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SUPREME COURT  
STATE OF WASHINGTON  
10/24/2019  
BY SUSAN L. CARLSON  
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SUPREME COURT NO. 97800-0  
COA NO. 51623-3-II

IN THE SUPREME COURT OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TRACEY KIMBERLY BAILEY,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge

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PETITION FOR REVIEW

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CASEY GRANNIS  
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**A. IDENTITY OF PETITIONER**

Tracey Bailey asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

Bailey requests review of the decision in State v. Tracey Kimberly Bailey, Court of Appeals No. 51623-3-II (slip op. filed September 24, 2019), attached as Appendix A.

**C. ISSUE PRESENTED FOR REVIEW**

Whether words equal the doing of "an act" for purposes of interpreting the criminal impersonation statute and, if not, whether the evidence is insufficient to prove impersonation where petitioner gave officers a false name and assumed a false identity during a traffic stop but did not commit an act in her assumed character?

**D. STATEMENT OF THE CASE**

Washington State Patrol trooper Jason Roe was driving on Interstate 5 when he noticed a vehicle's middle brake light was inoperative. 2RP<sup>1</sup> 32, 36, 38-39. Roe stopped the vehicle and contacted the driver, Tracey Bailey. 2RP 39, 47. Roe asked for a driver's license, which Bailey was unable to provide. 2RP 63-64. Bailey presented a vehicle registration

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<sup>1</sup> This brief cites to the verbatim report of proceedings as follows: 1RP - 3/7/18; 2RP - one volume consisting of 3/12/18, 3/13/18, 3/20/18.

in a man's name and an insurance card, both of which were expired. 2RP 64-65. Bailey gave her name as "Stracey Jones" and a date of birth. 2RP 47. Roe looked up the information for "Stracey Jones" in the Department of Licensing (DOL) database, which he accessed from his on-board computer. 2RP 47-48. The DOL photograph for Stracey Jones did not seem to match Bailey. 2RP 48. Roe went back to Bailey to confirm her identity and asked for the last four digits of her social security number. 2RP 48-49. The number she gave did not match the number for Jones. 2RP 49. Roe asked for the address on her driver's license. 2RP 49. Bailey gave two or three street addresses, which did not match the address for Jones. 2RP 49-50.

Trooper Tricia Krantz arrived to assist. 2RP 50-51. While consuming Dairy Queen Blizzards, for which Krantz had a two-for-one coupon, the two troopers tried to figure out who the driver was. 2RP 51, 71-72, 90. Krantz did not think the driver and the person in the DOL photo were the same person. 2RP 51, 93, 97. They talked to Bailey again. 2RP 52. Roe told Bailey that there were warrants out for Jones. 2RP 52, 55-56. Roe again asked for her name and birthday to confirm her identity. 2RP 56. Bailey said her name was Stracey Jones. 2RP 56, 94. Bailey told the troopers that she had a sister named "Tracey Bailey" who had

used her identity in the past. 2RP 56; Ex. 3 at 25:40-25:50, 26:00-26:40.<sup>2</sup> After comparing the driver to the DOL photo for Stracey Jones, Rose determined the driver was actually Tracey Bailey. 2RP 56-57. Bailey's driving status was suspended. 2RP 63. The troopers confirmed the validity of the warrants. 2RP 56. Roe asked a final time if she was who she said she was, and Bailey maintained she was Stracey Jones. 2RP 61-62. Roe then placed Bailey under arrest for the warrants and put her in the back of the patrol vehicle. 2RP 56, 62. While in the backseat, Bailey admitted that she was indeed Tracey Bailey. 2RP 95. Stracey Jones was Bailey's sister. 2RP 85.

The State charged Bailey with second degree identity theft. CP 1. The jury found Bailey guilty of the lesser offense of first degree criminal impersonation. CP 26.

On appeal, Bailey argued the evidence was insufficient to convict because simply giving false information regarding her identity did not constitute the doing of "an act in . . . her assumed character with intent to defraud another or for any other unlawful purpose." RCW 9A.60.040(1)(a). The Court of Appeals disagreed, holding "there was sufficient evidence to

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<sup>2</sup> Portions of the out-of-car and in-car video recordings were admitted into evidence and played for the jury. Ex. 3; 2RP 39-44. The timeframes for the out-of-car video published to jury are 0:00 to 2:30; 4:55 to 9:33; 23:58 to 27:25; and 35:53 to 36:28. 2RP 39-40, 42-43. The timeframe for the in-car video is 10:15 to 11:00. 2RP 40, 43.



support Bailey's conviction because she assumed the false identity and then provided additional information regarding that false identity in an attempt to mislead the trooper, acts which satisfied the elements of criminal impersonation." Slip op. at 1.

