

FILED  
Court of Appeals  
Division III  
State of Washington  
6/3/2019 12:24 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36441-1-III

*On review from Yakima County Superior Court  
Cause no. 17-1-02319-7*

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STATE OF WASHINGTON, Respondent,

v.

JAVIER GILES, Appellant.

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**APPELLANT'S BRIEF**

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Andrea Burkhart, WSBA #38519  
Two Arrows, PLLC  
8220 W. Gage Blvd #789  
Kennewick, WA 99336  
Phone: (509) 572-2409  
Andrea@2arrows.net  
Attorney for Appellant

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## **I. INTRODUCTION**

Police located a vehicle that was suspected to be involved in a hit-and-run collision. No witness observed who was driving the car or how many occupants it held. When police contacted the owner, Javier Giles, he appeared to be intoxicated. Giles now appeals his convictions for felony driving under the influence (DUI), driving with a suspended license (DWLS) in the second degree, driving without a valid ignition interlock device (IID), and hit and run on an unattended vehicle, contending that the evidence is insufficient to establish that he was the driver of the vehicle.

## **II. ASSIGNMENTS OF ERROR**

ASSIGNMENT OF ERROR NO. 1: Insufficient evidence supports the convictions.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

ISSUE NO. 1: Whether, when no witness identified who was driving the car or how many occupants it held, the presence of the owner in a crowd near the car a short time later is sufficient circumstantial evidence that he committed the crime.

#### **IV. STATEMENT OF THE CASE**

On November 24, 2017, Mary Edmondson was at home watching TV when she heard a loud bang outside. Looking out, she saw that her car had been hit, damaging its front fender and wheel. RP 132-33, 136. A black SUV was up against the car, and it started backing up to leave and proceeded down another street. RP 135. Edmondson did not get a good look inside the vehicle and observed only that the driver had short hair. RP 135.

Tara Sampson had been out for dinner with her husband and was driving home to get her identification. I RP 121-22. While she was driving, she saw bright lights and a dark green SUV driving fast that fishtailed around a corner. RP 123. The dark green vehicle struck another car parked on the side of the street. RP 123. Sampson did not see the license plate of the vehicle but saw that a window on the driver's side had been covered with plastic. RP 124. She called 911, described the vehicle, and followed it for a short time. RP 124. During the time she observed the vehicle, it was driving erratically, rolling through stop signs. RP 125. However, she did not see the driver or the number of occupants in the vehicle. RP 131.

A Yakima police officer who was nearby heard the description and located a matching vehicle parked nearby at the Depot, a place where homeless people were known to congregate overnight. RP 147, 149-50, 155. As he approached a group of five to ten people standing near the entrance, one man started to walk away. RP 155. The officer recognized the man as Javier Giles and, knowing his license was suspended, told him that he was not free to leave. RP 156-57. Giles continued to walk away and volunteered, "I wasn't driving." RP 157.

When other officers arrived, they placed Giles in handcuffs. RP 158-59. They observed that Giles smelled of alcohol, his speech was slurred, and he was belligerent and using profanity. RP 159, 185-87, 194-95. He continued to state that he was not driving and told police to "prove it." RP 159, 194. During a pat search police retrieved a lanyard key from around his neck that worked in the door of the suspect vehicle. RP 159-60, 195. A search of the vehicle identification number also showed that the vehicle was registered to Giles. RP 162. Police observed it was not equipped with an ignition interlock device. RP 165.

Giles subsequently refused a breath test and police transported him to the hospital for a blood draw. RP 206, 208-09. Analysis of the blood returned a result of .091 blood alcohol content, and a forensic scientist

later testified that due to the lapse in time between when he had his last drink and when his blood was drawn, his peak blood alcohol level would have been about .11 to .13. RP 268, 271.

The State charged Giles with felony DUI, DWLS second degree, IID, and hit and run – unattended. CP 6. A jury convicted him on all four counts and returned a special verdict finding that he refused a breath test. CP 148-52, RP 320-21. The trial court imposed a mid-range sentence of 75 months followed by 12 months of community custody on the felony DUI and ran the misdemeanor sentences concurrent. CP 169-70; RP 332-33. Giles now appeals and has been found indigent for that purpose. CP 159, 176.

## **V. ARGUMENT**

The sole issue on appeal is whether the State presented sufficient evidence to prove Giles' identity as the driver of the vehicle. Because the evidence establishes only that Giles owned the vehicle and was in proximity to it when police located it, the conviction must be reversed.

Well-settled standards of review govern the issue. The Due Process clause prohibits a conviction without proof of all essential elements of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.

