

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff and Respondent,

v.

KEVIN CHRISTOPHER BOLLAERT,

Defendant and Appellant.

CASE NO. D067863

SAN DIEGO COUNTY
SUPERIOR COURT NO.
SCD252338

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

(HONORABLE DAVID M. GILL, JUDGE)

APPELLANT'S REPLY BRIEF

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By Appointment of the Court of Appeal Under the Appellate
Defenders Independent Case System.

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ARGUMENT I

APPELLANT'S CONVICTIONS FOR IDENTITY THEFT UNDER PENAL CODE SECTION 530.5(a) MUST BE SET ASIDE AS HE WAS NOT AN INFORMATION OR INTERNET CONTENT PROVIDER AND THEREFORE COULD NOT BE PROSECUTED UNDER THAT STATUTE. THERE WAS NO POSSESSION OF THE IDENTIFYING INFORMATION OF ANOTHER WITH THE INTENT TO COMMIT FRAUD.

A. Appellant's Opening Brief.

In his opening brief appellant established that the People's case could not be sustained on any of the three

theories under which they believed appellant's actions fell within the purview of Penal Code section 530.5(a), identity theft. The People had proceeded on three separate theories upon which they believed liability was based: (1) violation of Penal Code section 653(m); (2) public disclosure of private facts; and (3) intrusion into a person's private affairs.

Appellant argued that none of the three theories were supported by the evidence. More specifically, appellant argued that under the Communications Decency Act appellant was immune from prosecution as he was not an internet content provider under any reasonable interpretation of the term. Additionally, appellant argued that he could not be guilty of identity theft because he did not obtain, distribute or otherwise misuse the personal identification information of any individual for an unlawful purpose. Finally, appellant argued that Section 530.5(a) does not apply to individuals engaged in the business of operating a website.

B. Respondent's Brief.

Respondent argues that appellant was an information content provider and therefore not immune under Section 530.5(a). Additionally, respondent argues that, if not,

appellant acted with the intent to defraud and for that reason is not immune. Respondent claims that appellant designed the site in such a way that posters to the site were required to provide victim's personal identifying information which was then inserted into the postings. Respondent argues that the information was retained and used in such a way as to defraud the victims into using "Changemyreputation.com" to remove the posted photos.

(Respondent's Brief p. 20, 24.) Respondent relies on *Fair Housing Council of San Fernando Valley v.*

Roomates.com LLC (9th cir. 2008) 525 F.3d 1157 to support their argument that appellant was an information content provider and that appellant, being engaged in a facially illegal act, is not to benefit from immunity under the Act. (Respondent's Brief pp. 24-25.)

Respondent also argues the information was obtained, retained, and distributed for purposes of defrauding the victims. This unlawful use makes his conduct fall within a purview of the statute. (Respondent's Brief p. 35.)

Finally, respondent argues that the disclosure of private facts forms an additional basis for the verdicts.

(Respondent's Brief p. 40.)

C. Discussion.

Respondent basically reiterates the arguments made below and relies on the same authorities. Respondent, for the most part, fails to discuss many of the cases cited by appellant clearly articulating why his conduct did not make him an internet content provider such as to remove him from the immunity protection. These cases support the conclusion appellant did not obtain, possess or distribute (disclose) private information of the victims.

It was not claimed below or by respondent at this level that appellant created the content of the website. Appellant received submissions from third parties and posted some of those submissions on the website along with other information that was largely available to anyone with access to a computer. Information as to an individual's Facebook address, residence and other information is readily available. Respondent has not successfully been able to distinguish appellant from the others who have engaged in virtually identical conduct that the courts have deemed protected. (See *Levitt v. Yelp! Inc.* (9th Cir. 2014) 765 F.3d 1123.)

1. Communications Decency Act.

Congress passed section 230 of the Communications Decency Act ("CDA 230") in 1991. The Act took the deliberate, affirmative step to protect speech online by broadly shielding internet service providers from responsibility for materials supplied by their users. Congress recognized that immunizing interactive computer services from liability for hosting diverse content in turn encouraged the development and availability of innovative online services that foster free speech. Because it encourages both large and small intermediaries to open forums for discussion, section 230 has been critical in protecting and expanding the internet as a forum for free speech embodied in the First Amendment.