**E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**THE QUESTION OF WHETHER A PERSON CAN BE GUILTY OF COMMITTING CRIMINAL IMPERSONATION BY MERELY ASSUMING A FALSE IDENTITY AND SAYING FALSE THINGS IN MAINTAINING THAT IDENTITY CONSTITUTES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND IS OF SUBSTANTIAL PUBLIC IMPORTANCE.**

The statute defining the offense of criminal impersonation requires the assumption of a false identity as well as the commission of an act in the assumed character with intent to defraud another or for any other unlawful purpose. RCW 9A.60.040(1)(a). The State proved Bailey assumed a false identity but did not prove she did an act in her assumed character. In holding otherwise, the Court of Appeals equated speech with conduct, i.e., the doing of an "act." Whether the impersonation statute should be interpreted to criminalize pure speech is an issue of substantial public interest warranting review, given the frequency with which charges under this statute arise. RAP 13.4(b)(4). This case also presents a significant question of constitutional law because citizens of this State are

entitled to adequate notice of what will subject them to criminal liability as a matter of due process. RAP 13.4(b)(3).

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"To determine whether the State has produced sufficient evidence to prove each element of the offense, we must begin by interpreting the underlying criminal statute." State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012). "The purpose of statutory construction is to give content and force to the language used by the Legislature." State v. Wilson, 125 Wn.2d 212, 216, 883 P.2d 320 (1994). In interpreting a statute, courts look first to its plain language. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). "In determining the elements of a statutorily defined crime, principles of statutory construction require the court to give effect to all statutory language if possible." State v. Smith, 155 Wn.2d 496, 502, 120

P.3d 559 (2005). "Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process." State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980).

A person is guilty of first degree criminal impersonation if he or she "[a]ssumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose." RCW 9A.60.040(1)(a). Bailey does not dispute the State proved that she assumed a false identity. She gave a false name and birth date to the trooper and otherwise maintained she was a person she was not throughout the police encounter. 2RP 47. The State, however, did not prove the additional element that she "[did] an act in . . . her assumed character with intent to defraud another or for any other unlawful purpose."

In construing a statute, each word in a statute must be given meaning. State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). Nothing is considered superfluous. Id. Use of the conjunction "and" in the impersonation statute indicates that the legislature did not intend criminal liability to follow from the mere assumption of a false identity. See Tesoro Refining & Marketing Co. v. Dep't of Revenue, 164 Wn.2d 310, 319, 190 P.3d 28 (2008) (The default rule is that the word

"and" does not mean "or" unless legislative intent clearly indicates otherwise). There must be some act in addition to that assumption. Under the plain language of the impersonation statute, assumption of false identity alone is not enough. There must be an act done in the assumed character. The act cannot be the assumption of false identity. Otherwise the "and does an act in his or her assumed character" requirement would be superfluous. If assumption of a false identity equaled the doing of an act in the assumed character, then the distinction between the two statutory requirements collapses. In construing legislative intent in defining the elements of the crime, "[s]tatutes should not be construed so as to render any portion meaningless or superfluous." State v. Mohamed, 175 Wn. App. 45, 52, 301 P.3d 504, review denied, 178 Wn.2d 1019, 312 P.3d 651 (2013) (quoting Stone v. Chelan County Sheriff's Dep't, 110 Wn.2d 806, 810, 756 P.2d 736 (1988)).

The phrase "an act" is not defined by statute. An undefined statutory term is given plain and ordinary meaning as ascertained from a standard English dictionary. State v. Barnes, 189 Wn.2d 492, 496, 403 P.3d 72 (2017). The word "act" means "the process of doing or performing something; an action . . . a deed . . . something that is done or performed." State v. Forrester, 21 Wn. App. 855, 867, 587 P.2d 179 (1978), review denied, 92 Wn.2d 1006 (1979) (citing American Heritage

Dictionary of the English Language (1969)); see also Webster's Third New Int'l Dictionary 20 (1993) (defining "act" as a "thing done" such as a "deed" or a "performance.").

Courts have long recognized that mere speech is distinct from conduct. See State v. Williams, 171 Wn.2d 474, 478-86, 251 P.3d 877 (2011) (detailing history of statutes prohibiting obstructing an officer, noting that such statutes have been held unconstitutional when applied to pure speech, rather than conduct); State v. Williamson, 84 Wn. App. 37, 43-45, 924 P.2d 960 (1996) (obstruction statute that prohibited conduct not violated by mere speech).

