

COURT OF APPEALS  
DIVISION II

NO. 38568-6-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASH.  
DEPUTY

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STATE OF WASHINGTON, Respondent

v.

AZAEL ORTIZ LOPEZ, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN F. NICHOLS  
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00956-4

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SUPPLEMENTAL BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

By notice of January 16, 2009, the Court of Appeals combined three causes that came out of the Clark County Superior Court dealing with this particular defendant. The Appellate Number was designated at 38558-9-II and involved three cases from Clark County: 07-1-00619-2; 08-1-00710-3; and 08-1-00956-4.

These combined cases demonstrate that on or about April 5, 2007, the defendant was arrested by the Clark/Skamania Drug Task Force and charged with Possession of Controlled Substance with Intent to Deliver – Methamphetamine. He made his first appearance under Cause No. 07-1-00619-2 on April 6, 2007. He was charged by Information (CP 1 in the 38558-9-II case) on April 9, 2007, along with a co-defendant, with Possession of Controlled Substance with Intent to Deliver – Methamphetamine and Tampering with Physical Evidence. At both the preliminary hearing and at the time of the filing of the Information, our defendant gave the court the name of Jonathan Ortiz Lopez. Under that name, he posted bail on April 17, 2007, and was released from custody on April 18, 2007. During the interim, his attorney and the prosecutor arranged in court for an Omnibus Hearing set for May 10, 2007, and a

Readiness Hearing set for May 31, 2007. The defendant signed scheduling orders with these dates on them.

The defendant failed to appear and ultimately a bench warrant was issued for his apprehension. At all times during this, he was known by the fictitious name of Jonathan Ortiz Lopez.

As indicated in the Appellant's brief, after issuance of the bench warrant, he was contacted in May 2008 by members of the Vancouver Police Department. It is at that time that he gave his name as Azael Ortiz Lopez. He produced a Washington State Identification card and a Washington State driver's license under the name Azael Ortiz Lopez. (RP 49-50).

Because of the prior misrepresentations to the court and the fact that he had fled under an assumed name, the Clark County Prosecutor charged Mr. Lopez with crimes of Criminal Impersonation in the First Degree and two counts of Forgery. (Information, CP 107 under No. 38568-6-II).

A bench trial was held and the defendant was found guilty of these three felonies related to his giving a false name to the court, using that false identity to attempt to flee the jurisdiction, and forging documents in that name for purposes of perpetrating a fraud on the court. (Felony

Judgment and Sentence, Prison – Community Placement/Community Custody, CP 112).

## II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised in this case is that there is insufficient evidence to find the defendant guilty of the crimes of Criminal Impersonation and Forgeries. The claim is that the evidence fails to establish that he defrauded or attempted to defraud the Superior Court.

A bench trial was held on September 9, 2008, in front of Judge Nichols. The State called as its first witness Deputy Prosecutor Jeffery McCarty. Mr. McCarty testified that he had been present in court during the handling of a docket which occurred on April 6, 2007, and he had occasion at that time to come in contact with the defendant. The defendant was making a first appearance on that date. Deputy Prosecutor McCarty identified the defendant in court as the person who appeared on that date for first appearance and further that he gave his true and correct name as Jonathan Lopez. (RP 40-41).

The next witness called by the State was Vancouver Police Officer Brian Billingsley. Officer Billingsley had been assigned to go to the defendant's house to arrest him after he failed to show up for court.

(RP 46-47). He came in contact with the defendant who gave him the name of Azael Ortiz Lopez. He specifically did not tell the officer a name of Jonathan Ortiz Lopez. (RP 47).

The next witness called was Officer Spencer Harris an officer for the Vancouver Police Department. Officer Harris indicated that he had been assigned to the arrest team that went after the defendant and was present when the defendant provided the name of Azael Ortiz Lopez (when finally apprehended) and gave a date of birth of October 11, 1987. He identified the person he came in contact with as the defendant who was in the courtroom at that time. He further indicated that the defendant produced a Washington State Identification card with that name on it and also he signed a waiver for search of the residence under that name. (RP 50).

The State called Nancy Druckenmiller as an expert witness to testify concerning the fingerprints taken from the person at the time of the defendant's initial appearance and comparing those to the person in court and she found that they were a match. (RP 54-58). Her conclusion was that the person who had provided two names (our defendant) was the same person. (RP 58).

The next witness called by the State was Michael Vaughn, II, Deputy Prosecutor. Deputy Prosecutor Vaughn indicated that part of his

duties was as a docket deputy and he was utilized by the State in its case-in-chief to run a video of the docket as it related to the defendant. He indicated that the defendant provided the name of Jonathan Ortiz Lopez on May 2, 2008, on one of these dockets. (RP 63).

Robert Shannon, a Deputy Prosecutor, was also involved in docket responsibilities and he testified concerning the release order and conditions as they related to the defendant. The defendant provided the name of Jonathan Ortiz Lopez on the release orders and scheduling orders which set trial dates and mandatory court dates. He testified that the man's signature appeared everywhere that it was necessary on the specific forms. (RP 64-66). He also showed video of the hearings to the trial court.

