

63038-5

63038-5

No. 63038-5-I

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

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STATE OF WASHINGTON

Respondent,

v.

GORDON WILLIAMS,

Appellant.

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

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APPELLANT'S OPENING BRIEF

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FILED  
JUL 30 2009  
STATE OF WASHINGTON  
2009 JUL 30 PM 4:28

## TABLE OF CONTENTS

A.	SUMMARY OF APPEAL.....	1
B.	ASSIGNMENT OF ERROR.....	1
C.	ISSUES PERTAINING TO ASSIGNMENT OF ERROR.....	1
D.	STATEMENT OF THE CASE.....	2
E.	ARGUMENT.....	4
1.	THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.....	4
	a. The State must prove each element of the offense charged beyond a reasonable doubt.....	4
	b. Two prior convictions for violating the provisions of a court order are essential elements of felony violation of a court order.....	4
	c. Independent evidence identifying the person on trial is the same person named in the prior convictions is required.....	6
	d. The State did not present competent evidence that Mr. Williams had two prior convictions for violating a court order.....	7
	e. Reversal of the conviction is required.....	9
2.	THE PROSECUTOR'S IMPROPER ARGUMENT DURING CLOSING DENIED MR. WILLIAMS A FAIR TRIAL.....	10
	a. The prosecutor has a duty to ensure a fair trial.....	10

b.	The prosecutor commits constitutional error by improperly shifting the burden of proof.....	11
c.	The prosecutor improperly shifted the burden of proof during closing argument.....	12
d.	The prosecutor's misconduct demands reversal.....	14
F.	CONCLUSION.....	15

## TABLE OF AUTHORITIES

### Statutes

RCW 26.50.110 ..... 5, 6

### Constitutional Provisions

U.S. Const. amend. 14 ..... 10

Wash. Const., art. 1, § 3 ..... 10

### Washington Supreme Court Cases

State v. Belgarde, 110 Wn.2d 504, 755 P.2d 174 (1988)..... 11

State v. Charleton, 90 Wn.2d 657, 585 P.2d 142 (1978)..... 14

State v. Cheatham, 150 Wn.2d 626, 81 P.3d 830 (2003)..... 11

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 4, 10

State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939)..... 6, 7

### Washington Court of Appeals Cases

State v. Boehning, 127 Wn. App. 511, 111 P.3d 899, (2005)..... 11

State v. Brezillac, 19 Wn.App. 11, 573 P.2d 1343 (1978) ..... 6

State v. Clafin, 38 Wn. App. 847, 690 P.2d 1186 (1984)..... 10

State v. Huber, 129 Wn.App. 499, 119 P.3d 388 (2005) ..... 7, 9

State v. Hunter, 29 Wn.App. 218, 627 P.2d 1339 (1981)..... 6

State v. Reed, 25 Wn.App. 46, 604 P.2d 1330 (1979)..... 10

State v. Traweck, 43 Wn. App. 99, 715 P.2d 1148 (1986), rev. denied 106 Wn.2d 1007 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991) ..... 11, 12, 14, 15

### U.S. Supreme Court Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970) ..... 4, 11, 15

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)..... 4

A. SUMMARY OF APPEAL.

Gordon Williams was convicted of felony violation of a court order. On appeal, he argues there was insufficient evidence to support the conviction where the State proffered no independent evidence to prove he was the same Gordon Williams named in the two judgment and sentences from convictions of violating a court order. Additionally, he argues he was denied a fair trial where the prosecutor shifted the burden of proof during closing arguments.

B. ASSIGNMENT OF ERROR.

1. There was insufficient evidence to support a guilty verdict.

2. The prosecutor committed misconduct by shifting the burden of proof during closing arguments.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Where a former conviction is an essential element of the charged offense, the State must present independent evidence to establish the person named in the judgment is the defendant. Mr. Williams was charged with felony violation of a court order. To establish the offense was a felony, the State must prove Mr. Williams had been twice convicted of violating a court order. To prove this, the State provided certified copies of judgment and

sentences with the name “Gordon Williams” and “Gordon E. Williams.” The State provided no other evidence linking Mr. Williams with the person(s) named in the judgment and sentences. Did the State fail to prove all the essential elements of the offense requiring reversal? Assignment of Error 1.

