

72138-1

72138-1

No. 72138-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent

v.

SHELBY BENOIT,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

2015 FEB 9 AM 9:32  
OFFICE OF THE CLERK  
STATE COURT OF APPEALS  
DIVISION ONE

JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 1

D. ARGUMENT ..... 4

THE STATE FAILED TO PROVE EACH ELEMENT OF  
DRIVING UNDER THE INFLUENCE (DUI), IN LIGHT OF  
INSUFFICIENT EVIDENCE THAT MR. BENOIT’S  
DRIVING WAS AFFECTED OR INFLUENCED BY HIS  
CONSUMPTION OF INTOXICATING LIQUOR. .... 4

1. The State is required to prove every essential element of  
the crime beyond a reasonable doubt. .... 4

2. The State failed to produce sufficient evidence to prove  
beyond a reasonable doubt that Mr. Benoit was under  
the influence. .... 5

3. The State failed to produce sufficient evidence to prove  
beyond a reasonable doubt that Mr. Benoit was under  
the influence of alcohol at the time he was stopped by  
police. .... 7

E. CONCLUSION ..... 12

TABLE OF AUTHORITIES

**Washington Supreme Court**

City of Seattle v. Slack, 113 Wn.2d 850, 784 P.2d 494 (1989)..... 5

State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006) ..... 5

State v. Donckers, 200 Wash. 45, 93 P.2d 355 (1939) ..... 6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 5, 12

State v. Hurd, 5 Wn.2d 308, 105 P.2d 59 (1940) ..... 6

**Washington Court of Appeals**

State v. Shabel, 95 Wn. App. 469, 976 P.2d 153 (1999)..... 6, 10

State v. Wilhelm, 78 Wn. App. 188, 896 P.2d 105 (1995)..... 5, 6

State v. Woolbright, 57 Wn. App. 697, 789 P.2d 815 (1990)..... 6

**United States Supreme Court**

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)... 5, 12

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970).. 5

**Washington Constitution**

Const. art. I, § 3..... 5

**United States Constitution**

U.S. Const. amend. XIV ..... 5

**Statutes**

RCW 46.61.024 ..... 4

RCW 46.61.502(5)..... 4, 5, 8

RCW 9A.76.040..... 4

A. ASSIGNMENT OF ERROR

The State failed to prove each element of driving under the influence beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To convict a defendant of driving under the influence, the State is required to prove beyond a reasonable doubt that the accused was driving a motor vehicle while under the influence or while affected by intoxicating liquor. In the absence of proof beyond a reasonable doubt, and without a blood-alcohol content test (BAC) or field sobriety test (FST), must Mr. Benoit's conviction be reversed?

C. STATEMENT OF THE CASE

On August 2, 2013, Shelby Benoit was driving his mother's car on Burlington Boulevard in Skagit County at about 2:30 a.m. RP 11, 20, 70. Because Mr. Benoit seemed to be exceeding the speed limit, Burlington Police Officer David Goss began to follow Mr. Benoit in his marked patrol car. RP 11-14, 70. There was no other traffic on the roads at the time. RP 16, 70 (Officer Jonathan Weiss: "The roads were empty.").

Officer Goss activated his car's emergency lights, and later, his siren, in an attempt to attract Mr. Benoit's attention. RP 37. Because

Mr. Benoit did not pull over, and due to Mr. Benoit's purported rate of speed, Officer Goss was ordered by his commanding officer, Sergeant Eddie Rogge, to terminate the pursuit of Mr. Benoit's vehicle. RP 127.

Officer Goss extinguished his emergency lights and siren, although he continued to follow Mr. Benoit's vehicle from several blocks away, observing Mr. Benoit's driving ability. RP 15-17, 45. Officer Goss testified that in this manner, he noted that as Mr. Benoit continued to drive from Burlington Boulevard toward a more residential neighborhood, Mr. Benoit's vehicle stayed appropriately within its travel lane and obeyed traffic laws. RP 45-46. Officer Goss observed no traffic infractions and issued no citations to Mr. Benoit. Id. The officer also was able to take down the license plate number for Mr. Benoit's vehicle, which indicated the car was lawfully registered to Mr. Benoit's mother, Linda. RP 46. The car had not been reported stolen, despite the officer's apprehensions, and no investigation was required. Id.