The CDA was enacted by Congress specifically to prevent actions against internet service providers that would constitute intrusive regulation of free speech. (*Zeran v. America Online, Inc.* (4th Cir.1997) 129 F.3d 327, 330.) As occurred in appellant's case, the law applies to acts such as his where interactive computer services and access software providers display content created by or originated by third parties. In appellant's case, respondent has never disputed the fact

that the content displayed on appellant's website was either created by or originated by third parties. The CDA specifically precludes enforcement of state actions that are inconsistent with the Act. (47 U.S.C. Section 320, subdivision (a)(1)(3).)

Here, the People claimed the statute's protection did not apply to appellant because he administered the "Yougotposted" website and retained the authority to pick and choose which information was posted. This does not make him a content provider. Those actions of appellant are no different than those found by the courts to be protected under the statute. (See e.g. *Levitt v. Yelp!, Inc.*, *supra*, 765 F.3d 1123.) The People's argument must fail because accepting their arguments would eviscerate protections provided by the statute, jeopardizing service providers and undermining free speech in the process.

2. Penal Code section 530.5.

Penal Code section 530.5, subdivision (f) immunizes an interactive computer service or access software provider from liability unless the service or provider acquires, transfers, sells, conveys or retains possession of personal information with the intent to defraud. Obviously, absent intent to defraud, Penal Code section

350.5 would have no applicability to appellant over and above the fact he is protected under the Act. Appellant is not liable under Penal Code section 530.5 because he is (1) an interactive computer service provider, (2) an access software provider as defined in the CDA and, (3) there was no fraud.

Here, the People produced no evidence in support of their belated claim that appellant possessed personal identification information with the intent to commit fraud. CALCRIM 2401 describes fraud as having deceived another person in order to cause a loss of money or something of value or damage to a legal, financial or property right. The People belatedly raised the claim that payments made through "changemyreputation.com" were obtained by fraud because the victims were not aware that appellant managed both websites. Problems arise with the argument. First, the link to "changemyreputation.com" was visible on "Yougotposted.com." There was no evidence suggesting appellant was trying to hide the fact that the sites were connected. A number of the victims stated it was "obvious" that the same person was behind both sites. (4RT pp. 305-306.) Additionally, the People's argument must fail because the victims clearly believe the payment

was to have the photos removed, not because they were "deceived".

As noted in Appellant's Opening Brief ("AOB" pp. 27-28) appellant falls within the protections of the Communications Decency Act as either an interactive computer service provider or an access software provider. Evidence presented at trial showed appellant to be both. He performed all of the functions described in the CDA including his right to filter, screen, and allow or disallow content. He was also, under the Act, permitted to pick, choose, analyze or digest contents as well as transmit, receive and display that content. (Subdivision (f)(4).)

The case relied on by respondent, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC* (Roommates) also recognizes that CDA 230 provides a safe haven for interactive computer service providers by removing them from the traditional liabilities attached to speakers and publishers. (*Roommates, supra*, 521 F.3d at p. 1179; see also *Zeran v. America Online, Inc., supra*, 129 F.3d at p. 330.)

On the facts of this case it cannot be credibly argued appellant was an information content provider.

The CDA makes it clear that the person or entity be "responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." (Subdivision (f) (3).) Appellant's acts consisted entirely of receipt of potential content and images submitted by third parties. He merely engaged in a decision as to whether or not to post some or all of the third party submissions to the website. The courts have consistently held that engaging in this type of a selection process does not render a party an information content provider. (See *Universal Communications Systems Inc. v. Lycos, Inc.* (1st Cir. 2007) 478 F.3d 413, 419.)

The Fourth Circuit has also made it clear that one may not hold the service provider liable for its exercise of a publisher's traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content. (*Zeran v. America Online Inc., supra*, 129 F.3d at p. 330.)

