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Division II
State of Washington
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COA NO. 51623-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

TRACEY BAILEY,

Appellant.

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

The Honorable Christine Schaller, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CRIMINAL IMPERSONATION CONVICTION BECAUSE THE STATE DID NOT PROVE BAILEY COMMITTED AN ACT IN HER ASSUMED CHARACTER.

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). Under the plain language of the statute, criminal liability may be imposed only if the State proves the defendant committed some act independent of the assumption of a false identity. Use of the conjunction "and" 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.

The State does not disagree with this interpretation of the statute. Instead, it argues Bailey committed several acts, such as providing a false date of birth, providing an incorrect social security number for Jones, providing wrong addresses for Jones, and claiming she had a sister named "Tracey Bailey" who had used her identity. Brief of Respondent at 3-4.

An act is defined as a "thing done" such as a "deed" or a "performance." Webster's Third New Int'l Dictionary 20 (1993). 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) (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.

Williamson is instructive because it too focuses on the distinction between speech and conduct. That case addressed a former version of the police obstruction statute, in which the legislature intended criminalization of conduct, not false and misleading statements, under one of its alternative means. Williamson, 84 Wn. App. at 43. In that case, 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. The State charged Williamson under the statutory means that required conduct. Id. at 44. This Court reversed, holding that the record showed only that Williamson gave false statements, when the statutory means with which he was charged required conduct. Id. at 44-45. The Court rejected the State's argument that Williamson's response, "Christopher Columbus," was conduct, rather than speech. Id. at 45.

Similar to Williamson, the charged offense here requires an act, not merely speech. See RCW 9A.60.040(1)(a). Specifically, there must be an act committed under the assumed identity. The State argues that maintaining a false identity by saying various things for 36 minutes constitutes the act necessary to establish the offense. BOR at 3-4. Williamson rejected a similar argument. There, 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. The State argued the defendant's repeated assertions were conduct, not speech, but this Court was unpersuaded, noting the State's approach would improperly blur the distinction between speech and conduct. Id. at 45.

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. The State's argument conflates the distinct requirements. 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.

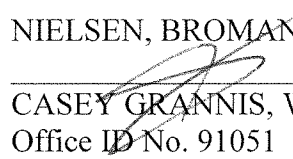
B. CONCLUSION

For the reasons stated above and in the opening brief, Bailey requests reversal of the conviction. In the event the conviction is not reversed, Bailey requests the challenged costs be stricken.

DATED this 17th day of December 2018

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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