Mr. Benoit eventually pulled his car into the parking lot of the Woodgate apartment complex and parked it in a marked parking space. RP 23. Officer Goss, who was still following Mr. Benoit, pulled into the parking lot behind Mr. Benoit, re-activated his emergency lights,

and drew his weapon. RP 17. Once Mr. Benoit exited the car and Officer Goss could see his hands, Officer Goss stated he re-holstered his weapon and told Mr. Benoit he was not free to leave. Id.

Mr. Benoit told Officer Goss that he needed to find his father, and turned to walk away. RP 18. Officer Goss held Mr. Benoit's arm and told Mr. Benoit that he was being detained. Id. Officer Goss said he smelled the odor of intoxicants on Mr. Benoit, but did not know whether this odor came from Mr. Benoit's breath or his clothing. Id.

By this time, Officer Jonathan Weiss had also arrived at the apartment complex, and he assisted in detaining Mr. Benoit by grabbing his other arm. Id. Both officers testified that Mr. Benoit resisted their attempts to "get control of him," and they pushed Mr. Benoit to the ground and handcuffed him. RP 18-19, 75-76.

Officer Goss asked Mr. Benoit how much alcohol he had consumed that evening, and Mr. Benoit purportedly stated that he and his father had purchased "a fifth of Bacardi" and had been drinking it at Mr. Benoit's apartment in Mount Vernon. RP 25. When asked how much he had consumed, Mr. Benoit allegedly responded, "The legal limit." Id.

Although Officers Goss and Weiss were both trained and certified in the administration of field sobriety tests (FST), portable breath tests, and blood-alcohol content tests (BAC), they declined to conduct any such testing on Mr. Benoit. RP 55-56, 99, 138-141.<sup>1</sup>

Mr. Benoit was charged with attempting to elude, driving under the influence, and resisting arrest. RCW 46.61.024; RCW 46.61.502(5); RCW 9A.76.040; CP 1-2.

Following a jury trial, Mr. Benoit was convicted as charged. CP 52-54.

#### D. ARGUMENT

THE STATE FAILED TO PROVE EACH ELEMENT OF DRIVING UNDER THE INFLUENCE (DUI), IN LIGHT OF INSUFFICIENT EVIDENCE THAT MR. BENOIT'S DRIVING WAS AFFECTED OR INFLUENCED BY HIS CONSUMPTION OF INTOXICATING LIQUOR.

1. The State is required to prove every essential element of the crime beyond a reasonable doubt. Due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d

---

<sup>1</sup> The record reveals that all officers were trained and certified to perform field sobriety tests, portable breath tests, and BAC testing, and that all necessary testing equipment at the police department was functioning on the date of Mr. Benoit's arrest. RP 138-41.

368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). An accused person's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "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." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980).

2. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Benoit was under the influence. A person is guilty of driving while under the influence if he or she drives a vehicle while "under the influence of or affected by intoxicating liquor." RCW 46.61.502(5)(c). A driver is considered "affected" when his or her "ability to handle an automobile [is] lessened in an appreciable degree by the consumption of intoxicants." State v. Wilhelm, 78 Wn. App. 188, 193, 896 P.2d 105 (1995).

The issue is not whether Mr. Benoit had consumed alcohol that night; the issue is whether, at the time he was operating his vehicle, Mr. Benoit was under the influence of the amount of alcohol he had consumed, and whether his ability to drive was affected. Id. Evidence of intoxication may be circumstantial, and intoxication need not be proved by scientific evidence such as breathalyzer results or blood-alcohol content (BAC) testing. See, e.g., State v. Shabel, 95 Wn. App. 469, 474, 976 P.2d 153 (1999) (finding, in addition to chemical tests proving intoxication, sufficient circumstantial evidence supporting finding of driving under the influence); Wilhelm, 78 Wn. App. at 193 n.6; State v. Woolbright, 57 Wn. App. 697, 701, 789 P.2d 815 (1990).

Although the State may prove intoxication by circumstantial evidence, it is the State's burden to prove the circumstances under which the accused was influenced by alcohol and the manner in which his ability to drive was affected. See, e.g., State v. Hurd, 5 Wn.2d 308, 314-16, 105 P.2d 59 (1940) (discussing the distinctions between influenced and affected); State v. Donckers, 200 Wash. 45, 93 P.2d 355 (1939) (noting circumstantial evidence must be proved and not assumed).