The information accepted by appellant for purposes of posting was neither private nor did it remove him from his protections under the CDA. None of the information received by appellant was illegal and in fact, it was not

necessarily private. The People never argued that any posting was per se illegal. Most of the information requested, including Facebook page information is often readily obtainable to anyone comfortable with a computer as many Facebook pages are not blocked and are readily viewable.

Under Section 530.5, requesting this information and possession of the information, publishing the information or disclosing it is not prohibited, absent the requisite criminal intent to defraud. In *Roommates*, the solicited information such as questions as to sexual orientation etc. was facially prohibited under various fair housing laws. Listing of the information was not prohibited. It is also worth noting that in *Zeran v. America Online*, the message board posted the plaintiff's home phone number which, as in this case, resulted in a number of telephone calls the victim deemed abusive. The Court held *America Online* was not liable under The Communications Decency Act, even though they were put on notice about the contents of the posts and deliberately took no action to remove them from the message board. (*Id.* at p. 329.)

Respondent's claim that appellant's posting of the photos and his request for information removed him from

the protections of the CDA has been rejected by the 9th Circuit. In *Califano v. Metrosplash.com Inc.* (9th Cir.2003) 339 F.3d 1119, the court specifically rejected the contention that the dating website was a content provider because it had required its users to answer pre-populated questions which appear to have included home addresses, e-mail addresses and telephone numbers. (*Id.* at p. 1124.) Similarly, in *Jones v. Dirty World Entertainment Recordings, LLC* (6th Cir.2014) 755 F.3d 398, the website posted disparaging and defamatory photos, videos and comments about other people. The plaintiff in the case sued the site because it posted third-party submissions suggesting she had engaged in sexual acts with the entire Cincinnati Bengals football team and that she had numerous sexually transmitted diseases. The post listed the high school where she taught among other information. The Sixth Circuit Court of Appeal found the Communications Decency Act applied and provided protection, finding "The Dirty" was not an information content provider. (*Id.* at p. 414.)

In *Jones, supra*, the Court found that the fact the website encouraged and solicited actionable material and the fact the website's operator ratified and adopted the

actionable material by adding his own commentary did not make the website operator a content provider. In that case the third-party user or provider was specifically instructed to provide specific information. (*Id.* at p. 430.)

It is the policy of the United States to minimize internet regulation. This policy of regulatory forbearance applies to any liability imposed based upon the exercise of traditional editorial functions such as to publish or withdraw third-party content. Any such liability was "for Congress simply another form of intrusive Government regulation of speech." (*Zeran, supra*, 129 F.3d at 330.) Congress has recognized in Section 230 what the United States Supreme Court later confirmed in extending the highest level of First Amendment protection to the internet.

"governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 885.) It is clear that Congress intended to encourage the unfettered and unregulated development of free speech on the Internet and to promote the development of the E-commerce."

Congress was rightfully concerned that imposition of liability on providers who host thousands and possibly millions of messages may necessarily lead to overreaching

moderation or outright censorship. By its express terms Section 230 creates a Federal immunity as to any cause of action that would make a service provider liable for information originating with third-party users of the service. (*Zeran, supra*, 129 F.3d at p. 330.) The courts have consistently applied this immunity broadly, and not sparingly, to encourage free speech on the Internet. (See e.g. *Nemet Chevrolet, Ltd., v. Consumeraffairs.com, Inc.* (4th Cir.2009) 591 F.3d 250, 254.) Section 230 precludes any cause of action brought against a person under any state or local law that is inconsistent with that section. (See *Carofano v. Metrosplash.com, Inc.* (9th Cir. 2003) 339 F.3d 1119, 1125.)

Both the Communications Decency Act and Penal Code section 530.5, subdivision (f) protect appellant from prosecution as he was only an interactive computer service provider.

3. The Finding of Guilt of Identify Theft is not Established on this Record.

The People argued appellant was guilty of identity theft under Section 530.5(a) because he obtained the personal identifying information of another and used that information for an unlawful purpose without the consent of the person whose information was provided by the third

party or publicly disclosed private facts. Respondent's Brief pp. 41-42.) Contrary to respondent's claim, appellant has throughout this case disputed he publicly disclosed private facts, a separate tort, or that he obtained or possessed the "private facts" for an unlawful purpose. The facts were not private, as discussed, and had been place in the public domain by the victims themselves or the third-party providers.