At the close of his testimony, the State rested. The defense presented no evidence. (RP 71).

The trial court prepared Findings of Fact and Conclusions of Law for Bench Trial held September 9, 2008. That documentation was filed August 18, 2009. (CP 28). The State submits that there is adequate and sufficient evidence to support all of the elements necessary to prove the crimes.

There is no question but that the defendant was attempting to utilize the false information to obtain his release so that he could flee from the situation.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (quoting State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)), cert. denied, 127 S.Ct. 440 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. Luther, 157 Wn.2d at 77-78 (citing State v. Alvarez, 105 Wn. App. 215, 223, 19 P.3d 485 (2001)).

“We may infer criminal intent from conduct and circumstantial evidence as well as direct evidence carries equal weight.” State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). The Appellant Court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) (citing State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)). The Court does not substitute its judgment for that of the fact finder on factual issues. State v. Israel, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002) (citing State v. Farmer, 116 Wn.2d 414, 425, 805

P.2d 200, 812 P.2d 858 (1991)), review denied, 149 Wn.2d 1013 (2003).  
“In determining whether the requisite quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case.” State v. Jones, 93 Wn. App. 166, 176, 968 P.2d 888 (1998), review denied, 138 Wn.2d 1003 (1999). “Intent is rarely provable by direct evidence, but may be gathered, nevertheless, from all of the circumstances surrounding the event.” State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558, review denied, 91 Wn.2d 1008 (1978); see also State v. Choi, 55 Wn. App. 895, 906, 781 P.2d 505 (1989), review denied, 114 Wn.2d 1002, 788 P.2d 1077 (1990). A jury may infer criminal intent from a defendant’s conduct where it is “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

§ 9A.60.040. Criminal impersonation in the first degree

(1) A person is guilty of criminal impersonation in the first degree in the person:

(a) Assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose.

- State v. Presba, 131 Wn. App. 47, 55, 126 P.3d 1280 (2005).

§ 10.58.040. Intent to defraud

Whenever an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to

defraud any person, association or body politic or corporate whatsoever.

The crime of forgery is defined in RCW 9A.60.020, which provides in pertinent part:

(1) A person is guilty of forgery if, with intent to injure or defraud;

(a) He falsely makes, completes, or alters a written instrument or;

(b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

The term “written instrument: is defined as follows:

“Written instrument” means: (a) Any paper, document, or other instrument containing written or printed mater or its equivalent; or (b) any access device, as defined in RCW 9A.56.010(3), token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

In City of Seattle v. Schurr, 76 Wn. App. 82, 881 P.2d 1063

(1994), the defendant was charged with one count of theft and one count of criminal impersonation. The jury convicted defendant of criminal impersonation but deadlocked on the theft charge and it was dismissed. Defendant challenged the judgment of conviction on the ground that it was not supported by sufficient evidence and that the trial court erred when it denied her pretrial petition for a deferred prosecution. The court held that defendant’s assumption of a false identity to return merchandise for cash

was, by itself, insufficient to prove that she acted with the intent to defraud. But, the decision rested on a city ordinance that required more than the State Statute. No evidence was produced that any items were taken. As the Court stated:

As charged in this case, criminal impersonation requires proof of three elements: (1) the assumption of a false identity; (2) the commission of an act while assuming a false identity; and (3) the "intent to defraud another". Seattle Municipal Code (SMC) 12A.08.130(B)(1). SMC 12A.08.130(A) provides:

As used in this section, "intent to defraud" means the use of deception in Section 12A.08.050 B *with the intention to injure another's interest which has economic value.* (Italics ours.) SMC 12A.08.050(B), which sets forth six ways for "[d]eception" to occur, concludes "[t]he term 'deception' does not include falsity as to matters *having no pecuniary significance.*" (Italics ours.)

Schurr contends that the use of another's identification to return merchandise for a cash refund is, by itself, insufficient proof of the "intent to defraud". We agree. The City is unable to point to any identifiable economic interest that would be injured by the assumption of a false identity to return merchandise. Specifically, we are unable to discern *whose* interest and the *nature* of the interest that might be injured by such action. This is particularly true because: (1) there was no evidence that the returned merchandise was stolen or was not rightfully in Schurr's possession and (2) Nordstrom received its own merchandise in exchange for the \$ 103 it refunded Schurr.

- City of Seattle v. Schurr, 76 Wn.App. at 84-85.

The city argued that the Appellate Court could infer intent to deceive. The Appellate court did not agree, but indicated as follows:

Second, the City argues that it can be inferred from the fact that Nordstrom has a policy requiring that identification be presented in order to receive a cash refund that Nordstrom has some economic interest in refunding the cash to the person whose identity was falsely assumed.