3. The State failed to produce sufficient evidence to prove beyond a reasonable doubt that Mr. Benoit was under the influence of alcohol at the time he was stopped by police. Because no chemical or field testing was conducted on the night Mr. Benoit was stopped, the State proceeded on purely circumstantial evidence. Thus, the State was required to prove beyond a reasonable doubt that Mr. Benoit was driving under the influence or was affected by the use of intoxicating liquor – by the observations of law enforcement witnesses alone.

The record shows that Mr. Benoit, according to his own statement, drank with his father on the night he was stopped. RP 25. At best, the record supports a finding that Mr. Benoit drank an unknown portion of alcohol, a few hours before his conversation with Officer Goss at approximately 2:30 a.m. RP 70 (time of Officer Weiss's radio call indicating that Officer Goss was in pursuit of Mr. Benoit's vehicle). The fact that Mr. Benoit had been drinking alcohol on the night he was stopped does not end the inquiry or support an inference that he consumed any particular amount of alcohol on the night he was stopped. Nor is it sufficient to support an inference that Mr. Benoit was under the

influence or the effect of the quantity consumed. See RCW 46.61.502(5)(c).

It is not illegal to consume alcohol; nor is it illegal to drive after consuming alcohol. CP 41 (Jury Instruction 13) (“It is not unlawful for a person to consume intoxicating liquor and drive a motor vehicle. The law recognizes that a person may have consumed intoxicating liquor and yet not be under the influence of it”). The fact that Mr. Benoit admitted to drinking rum with his father on the night in question, in addition to having the odor of alcohol on his breath, is insufficient evidence that Mr. Benoit was driving under the influence, even when considering the evidence in the light most favorable to the State. Even Sergeant Rogge agreed that drinking alcohol -- or indeed, smelling like alcohol -- would not necessarily mean that a person was intoxicated. RP 138.<sup>2</sup>

It was the State’s position that Mr. Benoit’s demeanor and behavior provided ample evidence of his intoxication. However, upon closer examination, it is clear that there was insufficient evidence that Mr. Benoit’s driving or his later behavior were influenced or affected by alcohol.

---

<sup>2</sup> Sergeant Rogge also agreed that being upset or angry was not necessarily evidence of intoxication, either. RP 138.

First, the State argued at trial that Mr. Benoit was so intoxicated that his consumption of alcohol influenced his driving. The implication was that the alcohol consumed by Mr. Benoit had such an impact on his driving that he therefore drove recklessly, and that his consumption of alcohol was the proximate cause of his reckless driving.

Short of chemical testing, however, there was insufficient evidence produced at trial to support the State's theory of driving under the influence. Officer Goss testified that he continued to follow Mr. Benoit slowly, from a distance of several blocks, to be sure he did not lose sight of Mr. Benoit's vehicle. RP 15-17, 45. This resulted in detailed testimony about Mr. Benoit's driving that night. RP 15-17, 45-46. Officer Goss stated that, other than surpassing the speed limit, Mr. Benoit complied with all traffic laws. RP 15-17, 45-46.<sup>3</sup>

Not once in Officer Goss's testimony is it mentioned that Mr. Benoit endangered another motorist or sideswiped a parked car. Nowhere does the testimony discuss Mr. Benoit driving erratically or

---

<sup>3</sup> In fact, for an individual purportedly under the influence of an intoxicating liquor, Mr. Benoit seems to have had remarkable control of his vehicle. According to Officer Goss, Mr. Benoit maintained speeds of up to 80 miles per hour, while never veering out of his lane of traffic, never having a single collision, and managing to park in his apartment complex parking space without incident. RP 15-17, 45.

frightening pedestrians. In fact, for an allegedly drunk driver, he apparently controlled his vehicle quite well. Although the police witnesses did allege that Mr. Benoit was driving too fast, and that he did not pull over during the brief period that Officer Goss had his lights on before ending the pursuit, these facts are not necessarily consistent with being under the influence.

The facts here are different from cases in which there was strong circumstantial evidence of driving under the influence. In Shabel, for example, sufficient evidence of intoxication was found where the defendant was found to be drinking from an open container in her car and police found additional empty beer cans in her vehicle. 95 Wn. App. at 471. Ms. Shabel also drove her car onto a sidewalk and then ran off into the woods after leaving her car unattended; even without her high BAC results, the Shabel Court found the circumstantial evidence was sufficient to support a conviction.