The evidence does not support a finding appellant willfully obtained, used or publicly disclosed any personal identifying information of the alleged victims for an illegal purpose. In this case the individuals who supplied the material were ex-boyfriends and/or personal friends who provided the information to the website. They would be similar to the third-party defendant in *In Re Rolando S.* (2011) 197 Cal.App. 4th 936. Appellant however, only provided the opportunity for third parties to post the information of their choice. The laws have not been used to prosecute a website host operator for crimes based on the actions of third parties.

Respondent appears to argue that appellant exercised his editorial discretion regarding the placement of information that was allegedly the personal identifying

information of another person to be used for an unlawful purpose. However, the record fails to disclose any such unlawful purpose. The protections of the CDA apply categorically and without any inquiry relative to the motivations or mental state of the provider in making his editorial decisions. (See e.g. *Green v. America Online* (3d Cir.2003) 318 F.3d 465, 470-471.)¹

Identity theft requires the possession or use of the personal identifying information of another person for an unlawful purpose such as fraud or harassment in violation of Penal Code section 653(m) as argued by the People below. However, in this case there was no evidence appellant contacted any of the alleged victims as is anticipated by section 653. He directed no obscene language to them nor did he harass them in any manner. These actions were undertaken by third parties unknown to appellant. Section 653 applies to third parties who seek out the website of their own free will, then decide to take the information on the website and make additional choices to direct obscene messages to particular people.

¹ As noted in Appellant's Opening Brief it appears that recently enacted Penal Code section 647, subdivision (j)(4) could possibly create misdemeanor liability on the third party providers in this case.

Here, there was no contact by the website operator, appellant. The evidence does not support any finding that appellant possessed, used, distributed or otherwise illegally dealt with the identifying information of another person for an unlawful purpose.

Additionally, appellant did not use the personal identifying information for the purpose of invading the victim's privacy or other fraudulent purpose. California law as to the civil tort of invasion of privacy requires:

- (1) The plaintiff had a reasonable expectation of privacy and specific information,
- (2) The defendant intentionally intruded into that matter,
- (3) The defendant's intrusion would be highly offensive to a reasonable person,
- (4) The plaintiff was harmed and
- (5) The defendant's contact was a substantial factor in causing the harm.

The unlawful purpose as to invasion of privacy may be attributed to the third parties who submitted the photographs to appellant's website, but not to appellant. Appellant did not know any of the alleged victims. These third parties sought out his website and chose to use it to post the photos without permission. These third parties acted of their own free will. Appellant was unable to tell from these submissions whether the people

submitting the photos were submitting photos of themselves or of other people without their permission.

A question exists as to whether each of the persons who had photos submitted had a reasonable expectation of privacy in the photos. Most, if not all, of the alleged victims admitted they knowingly took or allowed to be taken the photos which they then in turn shared on line with other people. Transmissions over the internet are not reasonably expected to be private. (See *United States v. Lifshitz* (2d Cir. 2004) 369 F.3d 173; *Four Navy Seals v. Associated Press* (2005) 413 F.Supp. 1136, 1143.) As is generally known by any individual even minimally educated as to the use of computers, smart phones, etc., pushing the "Send" button places that message and content out there for everyone. Any expectation of privacy then vanishes.

The evidence fails to establish appellant falls outside the protections of the Communications Decency Act or that the identifying information of the individual's was possessed, distributed or in any way used for an unlawful purpose that is not otherwise protected by the statutes. There is no good faith requirement written into the blanket protections of the law. Appellant's use

of information provided by the third parties is not actionable. Appellant's convictions under Penal Code section 530.5(a) must be reversed.

ARGUMENT II

APPELLANT'S EXTORTION CONVICTIONS ARE NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE AND MUST BE REVERSED.

A. Appellant's Opening Brief.

The prosecution below argued appellant used the posting of the photographs on the website to illegally obtain money from those whose photos were posted. This illegality allegedly was his solicitation of a fee to have the photos removed from the "Yougotposted" website via the "changemyreputation.com" website. The argument below was that appellant threatened to injure the victims or "expose their secrets" by publishing the images on the website.

