *State v. Wilson*, 2017 WI 63, ¶ 42, 376 Wis. 2d 92, 896 N.W.2d 682.

¹⁸ *State v. Kizer*, 2022 WI 58, ¶ 31, 403 Wis. 2d 142, 976 N.W.2d 356 (Rebecca Grassl Bradley, J., concurring).

passed.”¹⁹ Here, that means if there’s doubt about the jury instruction, it shouldn’t have issued.

B. *Lis* confirms this understanding of the statutory text.

Lis demonstrates why personal satisfaction just doesn’t cut it.²⁰ There, a father used his son’s identity to open a phone account and a credit card, ran up charges, and then the accounts were closed. The State argued the father still received a “benefit” even after he closed the accounts because creditors pursued the son instead of him. The Court of Appeals rejected this theory, holding that a “thing of value or benefit” means “the original receipt of something with value, not ongoing nonpayment of the associated liabilities.”²¹ The benefits the Court recognized—phone service and credit—were externally conferred at a single, discrete moment in time; in contrast, the consequences that fell on the son afterward were just that—“consequences,” not benefits to the father.²² The Court also emphasized that, if “ongoing nonpayment” counted as a benefit, the crime would “continue up to and even after his conviction, until the last dollar of restitution was paid” — it was not returnable in any sense, and would continue into perpetuity.²³

The logic of *Lis* is simple: the identity-theft statute criminalizes misappropriating someone else’s personal information to get things from others — e.g., credit from a bank, a paycheck from an employer, or a favorable ruling from a court. That is what the statute targets — not how the defendant feels about what he did. If dodging debt collectors, which

¹⁹ *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

²⁰ *Lis*, 311 Wis. 2d 691, ¶ 8.

²¹ *Id.*, ¶ 11.

²² *Id.*, ¶ 10.

²³ *Id.*, ¶ 11.

at least has a financial dimension, isn't an "other thing of value or benefit," then personal satisfaction certainly isn't either.

C. No Wisconsin case supports the State's "personal satisfaction" theory.

In the weeks since the verdict, the defense has found no case that supports the State's theory. The State will cite *Peters* and *Stewart* for the proposition that "thing of value or benefit" extends beyond items with commercial value.²⁴ True—but those cases involved fundamentally different facts and neither supports that an internally generated emotion qualifies. In *Peters*, the defendant lied about her identity during an arrest and received a lower bail amount (an externally conferred benefit)—which the court held operated as a form of "credit," one of the items the statute specifically lists.²⁵ The *Peters* court expressly left the catchall's outer limits undefined,²⁶ and the *Lis* court reasoned *Peters* had "limited relevance" on that question.²⁷

In *Stewart*, the defendant forged documents and received a more favorable sentence from a court acting on the misrepresentation.²⁸ In both cases, an external actor conferred a concrete advantage.²⁹ Personal satisfaction involves no external actor, no conferral, and no concrete advantage. No Wisconsin court has ever held that a purely internal emotional state satisfies the statute. And allowing a conviction based on that would stand as a first—one that the statute's language and history do not support.

²⁴ *State v. Peters*, 2003 WI 88, ¶¶ 21–23, 263 Wis. 2d 475, 665 N.W.2d 171; *State v. Stewart*, 2018 WI App 41, ¶¶ 26–27, 383 Wis. 2d 546, 916 N.W.2d 188.

²⁵ *Peters*, 263 Wis.2d 475, ¶ 22.

²⁶ *Id.*, ¶ 23.

²⁷ *Lis*, 311 Wis. 2d 691, ¶ 13.

²⁸ *Stewart*, 383 Wis. 2d 546, ¶¶ 2–3.

²⁹ *Stewart*, 383 Wis. 2d 546, ¶¶ 6–7; *Peters*, 263 Wis.2d 475, ¶¶ 22–23.

V. The error was prejudicial.

The definitions the Court provided came from *Lis*, which quoted the dictionary.³⁰ But *Lis* did not stop at the dictionary. It used those definitions as a starting point and then held that abstract gains or states of mind do not qualify.³¹ This Court quoted the dictionary language but omitted the legal analysis built on top of it. The result: if “benefit” is anything that “aids or promotes well-being,” then personal satisfaction qualifies almost by definition.³² The Court’s answer effectively resolved the jury’s question in the State’s favor without saying so. As the Supreme Court held in *Bollenbach*, “When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.”³³ Here, that would have been an answer of ‘no’ to the jury’s question—Wait’s personal satisfaction is irrelevant under the statute.

The prejudice was compounded by the State’s closing argument, which had already told the jury that personal satisfaction was enough. The Court’s supplemental instruction then appeared to confirm that position. This combination (a prosecution argument exploiting an omission in the instruction, followed by a supplemental instruction that validated the argument) is what the Court of Appeals condemned in *McAdory*.³⁴ There, the court reversed after finding that an incomplete instruction, combined with the prosecution’s closing exploiting the gap, created “a reasonable

³⁰ *Lis*, 311 Wis. 2d 691, ¶ 8; dkt. 243.

³¹ *Lis*, 311 Wis. 2d 691, ¶¶ 10–11.

³² Dkt. 243.

³³ *Bollenbach v. United States*, 326 U.S. 607, 612–14 (1946).

³⁴ *State v. McAdory*, 2021 WI App 89, ¶64, 400 Wis. 2d 215, 968 N.W.2d 770.

likelihood that the State was effectively relieved of its burden.”³⁵ Put differently, when instructions incompletely state the law and the prosecutor’s closing exacerbates the error, “the jury was probably misled.”³⁶

Here, the speed of the verdict confirms the harm that flowed from the instruction. The jury was stuck on the personal satisfaction question—that is why it sent the note. After receiving the Court’s answer, it convicted promptly. The inference is clear: the answer resolved the impasse in the State’s favor. Had the Court answered correctly (that personal satisfaction doesn’t qualify), the jury would have had to find a concrete, externally conferred benefit of objective worth—and on this record, there was none.

VI. Conclusion.

The jury asked the right question and received the wrong answer. Personal satisfaction is not an “thing of value or benefit” as contemplated by the statute. Rather, personal satisfaction is internally generated. It cannot be transferred or returned. It lacks objective worth. Reading the statute to cover it would make the Legislature’s separate treatment of other statutory subsections pointless. The Court’s broad definitions, untethered from statutory structure and the limiting principles of *Lis* left the jury free to convict on a theory the law does not support—and the State’s closing argument drove the jury to do exactly that. By introducing “personal satisfaction” during its closing arguments and the Court’s instruction right before the jury voted to convict Harry Wait, Wait was denied the chance to defend himself against the allegations of personal

³⁵ *Id.*, ¶2.

³⁶ *State v. Tee & Bee, Inc.*, 229 Wis. 2d 446, 456, 600 N.W.2d 230 (Ct. App. 1999).

satisfaction. Thus, Wait respectfully requests that this Court vacate his conviction and grant him a new trial.

Dated this 13th day of April, 2026.

Respectfully submitted,
HARRY E. WAIT, *Defendant*

Electronically signed by Joseph A. Bugni

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