2. The State alleged Mr. Williams violated a court order prohibiting contact with Gina Curley. He argued that there was insufficient evidence that the person he was with on the day he was arrested was Gina Curley. In response, the prosecutor argued that if the individual with Mr. Williams was not the protected person, she would have come to trial to testify. Did the State commit prosecutorial misconduct by impermissibly shifting the burden of proof requiring reversal? Assignment of Error 2.

D. STATEMENT OF THE CASE.

On August 2, 2008, an unidentified individual called 911 reporting that he was at the dog park near Pike Street “with this couple” and that the man was “[g]rabbing her and she’s grabbing his hand ...so he doesn’t hit her.” 1/15/09 RP 9. The caller described the man as “Native,” about 40 years old with long black hair, wearing a bandana, black coat and blue jeans. 1/15/09 RP

10. The 911 call center dispatched Seattle Police Officer James Moran to the dog park to investigate. 1/15/09 RP 13, 15.

Upon arrival, Officer Moran saw a man matching the caller's description and a woman standing "no more than five feet apart" engaged in "some type of conversation." 1/15/09 RP 17, 19, 23. Officer Moran got out of his car, ordered the man to move toward the patrol car and instructed the woman to remain where she was standing. 1/15/09 RP 18. After a second unit arrived, Officer Moran identified the individuals as Gordon Williams and Gina Curley. 1/15/09 RP 20-21. He ran their names through a database and determined that Ms. Curley had a no contact order against Mr. Williams. 1/15/09 RP 21.

The officer arrested Mr. Williams and read him his Miranda warnings. 1/15/09 RP 22. Ms. Curley was upset and repeatedly told the officer she did not want the police involved. 1/15/09 RP 22. Both individuals stated they did not know each other. 1/15/09 RP 22.

The State charged Mr. Williams with Domestic Violence Felony Violation of a Court Order. CP 1-4. A jury convicted Mr. Williams as charged. CP 21. He appeals. CP 50-59.

Additional pertinent facts are addressed in the argument section below.

E. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

a. The State must prove each element of the offense charged beyond a reasonable doubt. In a criminal prosecution, constitutional due process requires the State to prove each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); Green, 94 Wn.2d at 220-21. In assessing a claim of insufficient evidence, the reviewing court must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Here, there was insufficient evidence to support a conviction of a felony violation of a court order.

b. Two prior convictions for violating the provisions of a court order are essential elements of felony violation of a court order. The State charged Mr. Williams with one count of felony

violation of a court order pursuant to RCW 26.50.110(1)(5). CP 1-4. The State further charged Mr. Williams with a felony because he had two prior convictions for violating the provisions of a court order issued under the chapters listed in RCW 26.50.110(5). This subsection of the statute provides:

A violation of a court order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, chapter 7.90, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020. The previous convictions may involve the same victim or other victims specifically protected by the orders the offender violated.

RCW 26.50.110(5).

Thus, in order to convict Mr. Williams of a felony violation of a court order, the State had the burden of proving beyond a reasonable doubt that:

- (1) That on or about August 2, 2008, there existed a no-contact order applicable to the defendant;
- (2) That the defendant knew the existence of that order;
- (3) That on or about said date, the defendant knowingly violated a provision of this order;
- (4) *That the defendant has twice been convicted for violating the provisions of a court order, and*
- (5) That the defendant's acts occurred in the State of Washington.

RCW 26.50.110(1), (5) (emphasis added)

As argued below, the State failed to sustain its burden of proving beyond a reasonable doubt that Mr. Williams had twice been convicted for violating the provisions of a court order.

c. Independent evidence indentifying the person on trial is the same person named in the prior convictions is required.

Established case law holds the identity of names in a prior judgment and sentence alone is not sufficient proof of identity of the person charged. There must be independent evidence that the person whose former conviction is proved is the defendant in present charge. State v. Harkness, 1 Wn.2d 530, 542-43, 96 P.2d 460 (1939); State v. Brezillac, 19 Wn.App. 11, 12-14, 573 P.2d 1343 (1978); State v. Hunter, 29 Wn.App. 218, 221, 627 P.2d 1339 (1981). In 1939, the Washington Supreme Court decidedly ruled that where a prior conviction is an essential element of the charged crime:

The record of a former conviction is not sufficient alone to show that defendant in the present prosecution was formerly convicted. *It must be shown by evidence independent of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution.* The state has the burden of producing evidence to prove such identity.