Appellant noted in his opening brief that the Communications Decency Act provides that internet active computer service providers and access software providers are under no legal obligation to remove any postings submitted to their website by third parties, even those postings that are negative in nature. Appellant was, therefore, under no obligation to remove the negative content from his website. He merely offered a service to remove the photos and, by offering such a service, he was engaging in a standard legal business practice and not extortion.

B. Respondent's Brief.

Respondent argues this case is not about incidental harms caused by a "free market economy run amok". It is suggested appellant is a criminal who harmed many people and not a legitimate business operator. The respondent argues that the "threat" of continued exposure of the photographs was wrongfully used by appellant to extort money from the victims. Respondent also argues that the website contained the victim's personal information and therefore appellant was obligated to remove the content because he was not providing a service he otherwise had a legal right to perform. (Respondent's Brief pp. 42-43.)

Respondent suggests appellant induced fear by threat to expose a secret because he posted the victim's private photographs and their accompanying personal identifying information. Respondent claims appellant "implicitly" threatened to keep posting those images on line until the victims paid. Respondent argues the mere posting of the photos and various indicia of identification such as name and city as a "threat" to the victim. (Respondent's Brief p. 45.)

C. Discussion.

Penal Code section 519 describes fear used to extort and includes threats to:

1. Do an unlawful injury to the person or property of the individual threatened or of a third person.
2. To accuse the individual threatened or any relative of his, or member of his family, of any crime.
3. To expose or to impute to him or them any deformity, disgrace or crime, and
4. To expose any secret affecting him or them.

As argued in appellant's case, to be guilty of the crime of extortion it must be established the person (1) threatened to unlawfully injure another person or threatened to expose a secret about another person or to expose them to disgrace and (2) when making the threat, the defendant intended to use the fear engendered by that threat to obtain the person's consent to give the defendant money and (3) as a result of the threat the other person gave the defendant money. (Penal Code sections 519, 520.)

In order to establish extortion, the wrongful use of force or fear must be the operating or controlling cause compelling the victim's consent to surrender money to the

extortionist. (See *Chan v. Lund* (2010) 188 Cal.App. 4th 1159, 1171.)

In appellant's case the People proceeded on the theory the third-party postings constituted exposure of a secret affecting the persons portrayed in the photos. The posting done by appellant on the website of this information provided solely by third parties does not constitute a threat to expose any secret as to the other persons because the alleged secret (the photos) was already in the public domain and had been provided by the third parties unaccompanied by any demand for payment. Appellant merely provided a service whereby, for payment of a fee, the information legally posted on the website could be removed.

Respondent's attempts to distinguish *Levitt v. Yelp!, Inc., supra*, are not persuasive. There the Ninth Circuit found that *Yelp!, Inc.*, a website allowing the public to post reviews of businesses, was not engaging in extortion by calling those businesses and asking them to pay for advertising in exchange for more favorably placed good reviews, fewer negative reviews and overall higher ratings. In *Yelp!*, business owners had claimed they received less than favorable reviews from customers that

in turn were posted on Yelp!. The owners would later be contacted by representatives of Yelp! asking them to pay for advertising with assurances that the result would be more positive reviews, fewer negative reviews and/or the listing of reviews in such an order as to place some more favorable reviews on top.²

A number of the plaintiffs in *Yelp!* claimed that if they rejected the solicitation for advertising, positive reviews would be totally removed and negative reviews elevated. It was also alleged that Yelp! was fabricating negative reviews that made disparaging and untrue claims about the businesses. There were claims that Yelp! manipulated the rating system to give the non-advertising companies poor ratings. In many ways, Yelp's conduct could be deemed more egregious than appellant's. In *Yelp!*, not only was the advertising fee solicited with the implied promise of positive reviews placed in a more prominent spot, but, where the solicitation to advertise was rejected, Yelp! posted additional negative reviews

² The San Diego Reader (10/7/15) printed an article where local business owners similarly claimed negative reviews accentuated when they failed to pay the advertising fee but that some false reviews were posted.

and/or intentionally re-adjusted the reviews so that the negative ones were then prominently displayed. In this case appellant merely posted the removal information. At no time was it shown that he modified or added to any posting when payment was not made. In fact, a number of postings were removed by appellant without any payment being made.

