



No. 29239-8-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTONIO A. PONCE,

Defendant/Appellant.

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Appellant's Brief

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DAVID N. GASCH  
WSBA No. 18270  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant



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Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to find Mr. Ponce guilty of the charged crime.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Mr. Ponce's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to identify him as the perpetrator of the charged crime?

C. STATEMENT OF THE CASE

Antonio Ponce was convicted by a jury of second degree possession of stolen property. CP 41. During the trial, none of the State's witnesses identified the defendant in court as the perpetrator of the charged crime. RP 22-72. There were references in the testimony to a "Mr. Ponce" but none of the witnesses identified *that* "Mr. Ponce" as the person sitting in court at counsel table. RP 29-30, 33-47.

This appeal followed. CP 4-20.

D. ARGUMENT

Mr. Ponce's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to identify him as the perpetrator of the charged crimes.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case,

means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068

(citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

The State has the burden of proving identity through relevant evidence:

It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. Identity involves a question of fact for the jury and any relevant fact, either direct or circumstantial, which would convince or tend to convince a person of ordinary judgment, in carrying on his everyday affairs, of the identity of a person should be received and evaluated.

*State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The function of an appellate court is to assess that there was substantial evidence from which the trier of fact could infer that the burden of proof had been met and that the defendant was the one who perpetrated the crime. *State v. Johnson*, 12 Wn. App. 40, 45, 527 P.2d 1324 (1974).

The identification of the defendant by the victim is substantial evidence that the defendant was the person who committed the crime. *State v. Lane*, 4 Wn. App. 745, 484 P.2d 432 (1971). Here, the alleged victim testified he had a next door neighbor named “Mr. Ponce” but did not identify *that* “Mr. Ponce” as the person sitting in court at counsel table. RP 29-30.

While not "recommend[ing] the omission of specific in-court identification where feasible," the *Hill* court found the evidence sufficient due to "numerous references in the testimony to 'the defendant' and to 'Jimmy Hill.'" *Hill*, 83 Wn.2d at 560. Indeed, the arresting officer had testified in open court, with the defendant sitting before him, that "it was 'the defendant' whom he observed at the scene of the arrest." *Id.*

By contrast, in the present case, there is no testimony cross-referencing Antonio Ponce and “the defendant.” Unlike *Hill*, None of the officers who testified indicated that Antonio Ponce was the “suspect” or “defendant” to which they were referring in their testimony. Therefore, the present case is distinguished from *Hill* and Mr. Ponce was not sufficiently identified as the perpetrator of the charged crimes.

Even if defense counsel introduced his client before jury selection started, that in itself does not constitute evidence sufficient to show that

the person referred to in the witnesses' testimony was the person on trial. *State v. Huber*, 129 Wn. App. 499, 503-04, 119 P.3d 388 (2005), (citing *State v. Kelly*, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)). Such statements are considered only remarks by counsel, and are not evidence. *Id.* at 504 (citing *State v. Rice*, 120 Wn.2d 549, 573, 844 P.2d 416 (1993)).

Here, the State failed to present substantial evidence from which the trier of fact could infer that the burden of proof had been met that Antonio Ponce was the one who perpetrated the crime. Where the evidence is insufficient to support a finding that the person on trial is the person referred to by the State's witnesses as the perpetrator of the crime, the remedy is reversal and dismissal with prejudice. *Huber*, 129 Wn. App. at 504, 119 P.3d 388 (citing *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

D. CONCLUSION

For the reasons stated, the conviction should be reversed and the case dismissed with prejudice.

Respectfully submitted April 11, 2011.

  
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David N. Gasch  
Attorney for Appellant  
WSBA #18270