Harkness, 1 Wn.2d at 543 citing Underhill's Criminal Evidence (4th ed.) 1500, § 829. (emphasis added)

This was the sole issue raised in State v. Huber, 129 Wn.App. 499, 119 P.3d 388 (2005). There, the defendant was convicted of bail jumping. Id. at 501. In its case-in-chief, the State offered certified copies of an information charging the defendant with witness tampering and violating a protection order; an order for the defendant to appear in court; clerk's minutes indicating he failed to appear at the hearing; and a bench warrant for his arrest. Id. at 500-01. The conviction was reversed because the documents were insufficient to support a finding that the Wayne Huber named in the State's exhibits is the same Wayne Huber on trial. Id. at 504.

d. The State did not present competent evidence that Mr. Williams had two prior convictions for violating a court order. The State sought to prove Mr. Williams had been twice convicted for violating provisions of a court order by presenting certified copies of judgments and sentences from Bainbridge Municipal Court. Exhibit 5, 6. This alone was insufficient evidence that Mr. Williams had been twice convicted of violating a court order as the State failed to meet its burden of producing independent

evidence that he was the same person named in the prior convictions entered into evidence.

At the pre-trial hearing, defense counsel sought to strike the prior convictions based, in part, on the lack of “independent evidence that the person whose former conviction is proved is the defendant in the present action.” CP 18, 1/14/08 RP 20. The State admitted it was not prepared to present evidence to prove Mr. Williams was the same person named in the prior convictions. The State argued:

[I]f the court is looking for additional information before it would be satisfied that these are the same two individuals, the State can acquire the police reports associated with these judgment and sentences in Bainbridge Island and tie up the date of birth, the descriptive factors: age, height, weight, race, all of those things. Quite frankly though this has never come up for me before because it has never been challenged in this way before so I do not have those documents at this time and this is the first time I am hearing about this, the nature of this motion

1/14/08 RP 22-23.

The court ruled that State was not required to present independent identification evidence at trial where the defense did not give prior notice of its challenge of the convictions. The court stated in part:

[Y]ou kind of need to give the State more notice that, in the sense that they don't have this information at their fingertips unless they know there is going to be an issue, if they know there's going to be an issue then they'll get this kind of information. And so my inclination is to say that perhaps Ms. Woo should get this information, but this is something that we can deal with after the trial if we have to go all the way through and if it turns out, if he's convicted, ...then we can decide afterwards if the prior conviction (inaudible) then obviously it's a misdemeanor rather than a felony and we should sentence him instead as a misdemeanor rather than a felony.

1/14/08 RP 23-25.

Here, as in Huber, the State only presented two certified copies of judgment and sentences to prove Mr. Williams had been twice convicted of violating a court order. Exhibit 5, 6. The State presented no independent evidence that Mr. Williams was the same Gordon Williams named in the judgment and sentences. There was nothing to link Mr. Williams, an arguably common name, with the Gordon Williams in the judgment and sentences.

e. Reversal of the conviction is required. Because the State failed to present independent evidence that Mr. Williams is the same Gordon Williams named in the certified judgment and sentences, there is insufficient evidence to support the finding that Mr. Williams had been twice convicted of violating a court order. Where there is insufficient evidence for a rational trier of fact to find

find an essential element of the charged offense beyond a reasonable doubt, the conviction cannot stand. State v. Green, 94 Wn.2d at 221. Therefore, the conviction must be reversed.

2. THE PROSECUTOR'S IMPROPER ARGUMENT DURING CLOSING DENIED MR. WILLIAMS A FAIR TRIAL.

a. The prosecutor has a duty to ensure a fair trial. A criminal defendant's right to due process of law ensures the right to a fair trial. U.S. Const. amend. 14;<sup>1</sup> Wash. Const., art. 1, § 3,<sup>2</sup> 22.<sup>3</sup> The prosecutor, as a quasi-judicial officer, must act impartially and solely in the interests of justice to the end that each defendant receives a fair trial. State v. Reed, 25 Wn.App. 46, 48, 604 P.2d 1330 (1979). The prosecutor's duty is to ensure a verdict free of prejudice and based on reason. State v. Clafin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984).

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<sup>1</sup> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>2</sup> No person shall be deprived of life, liberty, or property, without due process of law.