In *Yelp!*, the Court discussed the Hobbs Act (a civil extortion statute) and California Penal Code sections 519 and 520, those charged here. The court concluded the statutes were virtually identical. The Court concluded that *Yelp!*, as an internet service provider, was not engaging in extortion. The court stated:

In sum, to state a claim of economic extortion under both Federal and California law, the litigant must demonstrate either that he had a pre-existing right to be free from the threatened harm, or that the defendant had no right to seek payment for the service offered. Any less stringent standard would transform a wide variety of legally acceptable business dealings into extortion.

Yelp! was simply offering a service when it offered to remove negative reviews from its web page. The offering of that service in exchange for money amounted to a legitimate business practice. (*Id.*)

Respondent appears to seek expansion of the criminal statutes and/or dilution of the Communications Decency

Act because respondent finds appellant's posting of the photos so morally reprehensible. Neither the nature of the postings nor the posting by appellant warrants the evisceration of the Congressional protections approved in such cases as *Yelp!*. Though respondent finds appellant's conduct to be reprehensible, his conduct was nonetheless protected by law. It did not amount to extortion under prevailing legal principles.

Extortion is a specific intent crime. (*People v. Hesslink* (198) 167 Cal.App. 3d 781, 788.) In this case, there was no evidence that appellant threatened to expose a secret or disgrace any alleged victim. He personally did not threaten any victim and there could be no threat to expose a secret or disgrace when that very secret or disgrace had already been exposed. Appellant made no threats, direct or implied. He never sought out or contacted any of the victims and took no action by word or mouth to threaten them. Information that is publicly available on websites to anyone interested in knowing about it does not constitute a secret for purposes of extortion. (*Cross v. Cooper* (2011) 197 Cal.App. 4th 357, 387-388.)

The fact that some other person may be unaware of

the existence of the "secret" is not controlling. *Cross* undermines respondent's reliance on *People v. Peniston* (1966) 242 Cal.App. 2d 719. In *Peniston*, the Court of Appeal concluded that a threat to expose nude photographs of the victim to her husband and parents constituted sufficient evidence of extortion, even though the same photographs were widely circulated. (*People v. Peniston, supra*, 242 Cal.App. 2d at p. 722.)

Peniston is distinguishable in several important areas. First, in *Peniston* the person threatening to expose the photographs was in actual possession of those photographs. Here, the photographs were provided to appellant through third parties who had been given access to the photographs by the victims. Further, *Peniston* was a 1966 case and did not deal with publication through the Internet. The court could therefore not have discussed the voluminous recent legislation providing protection to internet site operators such as appellant who received the photos or information from third parties. *Peniston* simply does not apply.

Respondent's suggestion that because there may be one person on the planet who is not aware of the photos, the information is still "secret" does not ring true

here. For the victims, once those photographs were sent over the Internet, they can reasonably be presumed to have known it would be viewed or shared by other persons. Here, no demands were made of the victim before the photos were posted on the website. Appellant merely provided a service whereby the photos could be removed. While reprehensible, this was not illegal. (*Yelp!*, *supra*, 765 F. 3d at p. 1127.) The fact appellant provided a means by which already exposed information could be removed does not support the charge of extortion.

ARGUMENT III

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY WITH CACI CIVIL LITIGATION INSTRUCTIONS THAT ALLOWED THE JURY TO ELEVATE A POSSIBLE CIVIL WRONG INTO AN ELEMENT OF THE CRIMINAL OFFENSE OF UNAUTHORIZED USE OF PERSONAL IDENTIFYING INFORMATION BASED ON PENAL CODE SECTION 653m, SUBDIVISION (a).

A. Appellant's Opening Brief.

The trial court had instructed the jury that an unlawful purpose required for the unauthorized use of personal identifying information as charged in various counts could be shown based upon a violation of Penal Code section 653m, subdivision (a). The court instructed the jury with two civil instructions, CACI 1800 and 1801, intrusion into private affairs and public disclosure of private facts, respectively. (2CT pp. 387-388.)

