

**IN THE COURT OF APPEALS OF IOWA**

No. 0-574 / 09-1593  
Filed September 9, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BULFRANO MALDONADO,**  
**a/k/a JOSE ALEXANDER QUEVEDO,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Sioux County, James D. Scott,  
Judge.

The defendant appeals from his conviction of identity theft. **REVERSED  
AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney  
General, and Coleman McAllister, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ.  
Tabor, J., takes no part.

**DANILSON, J.**

The defendant appeals from his conviction of identity theft, contending there is insufficient evidence to sustain the conviction. He also contends trial counsel was ineffective in failing to object to hearsay testimony and raise confrontation right objections. Because the defendant's trial counsel failed to lodge meritorious hearsay objections to the only evidence establishing the existence of another person whose identification information the defendant is alleged to have fraudulently used, the defendant received ineffective assistance of counsel. We reverse and remand.

**I. Background Facts & Proceedings.**

The following evidence was presented at the July 28, 2009 bench trial: On April 16, 2004, the defendant opened a checking account with Northwestern State Bank in Orange City, representing himself as Jose Alexander Quevedo, with a social security number of 616-XX-XXXX<sup>1</sup> and a date of birth of April 1, 1972.

On July 7, 2008, the defendant obtained a loan from the bank for \$2500. On the loan application, he represented his name as Jose Alexander Quevedo, with a social security number of 616-XX-XXXX and a date of birth of April 1, 1972.

On September 26, 2008, the defendant received an extension or renewal of his July 7, 2008 loan. On the loan application, he represented his name as

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<sup>1</sup> No social security card was presented to the bank until November 2008. We find it imprudent to include the specific social security numbers at issue in this opinion.

Jose Alexander Quevedo, with a social security number of 616-XX-XXXX and a date of birth of April 1, 1972.

On November 24, 2008, the defendant went to the bank and met with personal and mortgage loan officer, Bonnie De Jong, stating he was changing his name. He presented a Nebraska identification card showing the name Bulfrano Maldonado, birth date April 15, 1975, and a social security card in that name with the social security number 530-XX-XXXX. De Jong found it suspicious that “the person I had been seeing all these years is now coming to me with a different social security number and a different date of birth.”

De Jong filed a suspicious activity report and contacted local police in accordance with banking regulations. Without objection, De Jong testified she called the Social Security Administration (SSA) and was told “that the social security numbers [she] had did not match either of the names . . . Jose or Bulfrano.” She further testified that the bank would not have loaned the defendant money without a social security number.

Orange City Police Chief Dann De Vries testified he faxed a letter to the SSA listing the name Bulfrano Maldonado, date of birth April 5, 1975, and social security number 530-XX-XXXX. Without objection, De Vries testified he received a faxed reply “from Jason Albers, who’s an investigator for the [SSA], and it stated that the social security number didn’t match or the date of birth given.” De Vries testified he later checked with SSA on the original name on the loan, Jose Alexander Quevedo, date of birth April 1, 1972, and social security number 616-XX-XXXX. Without objection, De Vries testified that Jason Albers replied that Jose Quevedo’s name and social security number matched, but not the

birthday. De Vries testified that he concluded there “is really a Jose Alexander Quevedo”; however, he made no efforts to find him, had received no complaints from such a named person, and would not know where to look for him.

The district court admitted State’s exhibits 6 and 7 without objection from the defense. Both exhibits 6 and 7 bear a “certification of extract from records” and are letters with a SSA caption signed by “Kathy Smith, Regional Privacy Coordinator” stating neither social security number 530-XX-XXXX or 616-XX-XXXX “belong[s] to Bulfrano Olmedo Maldonado, date of birth April 1, 1972.”

Defendant’s trial counsel moved for a directed verdict, arguing the State had failed to prove (1) there had been any fraudulent use of another person’s identity within the dates alleged in the trial information or (2) there was another person by the name of Jose Quevedo. Counsel stated,

The officer testified about some hearsay that there may have been such other person but there’s no documentary evidence supporting that. The Code section requires that it actually be the theft of someone else’s identity, not merely a made-up name or social security number or birth date.

My client’s probably guilty of some type of fraud, but it doesn’t fit within the definition of identity theft as alleged in the trial information.