The evidence presented at trial did not include any "act." There is only speech connected with the assumption of a false identity. Bailey did not do anything other than speak to the officer in aid of her deception. She did not produce a false identification card. She did not forge a signature. She only gave the officer false information in response to police attempts to ascertain her identity. Consequently, there was no evidence of any conduct which could constitute an act done in an assumed character.

Williams and Williamson are instructive because they too focus on the distinction between speech and conduct. In Williams, this Court held the obstruction statute requires some conduct in addition to making false statements. Williams, 171 Wn.2d at 475. In that case, when police

contacted the defendant to investigate a possible theft, the defendant gave his brother's name to police instead of his own to avoid discovery of an outstanding warrant for a community custody violation. Id. This Court vacated the conviction because, in order to avoid constitutional infirmities, "some conduct in addition to making false statements" was required to support a conviction for obstructing an officer. Id. at 486.

In reaching that holding, Williams cited Williamson as an example of case drawing a valid distinction between speech and conduct. Id. at 483. Williamson addressed a former version of the police obstruction statute, in which one alternative means criminalized conduct: "Willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties." Former RCW 9A.76.020(1)(b) (Laws of 1994). The other alternative means criminalized speech: "Willfully makes a false or misleading statement to a law enforcement officer who has detained the person during the course of a lawful investigation or lawful arrest." Former RCW 9A.76.020(1)(a).

In Williamson, police responded to a report of a fight. Spartacus Williamson told the officers several times that he was Christopher Columbus, and he was arrested for obstructing a public servant. Id. at 40. Every time the defendant was asked his name, he responded, "Christopher

Columbus," and it took police 30 to 45 minutes to discover his real name. Williamson, 84 Wn. App. at 40.

Williamson reversed based on a defective charging document, holding the evidence showed only that Williamson gave false statements, when the statutory means with which he was charged required conduct. Id. at 44-45. Williamson unequivocally rejected the State's argument that the defendant's response to police, "Christopher Columbus," was conduct, rather than speech. Id. at 45. The State argued the defendant's repeated assertions amounted to conduct, not speech, but the Williamson court rejected the characterization because such an approach would improperly blur the distinction between speech and conduct. Id. at 45.

Like Williamson, the impersonation statute requires an act, not merely speech. Specifically, there must be an act committed under the assumed identity. RCW 9A.60.040(1)(a). Here, as in Williamson, the State proved nothing more than speech. The impersonation statute requires more than an assumption of identity through speech. There must also be an act done under the assumed identity. The two are not the same thing. Bailey did no more than speak when she told the officer her sister's name and date of birth, gave addresses, and said her sister used her identity. Each is a manifestation of an assumption of her sister's identity. A false statement made as part of an assumed identity does not equal an

act under the statute. Without an act, there is no crime. The State, therefore, failed to present sufficient evidence to establish the necessary elements of criminal impersonation.

The Court of Appeals attempted to distinguish Williamson on the ground that the defendant there only gave a false name, whereas Bailey gave a false name and then gave additional false information. Slip op. at 4-5. That additional false information, according to the Court of Appeals, constituted acts under an assumed identity. Id. What the Court of Appeals did not explain is how additional speech transmogrifies into conduct. If one false statement is speech rather than an act, then additional false statements must also be speech, not acts. The repetition of false statements does not turn speech into acts. The Court of Appeals interpretation of the impersonation statute criminalizes pure speech, in derogation of a long line of cases holding that this is forbidden. Williams, 171 Wn.2d at 478-86.

Further, "[i]n criminal cases, fairness dictates that statutes should be literally and strictly construed and that courts should refrain from using possible but strained interpretations." State v. Garcia, 179 Wn.2d 828, 837, 318 P.3d 266 (2014). "To strictly construe a statute means that given a choice between a narrow, restrictive construction, and a broad, more liberal interpretation, the first option must be chosen." State ex rel.



McDonald v. Whatcom Cty. Dist. Court, 19 Wn. App. 429, 431, 575 P.2d 1094 (1978), aff'd, 92 Wn.2d 35, 593 P.2d 546 (1979). The Court of Appeals' holding represents a loose interpretation of the impersonation statute, not the strict one demanded by elementary principles of statutory construction.