The problem with this "inference" is that it requires us to make a leap unsupported by any evidence. The record is devoid of any facts showing the purpose of Nordstrom's identification policy. It is pure speculation that Nordstrom has some economic interest in ensuring that the person whose identity is falsely assumed receive the refunded cash. Consequently, we refuse to infer from the *mere existence* of Nordstrom's policy that a person who presents false identification to return legitimate merchandise for a cash refund did so with the intent to defraud.

This would be a different case if the record indicated that Schurr's presentation of false identification was part of a larger scheme to defraud Nordstrom. However, in this case, the jury did not convict Schurr of the theft charge, and there was no other basis from which one could infer that the use of false identification was intended "to injure another's interest which has economic value".

In sum, the City has failed to identify any plausible economic interest that would be injured by the assumption of a false identity to return merchandise. Therefore, we conclude that no rational trier of fact could find that Schurr acted with the intent to defraud.

- City of Seattle v. Schurr, 76 Wn. App. at 86.

The issue of an Intent to Deceive is usually found in the Forgery cases, but some of the reasoning applies to our situation as well. In State v. Esquivel, 71 Wn. App. 868, 863 P.2d 113 (1993), the State appealed a dismissal of forgery charges dealing with an alien who presented a fake alien registration card. In reversing the lower court, the Appellate Court found that because the aliens conceded the falsity of the documents, the fact that true statements appeared on the documents was not fatal to the State's forgery case. The court reasoned that as a matter of logical probability, intent to defraud could be inferred from the facts and circumstances. It was concluded that the instruments' only value would have been to falsely represent the aliens' right to legally be in the country. By showing the cards to the officers, the aliens misrepresented their legal status, even though they did not misrepresent their legal names and other details about them. The court further held that the intent to defraud the specific officers was not required.

Mr. Luna and Mr. Esquivel fail to distinguish between false statements in a document and a false document. Since they conceded the falsity of the documents, the fact that true statements appeared on those documents is not fatal to the State's forgery case.

(b) Intent To Defraud. The trial court appeared to base its decisions on the State's inability to prove intent to defraud. However, intent to commit a crime may be inferred from surrounding facts and circumstances if they "plainly indicate such an intent as a matter of logical probability".

State v. Woods, 63 Wn.App. 588, 591, 821 P.2d 1235 (1991) (burglary); see State v. Bergeron, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985) (burglary). As stated in 1 C. Torcia, *Wharton on Criminal Evidence* § 81, at 265-66 (14th ed. 1985):

The unexplained possession and uttering of a forged instrument . . . raises an inference, or a rebuttable presumption, is strong evidence or is evidence, or makes out a prima facie case of guilt of forgery of the possessor.

(Footnotes omitted.)

Forgery does not require that anyone be actually defrauded. W. LaFave & A. Scott, at 671.

Here, the false instruments contained the names of defendants. In the case of the registration cards, their photographs and signatures appeared on them. As a matter of logical probability, intent to defraud could be inferred from such facts and circumstances. See Bergeron, at 19-20; Woods, at 591. Indeed, the instruments' only value would be to falsely represent the defendants' right to legally be in this country. By showing the cards to the officers, they misrepresented their legal status, even though they did not misrepresent their legal names and other details about them. Their intent to defraud the specific officers is not required. RCW 10.58.040 states:

Whenever an intent to defraud shall be made an element of an offense, it shall be sufficient if an intent appears to defraud any person, association or body politic or corporate whatsoever.

- State v. Esquivel, 71 Wn. App. at 871-872.

Relying on State v. Bencivenga, 137 Wn.2d 703, 974 P.2d 832 (1999) and State v. Weaver, 60 Wn.2d 87, 371 P.2d 1006 (1962), the defendant argues that the State used an impermissible “pyramiding of inferences” to prove his guilt. (Brief of Appellant, p. 6). But under current law, “if the inferences and underlying evidence are strong enough to permit a rational fact finder to find guilty beyond a reasonable doubt, a conviction may be properly based on ‘pyramiding inferences.’” Bencivenga, 137 Wn.2d at 711 (quoting 1 Clifford S. Fishman, *Jones On Evidence: Civil and Criminal* § 5.17 at 459 (7<sup>th</sup> ed. 1992)).

It is clear that the defendant was attempting to defraud or use for some other illegal purpose the falsifying of information about his true identity. He maintained this false identity until he was actually apprehended and brought back to court. It is interesting to note that when he was apprehended at a residence, he had on him identification giving his true name. The State submits it would be extremely difficult for him at that time when he would be going back into booking, to claim the false identity again. Clearly, he had been caught and was trying to minimize the damage that his illegal activities had caused.

III. CONCLUSION

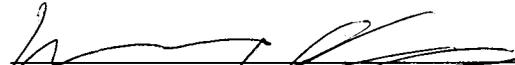
The State submits that the findings of the trial court have been affirmed by substantial evidence and that the defendant was in fact guilty of the criminal actions he was charged with. The trial court should be affirmed in all respects.

DATED this 2 day of Oct, 2009.

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