The district court found the defendant guilty as charged:

Although Defendant’s true name is Bulfrano Olmedo Maldonado, he represented himself to the bank to be Jose Alexander Quevedo. The social security number he provided, 616-[XX-XXXX], matches the number assigned to Mr. Quevedo. *Because the name and social security number match, the Court concludes Mr. Jose Alexander Quevedo is a real person, not a made up name.* It is highly unlikely a fictitious name would match a real social security number.

Further, the only logical conclusion from Defendant’s procurement of loans using the name and social security number of Mr. Quevedo is that Mr. Quevedo did not consent. It is nonsense to believe that the rightful holder of a social security number would

consent to liability for almost \$7,000 of loans when he obtains nothing in return. Defendant did not have Mr. Quevedo's permission to present his name and social security number to the bank.

(Emphasis added.)

The defendant appeals, contending there is insufficient evidence that he fraudulently used the identity of another person and that he received ineffective assistance of counsel. Because we find the ineffectiveness claim dispositive, we confine our discussion to that issue.

## **II. Scope and Standard of Review.**

Because a claim of ineffective-assistance-of-counsel claims implicates constitutional rights, our review is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). To establish ineffective assistance of counsel, a claimant must demonstrate by a preponderance of the evidence both that (1) trial counsel failed to perform an essential duty and (2) resulting prejudice. *Id.* at 142 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). To establish prejudice, a claimant must demonstrate “there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008). The probability of a different result must be “sufficient to undermine confidence in the outcome.” *Id.*

## **III. Failure to Object to Hearsay.**

Iowa Code section 715A.8(2) (2007) provides that a person commits the offense of identity theft if “the person fraudulently uses or attempts to fraudulently use identification information of another person, with the intent to obtain credit,

property, services, or other benefit.” Identification information is defined in section 715A.8(1)(a) and includes the “name, address, date of birth, . . . social security number . . . of a person.” Section 715A.8(3) states identity theft is a class “D” felony if “the value of the credit, property, or services exceeds one thousand dollars.” Iowa Code § 715A.8(3). The State does not contest that it had the burden to establish that there was indeed “another person” whose identification information was used.

In the case before us, the only evidence that the defendant used identification information of “another person” came from De Vries, who testified a Jason Albers told him the Jose Quevedo name and social security number matched. It was from this testimony the trial court concluded there was another person. (*“Because the name and social security number match, the Court concludes Mr. Jose Alexander Quevedo is a real person, not a made up name.”*)

De Vries’s testimony about what Jason Albers told him constituted hearsay: it was “a statement, other than one made by the declarant while testifying at the trial . . . offered to prove the truth of the matter asserted.” Iowa R. Evid. 5.801(c). Absent specific exceptions, hearsay is not admissible. Iowa R. Evid. 5.802. The trial court would have been required to sustain a hearsay objection had trial counsel made it. In fact, trial counsel argued to the court that the only evidence of Jose Quevedo’s being a person came when the “officer testified about some hearsay.” The State concedes the statement was inadmissible hearsay.

The State argues that trial counsel “had to have a reason for not objecting,” but it offers none and we can discern no such reason.

The State argues that counsel's failure to object did not result in prejudice because it was cumulative to other evidence that came in without objection. The State relies upon De Jong's testimony, but this does not establish the existence of "another person." She testified she was told "the social security numbers that I had did not match *either* names I had, Jose or Bulfrano." Far from being cumulative, her testimony contradicts Officer De Vries's testimony.

The State also argues that exhibits 6 and 7 admitted into evidence support its position. Although exhibits 6 and 7 are self-authenticating documents from the SSA, the exhibits only establish the social security numbers provided did not belong to Bulfrano Maldonado with a birth date of April 1, 1972; they do not include enough information to establish the existence of another person.

We conclude the defendant did suffer prejudice as a consequence of his trial counsel's failure to object to De Vries's hearsay testimony. Absent the hearsay testimony, there is no evidence that the defendant used the identification information "of another person" as required by section 715.8(2). We therefore reverse and remand for a new trial. See *Reynolds*, 746 N.W.2d at 845-46. Because we reverse on the hearsay issue, we need not address the defendant's claim that counsel was ineffective in failing to raise confrontation claims.

**REVERSED AND REMANDED.**