Moreover, even if the meaning of the criminal impersonation statute is susceptible to more than one reasonable interpretation, the rule of lenity requires the court "to adopt the interpretation most favorable to the defendant." State v. Flores, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008). Any ambiguity must be strictly construed against the State. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). "The underlying rationale for the rule of lenity is to place the burden on the legislature to be clear and definite in criminalizing conduct and establishing criminal penalties." State v. Weatherwax, 188 Wn.2d 139, 155, 392 P.3d 1054 (2017). Bailey has at minimum advanced a reasonable interpretation of the statute that results in the conclusion that she did not commit the crime. She therefore receives the benefit of the rule of lenity. The Court of Appeals did not address the rule of lenity, implicitly determining that Bailey's interpretation of the statute was unreasonable. Bailey asks this Court to conclude otherwise and find in her favor.

F. **CONCLUSION**

For the reasons stated, Bailey requests that this Court grant review.

DATED this 24<sup>th</sup> day of October 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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CASEY GRANNIS

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# APPENDIX A

September 24, 2019

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent.

v.

TRACEY BAILEY,

Appellant.

No. 51623-3-II

UNPUBLISHED OPINION

GLASGOW, J. — Tracey Bailey was convicted of criminal impersonation after a jury trial. During a traffic stop she gave the trooper the name and birth date of her sister (Stracey Jones), a false social security number, and various street addresses. Also, while still pretending to be Jones, she told the trooper that Bailey had previously used her identity.

Bailey appeals, arguing that the criminal impersonation statute requires an act and that the jury did not have sufficient evidence to convict her because simply giving false information regarding her identity was not an act. She also challenges the imposition of the criminal filing fee, a warrant service fee, and the DNA collection fee.

We hold that there was sufficient evidence to support Bailey's conviction because she assumed the false identity and then provided additional information regarding that false identity in an attempt to mislead the trooper, acts which satisfied the elements of criminal impersonation. We remand to strike the criminal filing fee, warrant service fee, and DNA collection fee.

FACTS

Trooper Jason Roe pulled over Bailey because she was driving a vehicle with a broken middle brake light. Bailey told the trooper that her name was Stracey Jones. Jones is actually Bailey's younger sister. The trooper thought she said "Tracey," and Bailey corrected him and told him again her name was Stracey Jones. Verbatim Report of Proceedings (VRP) at 47. Bailey then proceeded to spell the name she gave him. Bailey also gave the trooper Jones's date of birth. The trooper noted that the photo for Jones in his database did not match Bailey. The trooper asked her again to confirm who she was. Bailey then gave the trooper a social security number, but it did not match Jones's social security number. The trooper asked for the address on her license, and Bailey gave multiple streets. None of the streets matched the trooper's records for Jones.

Bailey maintained that she was Jones for more than 30 minutes. While maintaining that she was Jones, Bailey told the trooper that her sister, Bailey, had used her identity in 2003 in Pierce County. Bailey also claimed her sister had been arrested for using her identity and that she took her sister to court as a result. The trooper pulled up Bailey's information and learned that Bailey's driving status was suspended. Additionally, the records showed that Bailey was also known as Jones.

The trooper talked to Bailey about warrants out for Jones, and Bailey still insisted that she was Jones. The trooper then arrested Bailey for the warrants out on Jones. After the arrest Bailey admitted that she was Tracey Bailey.

## ANALYSIS

### I. SUFFICIENCY OF THE EVIDENCE

The trial court instructed the jury that first degree criminal impersonation occurs when the defendant “assumes a false identity and does an act in her assumed character with intent to defraud another or for any other unlawful purpose.” VRP at 132. This instruction was consistent with RCW 9A.60.040(1)(a). Bailey argues that the State failed to present sufficient evidence to convict her of first degree criminal impersonation. She contends that she only assumed a false identity and did not commit an act as required by the statute. She reasons that anything she said to the trooper was not a separate act because speech is not an act. We disagree.

There is sufficient evidence “to support a conviction if, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.” *State v. Imokawa*, 4 Wn. App. 2d 545, 560, 422 P.3d 502 (2018), *review granted*, 192 Wn.2d 1016 (2019). A defendant’s “claim of insufficiency admits the truth of the State’s evidence.” *Id.* We draw all reasonable inferences in favor of the State and interpret them most strongly against the defendant. *Id.* Circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Bailey argues that she only assumed a false identity. She reasons that the statute requires an action with the necessary intent in addition to her statements regarding her identity. Bailey relies on *State v. Williamson*, 84 Wn. App. 37, 924 P.2d 960 (1996), arguing in that case, the court rejected the State’s argument that giving a false name was conduct instead of speech.

The State responds that Bailey committed multiple acts when she continued to give false information beyond just giving a false name. This included providing Jones's date of birth, giving an incorrect social security number, blaming her sister for warrants out for Jones, and providing multiple addresses. Additionally, the State argues Bailey did this so the trooper would not know she was driving on a suspended license.