<sup>3</sup> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both improper and prejudicial. State v. Cheatham, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Prejudice occurs if “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899, (2005). Where the prosecutor’s remarks were not objected to reversal is still appropriate if the misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

b. The prosecutor commits constitutional error by improperly shifting the burden of proof. In a criminal trial the State carries the burden of proving every element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. at 361; State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148 (1986), rev. denied 106 Wn.2d 1007 (1986), disapproved on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). Accordingly, a prosecutor commits misconduct when he shifts the burden of proof to the defendant in closing argument by suggesting that the defendant had an obligation to produce evidence of his innocence.

State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546 (1990);

Traweek, 43 Wn. App. at 107.

In Traweek, a jury convicted Mr. Traweek and a co-defendant of robbing a store. 43 Wn. App. at 101. In closing arguments, after Mr. Traweek chose not to testify, the prosecutor stated,

“Mr. Traweek doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it be [sic] presented if there are explanations, which there aren't?”

Id. at 106. The Court held the prosecutor committed misconduct because he erroneously “suggested that the defendant was obliged to call witnesses and thus to prove his innocence.” Id. at 107.

c. The prosecutor impermissibly shifted the burden of proof during closing argument. The State offered evidence that a person named Gina Curley had a no contact order against Gordon Williams by presenting certified copies of a Washington identification card and no contact order. Exhibit 3, 4. However, Gina Curley did not testify at trial. The defense argued that there was insufficient evidence that the woman with Mr. Williams when he was arrested was in fact Gina Curley. 1/15/09 RP 53-55.

Officer Moran testified that the photograph of the woman on the Washington State identification for Gina Curley was the woman with Mr. Williams on the day of the arrest. 1/15/09 RP 24-25; Exhibit 3. However, during cross examination, he admitted he did not obtain the woman's identification card or driver's license when he questioned her, did not take her photograph, had not seen her after Mr. William's arrest and has stopped more than one hundred individuals for various investigations since then. 1/15/09 RP 29-30. Defense counsel argued that given the fallibility of Officer Moran's memory, the amount of time that passed and the officer's limited investigation into the woman's identity, the State had not demonstrated the woman with Mr. Williams was Gina Curley. He argued:

We don't know anything...about that day. We don't know if she was best friends with Gina Curley, we don't know if they were sisters, we don't know if they were cousins, we don't know if they were roommates, we don't know what information that woman that day has about Gina Curley.

1/15/09 RP 55.

In response, the State argued:

[W]e don't have any evidence to support the fact that this was Gina Curley's sister, best friend, cousin, roommate.

If she's not Gina Curley and the Defendant has committed no crime, she has not come forward at all and said it was me with the Defendant that day, it wasn't Gina Curley. If it was her sister or her cousin or best friend (inaudible) for whatever reason (inaudible).

1/15/09 RP 55-56.

Similar to Traweek, the prosecutor shifted the burden of proof to Mr. Williams by suggesting he had an obligation to present evidence to prove his innocence. Here, the prosecutor impermissibly shifted the burden of proof because she suggested Mr. Williams was obligated to prove his innocence by calling a witness to testify she was with Mr. Williams on the day of the arrest and that she lied to the officer by claiming to be Gina Curley.

d. The prosecutor's misconduct demands reversal.

"Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charleton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). The prosecutor's improper arguments prejudiced Mr. Williams and were not a legitimate response to his theory of defense. Instead, the prosecutor eviscerated a legitimate defense argument by impermissibly demanding Mr. Williams was obligated to provide evidence. Although defense counsel did not object to the State's

arguments, reversal is still appropriate. The prosecutor's improper comments violated well established case law that the State has the burden of proving each element of the offense charged beyond a reasonable doubt. In re Winship, 397 U.S. at 361; State v. Traweek, 43 Wn. App. at 107. The State's misconduct violates its basic role of ensuring a fair trial by shifting the burden of proof. This violation cannot be characterized as anything other than flagrant and ill-intentioned. Therefore, reversal is required.

F. CONCLUSION.

Based on the aforementioned reasons, Mr. Williams respectfully requests this court to reverse his conviction.

Respectfully submitted this 30<sup>th</sup> day of July 2009.



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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 63038-5-I
v.	)	
	)	
GORDON WILLIAMS,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> GORDON WILLIAMS 5049 DELRIDGE WAY, APT A SEATTLE, WA 98107	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF JULY, 2009.

x  \_\_\_\_\_

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