Appellant argued that each of the instructions was based upon civil liability and actions arising from obligations under civil law. The trial court, by giving the instructions, elevated these alleged possible civil wrongs into an unlawful "criminal" purpose such as to become crucial elements of establishing a violation of Penal Code section 653m, subdivision (a). In turn, these "elements" of the crime could be found based on a civil law theory and establish the use of personal identifying information for an "unlawful" purpose.

Appellant argued that giving the instruction was error as the standard applied to a civil wrong is lower than beyond a reasonable doubt. The trial court wrongly allowed the use of some civil wrong to be elevated by the jury into a criminal wrong supporting a required unlawful purpose. The error here was prejudicial, particularly in light of the inability to determine whether jurors relied on this theory to support their convictions for identify theft.

B. Respondent's Brief.

Respondent argues that any error in giving the instructions was invited by appellant's counsel and that, if construed as a whole, the jurors were more than able to determine every element beyond a reasonable doubt.

Respondent argues that since defense counsel sought the instructions, any error in giving them was invited by defense counsel. Further, respondent argues that, given the totality of the instructions given to the jury, the jury would have concluded appellant was guilty of all elements of the charged offenses beyond a reasonable doubt. (Respondent's Brief pp. 57-59.)

C. Discussion.

It appears from the record that while respondent is technically correct that appellant's counsel requested the CACI instructions, it was only in response to the court's expressed intention to instruct the jury under other civil instructions contained in BAJI. (7RT p. 995.) It is reasonable to infer that since the court was going to give some type of a civil instruction as to the violation of section 653m, defense counsel proposed their own.

Appellant's issue with the instructions was that it was not made clear to the jury that the instructions encompassed what is basically a civil wrong and how that civil wrong could somehow be used to support a violation of Penal Code section 653m. Appellant believes that the trial court, having determined to give civil instructions as to elements needed to be proved under the People's theory under Penal Code section 653m, was then under an obligation to clarify that the civil instructions do not fall under a lesser standard. In other words, that the burden of proof is not lessened for the People by the giving of these instructions. (See *Partach v. Banning* (1967) 251 Cal.App. 3d 278, 286.)

The court instructed the jury they could use either intrusion into private affairs as described under civil law or public disclosure of private facts, also as described in civil law, to be equivalent to an unlawful (criminal) purpose required to establish elements of the crime of identity theft. These theories were strongly argued by the People in support of the identify theft counts. Here the court should have instructed on the general principle that the civil wrongs must be proved beyond a reasonable doubt in order to make a finding in support of an identity theft criminal charge. (See *People v. Seden* (1974) 10 Cal.3d 703, 715-716.) Since it cannot be determined the jury applied the correct standard, the error requires reversal of appellant's convictions.

CONCLUSION

For the foregoing reasons appellant requests that his convictions be reversed.

Respectfully submitted,

/s/PATRICK J. HENNESSEY, JR.
PATRICK J. HENNESSEY, JR.
Attorney for Defendant

CERTIFICATION OF WORD COUNT

People v. Bollaert

I, Patrick J. Hennessey, Jr., hereby certify that according to the computer program used to prepare this document, Appellant's Reply Brief contains 5,323 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 19th of February, 2016, in San Diego, California.

/s/PATRICK J. HENNESSEY, JR.
PATRICK J. HENNESSEY, JR.
Attorney for Defendant

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I, the undersigned, declare that: I am over the age of eighteen years and not a party to the action; I am employed in the County of San Diego, California, within which county the subject mailing occurred; my business address is 2356 Moore Street, Suite 201, San Diego, California; I am familiar with this firm's practice for collection and processing correspondence for mailing with the United States Postal Service pursuant to which practice all correspondence will be deposited with the United States Postal Service the same day in the ordinary course of business. I served the following document(s):

Appellant's Reply Brief

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I server declare I electronically served from my service address the same referenced above document on:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on 2/22/16.

/s/PATRICK J. HENNESSEY, JR.
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