In *Williamson*, a defendant was convicted for obstructing a public servant after telling an officer his name was Christopher Columbus and confirming that was his name. 84 Wn. App. at 40-41. He did not further pretend that he was in fact Mr. Columbus. *Id.* at 40. Williamson was convicted under a statute that prohibited obstructing a police officer, which prior decisions had interpreted to require conduct beyond giving a false name. *Id.* at 40-41.<sup>1</sup> Ultimately, we reasoned that when the defendant provided a false name, that was speech, not conduct. *Id.* at 45. Because there was no evidence that Williamson did any act, other than declaring his name as Christopher Columbus, we concluded the State could not prove the charged offense because the statute required conduct. *Id.*

*Williamson* is distinguishable because unlike Bailey, Williamson only gave a false name. *Id.* at 40-41. Here, Bailey gave a false name, but over the course of more than 30 minutes, she

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<sup>1</sup> The Washington Supreme Court has since confirmed that the obstruction statute has a jurisprudential history of requiring conduct in addition to speech. *State v. Williams*, 171 Wn.2d 474, 485, 251 P.3d 877 (2011).

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also gave a false birthdate, a false social security number, and multiple incorrect streets for her address, as well as confirming the false name multiple times and spelling it for the trooper. She also talked about past events involving Bailey and Jones, while acting as Jones. These were acts performed to assume Jones's identity. In contrast, Williamson never took on the identity of Christopher Columbus or pretended to be him.

Bailey argues that the legislature's use of the word "act" requires something more than statements made to mislead the officer. But there is no indication that the legislature intended an "act" as used in the criminal impersonation statute to exclude additional false statements. If Bailey performed at least one "act" in her assumed identity, including making further false statements to avoid discovery that she was driving with a suspended license, that is sufficient under the statute.

Bailey gave false information beyond just a name so the trooper would believe she was actually her sister and would not discover that she was driving on a suspended license. Given that we must take the evidence in the light most favorable to the State, we conclude there was sufficient evidence for the jury to decide Bailey acted under an assumed identity.

## II. LEGAL FINANCIAL OBLIGATIONS

Bailey challenges three legal financial obligations. She argues the criminal filing fee, the DNA collection fee, and the warrant service fee should be stricken. The State concedes that these fees should be stricken.



In 2018, the legislature amended RCW 36.18.020(h) to prohibit the imposition of the criminal filing fee if a defendant is indigent as defined in RCW 10.101.010(3)(a) through (c). LAWS OF 2018, ch. 269, § 17. Additionally, a warrant service fee is a discretionary fee that cannot be imposed if the defendant is indigent. RCW 9.94A.760(1); RCW 10.01.160. The legislature also amended RCW 43.43.7541 to authorize the imposition of a DNA collection fee only if the State has not “previously collected the offender’s DNA as a result of a prior conviction.” LAWS OF 2018, ch. 269, § 18. Our Supreme Court has held that the 2018 amendments to the legal financial obligation statutes apply to cases pending on direct review and not final when the amendments were enacted. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

The 2018 amendments apply here. The State concedes that the court found Bailey indigent and there is evidence in the record to support that concession. The State also concedes that the record shows Bailey has been convicted of multiple prior felonies that would have required DNA collection.

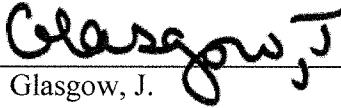
Therefore, we remand for the trial court to strike the criminal filing fee, the warrant service fee, and the DNA collection fee.

#### CONCLUSION

We affirm the conviction for criminal impersonation and remand to the trial court to strike the criminal filing fee, the warrant service fee, and the DNA collection fee.

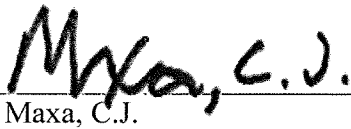
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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

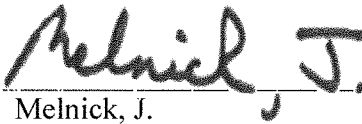
  
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Glasgow, J.

We concur:

  
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Maxa, C.J.

  
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Melnick, J.

**NIELSEN, BROMAN & KOCH P.L.L.C.**

**October 24, 2019 - 1:07 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51623-3  
**Appellate Court Case Title:** State of Washington, Respondent v. Tracey Kimberly Bailey, Appellant  
**Superior Court Case Number:** 16-1-02274-3

**The following documents have been uploaded:**

- 516233\_Petition\_for\_Review\_20191024130646D2995393\_4374.pdf  
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