Ed. 2d 368 (1970). In a challenge to the sufficiency of the evidence, the reviewing court considers all of the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salas*, 127 Wn.2d 173, 183, 897 P.2d 1246 (1995). Circumstantial evidence is as reliable as direct evidence and the reviewing court defers to the trier of fact on questions of credibility, resolving conflicting evidence, and persuasiveness. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Each of the crimes with which the State charged Giles required proof that he was the driver or operator of the vehicle. RCW 46.61.502(1) (“A person is guilty . . . if the person drives a vehicle within this state . . .”); RCW 46.20.342(1) (“It is unlawful for any person to drive a motor vehicle in this state while . . .”); RCW 46.20.740(2) (“It is a gross misdemeanor for a person with [an IID] notation on his or her driving record to operate a motor vehicle that . . .”); RCW 46.52.010(1) (“The operator of any vehicle which . . .”). In any criminal case, the State must prove the identity of the defendant as the person who committed the crime. *State v. Hill*, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Other cases in Washington have addressed the sufficiency of evidence to prove the identity of a vehicle's driver. In *Salas*, 127 Wn.2d at 173, police responded to an accident in which it was not clear at the scene who had been driving the car. However, an accident reconstructionist evaluated the injuries of the vehicle's occupants and determined that Salas's injuries were consistent with being the driver. *Id.* at 178-79. Additionally, the car's other two occupants testified that Salas was the driver. *Id.* at 184. Under those circumstances, the Supreme Court easily concluded that the evidence was sufficient to establish Salas's identity. *Id.*

In *State v. Danielson*, 37 Wn. App. 469, 470-71, 681 P.2d 260 (1984), police chased a fleeing vehicle until it became stuck in the mud and the driver and passenger ran off. The person who was believed to be the passenger was contacted, and that person's father told police he would have the driver call the officer. *Id.* at 471. The officer later received a call from somebody who identified himself as Danielson. *Id.* The caller provided numerous facts such as address, date of birth, and the existence of outstanding warrants for his arrest, that were consistent with his identity as Danielson. *Id.* at 472.

In addition, Danielson's mother testified at trial that Danielson was the primary driver of the vehicle and on the day of the incident, he told her the car had been stuck in the mud and was towed away. He admitted to her that he might have been speeding when he passed officers on the highway. *Id.* at 473. Danielson's father also testified that a few days after the incident, he discussed it with Danielson, who told him the gas pedal had been stuck. *Id.* Again, under these facts, the court found sufficient evidence to prove Danielson was the driver. *Id.*

Here, by contrast, it is undisputed that no witness saw Giles drive the car or observed who occupied it. RP 131, 139, 169, 188, 216. Moreover, Giles consistently denied being the driver. RP 157, 159, 194, 226. When police located Giles, he was standing with a group of five to ten other individuals, none of whom testified at trial about Giles' arrival at the scene. RP 155. Giles had a key to the car around his neck and was its registered owner. RP 159-60, 162. He began to walk away when police approached the group, while no one else did. RP 155-56.

This evidence falls far short of the quantum of evidence held to be sufficient in *Salas* and *Danielson*. Like the present case, both *Salas* and *Danielson* involved circumstantial evidence rather than direct evidence of the driver's identity. But in both cases, there was some non-speculative

evidence that tended clearly to put the defendant in the driver's seat – in *Salas*, the driver's injuries, and in *Danielson*, the driver's phone call to police and his admissions to his parents. By contrast, in the present case, the inference that Giles must have been driving his car requires a significant leap of logic based primarily on the facts that he was near it and possessed a key to it when police contacted him. This inference is speculative, and therefore insufficient to establish Giles's guilt beyond a reasonable doubt. *See State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.”); *State v. Donckers*, 200 Wash. 45, 49-50, 93 P.2d 355 (1939) (“Although circumstantial or presumptive evidence is allowed to prevail, even to the convicting of an offender, still the circumstances must themselves be proved and not presumed.”).

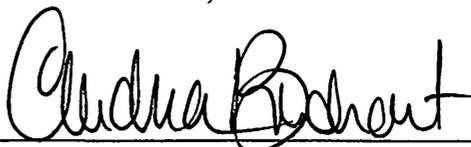
Because the State failed to present sufficient non-speculative evidence to show that Giles was driving the car when it struck Edmonson's car, it failed to prove an essential element of the charges beyond a reasonable doubt. If the State fails to present sufficient evidence to support a conviction at trial, double jeopardy prohibits retrial. *Burks v. U.S.*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978). Accordingly, the convictions should be vacated and dismissed.

**VI. CONCLUSION**

For the foregoing reasons, Giles respectfully requests that the court  
VACATE and DISMISS his convictions.

RESPECTFULLY SUBMITTED this 3 day of June, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a large initial "A".

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ANDREA BURKHART, WSBA #38519  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Javier Roque Giles, DOC #852703  
Airway Heights Corrections Center  
PO Box 2049  
Airway Heights, WA 99001

Tamara Hanlon  
Yakima County Prosecutor's Office  
128 N 2nd St Rm 329  
Yakima, WA 98901-2621

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 3 day of June, 2019 in Kennewick,  
Washington.

  
\_\_\_\_\_  
Andrea Burkhart

**BURKHART & BURKHART, PLLC**

**June 03, 2019 - 12:24 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36441-1  
**Appellate Court Case Title:** State of Washington v. Javier Giles  
**Superior Court Case Number:** 17-1-02319-7

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Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net  
Address:  
8220 W. GAGE BLVD #789  
KENNEWICK, WA, 99336  
Phone: 509-572-2409

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