This case is also distinguishable from Wilhelm, in which the defendant failed the field sobriety tests that were administered on the shoulder of I-5. 78 Wn. App. at 192. Another important distinction from Wilhelm is that Mr. Wilhelm refused a breathalyzer test, which this Court considered as evidence supporting a reasonable inference of

intoxication, along with the other circumstantial evidence adduced at trial. Id. In Mr. Benoit's case, there was no refusal and no field sobriety tests – because the law enforcement officers failed to administer any of them.

Lastly, Mr. Benoit's subsequent behavior at the police station was insufficient proof of intoxication to bolster the State's argument that Mr. Benoit had previously been driving while under the influence. Due to the weak circumstantial evidence of intoxication, the State argued at trial that Mr. Benoit's later behavior during the booking process should be considered by the jury. RP 63-64, 108, 113, 121 (noting Mr. Benoit's labile demeanor, including "mood swings," joking with officers, becoming teary at times, and even singing).

Although the State argued that Mr. Benoit's odd behavior was attributable to his alcohol consumption, Officer Goss agreed that what is actually mental illness can sometimes be mistakenly identified as intoxication. RP 55. In fact, Officer Kyle Campo testified that although Mr. Benoit vomited at the precinct, this occurred only after the officers left Mr. Benoit unattended in a cell, and he fell and hit his head on the

concrete floor. RP 58, 108-110.<sup>4</sup> Officer Kyle also stated that he saw Mr. Benoit doing other unusual things in his cell, which might have suggested his mental health history. For example, Officer Kyle noticed Mr. Benoit rubbing his head back and forth against the cell door, humming and chanting a nursery rhyme: “momma is going to buy a diamond ring.” RP 113. After Mr. Benoit hit his head, officers found him lying in a fetal position on the floor of his cell, cold and shivering, humming softly. RP 31-32, 121. Unsure of whether he was asleep or unconscious, officers took a picture of him and put it in the file. RP 31-32, 121.

The circumstantial evidence concerning Mr. Benoit’s behavior at the police station was equally consistent with an explanation inconsistent with intoxication – such as mental illness – as with one supporting the State’s theory. Likewise with the State’s failure to prove Mr. Benoit’s alleged consumption of alcohol influenced his driving.

This failure of proof ultimately lies with the State, as it is the State’s burden to prove all of the elements of each charge beyond a reasonable doubt. Winship, 397 U.S. at 358; Green, 94 Wn.2d at 222.

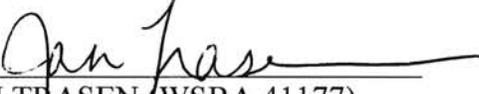
---

<sup>4</sup> Emergency medical technicians (EMT’s) were called to assist Mr. Benoit, but after four minutes determined “that nothing was medically wrong with him.” RP 29. The record indicates that no psychological assessment was done by the emergency medical providers.

E. CONCLUSION

The State failed to produce sufficient evidence to establish beyond a reasonable doubt that Mr. Benoit's driving was influenced or affected by his consumption of alcohol. For the foregoing reasons, Mr. Benoit requests this Court reverse his conviction with instructions to dismiss the charge with prejudice against refiling.

Respectfully submitted this 5<sup>th</sup> day of February, 2015.

  
\_\_\_\_\_  
JAN TRASEN (WSBA 41177)  
Washington Appellate Project  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72138-1-I
v.	)	
	)	
SHELBY BENOIT,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5<sup>TH</sup> DAY OF FEBRUARY, 2015, 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:

- |  |                   |                                     |
|--|-------------------|-------------------------------------|
| [X] ERIK PEDERSEN, DPA<br>SKAGIT COUNTY PROSECUTOR'S OFFICE<br>COURTHOUSE ANNEX<br>605 S THIRD ST.<br>MOUNT VERNON, WA 98273 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] SHELBY BENOIT<br>2107 N LAVENTURE RD<br>APT 27<br>MOUNT VERNON, WA 98273   | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 5<sup>TH</sup> DAY OF FEBRUARY, 2015.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
☎(206) 587-2711