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DIVISION II

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STATE OF WASHINGTON

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No. 38223-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Miklos Toth,

Appellant.

Clallam County Superior Court Cause No. 08-1-00138-4

The Honorable Judges George L. Wood,

Kenneth Williams, and S. Brooke Taylor

Appellant's Opening Brief

(Corrected Copy)

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ASSIGNMENTS OF ERROR

1. Mr. Toth's conviction for felony DUI infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The trial judge violated Mr. Toth's Fourteenth Amendment right to due process by allowing the prosecutor to shift the burden of proof in closing.
3. The trial judge erred by allowing the prosecutor to make a "missing witness" argument in closing.
4. The trial judge erred by admitting Mr. Toth's purported refusal to take a breath test.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Felony DUI requires proof that the accused person has four prior qualifying convictions. The state did not introduce independent evidence (beyond identity of names) proving that Mr. Toth was the person named in three of his four alleged prior DUI convictions. Did Mr. Toth's conviction for felony DUI violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. The Fourteenth Amendment right to due process requires the state to bear the burden of proving a criminal offense beyond a reasonable doubt. Here, the trial judge allowed the prosecutor to argue that Mr. Toth should have called his brother and other witnesses to testify in his defense. Did the trial court violate Mr. Toth's Fourteenth Amendment right to due process by allowing the prosecutor to shift the burden of proof?

3. Under Washington's "implied consent" law, a driver is deemed to have consented to a breath test under certain circumstances, and a driver's refusal to take a breath test may be admitted as evidence in a criminal trial. Mr. Toth agreed to take a breath test and provided a breath sample for a portable breath test. Did the trial judge err by allowing testimony that Mr. Toth purportedly refused to submit a breath sample when asked to do so at the police station?

4. Admission of a breath test refusal requires proof that the driver was provided an opportunity to make a knowing and intelligent decision whether to take or refuse the test. Mr. Toth objectively manifested confusion over the implied consent warnings, but the arresting officer did not attempt to clarify his confusion. Should the trial judge have suppressed Mr. Toth's purported breath test refusal?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Miklos Toth worked as a welder in Seattle. RP 176¹. After work on April 11, 2008, he drove to his brother's in Sequim. RP 177-179. After staying at his brother's for some time, he was stopped for speeding. RP 40, 115, 178-182. The officer suspected that Mr. Toth was driving while affected by alcohol, and so he asked if Mr. Toth would perform voluntary field sobriety tests. RP 42. Mr. Toth said that he wouldn't, but that he would "blow." RP 42. The officer then offered him a portable breath test, which he took. RP 42-43.

The officer arrested Mr. Toth and transported him to the police station. RP 43, 45-47. He reviewed Miranda warnings with Mr. Toth. When asked if he understood, Mr. Toth replied "nope."² RP 45-46. Then the officer reviewed the Implied Consent Warnings. RP 46. When asked if he understood the implied consent warnings, Mr. Toth responded, "No, I gave you a breath test and now you want another." RP 46-47, 56. The officer did not take any steps to clarify Mr. Toth's understanding. RP 46-47, 56.

¹ All citations to the Verbatim Report of Proceedings refer to the RP for 8-12, 8-13, 8-21, and 8-22-08, which are part of a two-volume set with continuous pagination.

² Mr. Toth burped in conjunction with this statement. RP 46.

The state charged Miklos Toth with Felony Driving While Intoxicated, alleging that he had four prior DUI convictions. CP 18. Prior to trial, Mr. Toth moved to suppress testimony that he refused to take a breath test. RP 61-64. The court denied the motion, ruling that Mr. Toth had knowingly refused the test, and the evidence was admitted at trial through testimony of the arresting officer. RP 69, 125-126.

Mr. Toth testified, and told the jury that he had consumed a couple of beers while working on a boat trailer at his brother's home. RP 178-180. He said this took place over the course of two to three hours, and that he ate a hamburger and fries just before his arrest. RP 178, 181. He also testified that at least eight other people were at his brother's home while he was there. RP 178.

After all the evidence was presented, the state proposed a missing witness instruction, arguing that Mr. Toth had not called his brother (or any of the other people who were present) to testify. RP 208. The court denied this request, but allowed the state to make a "where's the brother?" argument to the jury. RP 209. During his rebuttal closing argument, the prosecutor said the following to the jury:

Where's his brother? Where are any of the other people that were at that party? Why hasn't any of them come here to testify on his behalf? We don't even know that he was even at his brother's house. That's just his story. Maybe he was there. We don't know for sure whether or not her was there. But, what we don't have is

any definitive evidence that he was there at all. And, he claims all he drank there was two beers and a swig of whiskey. We don't have anybody here to support that statement. Not one person. They found four empty beer cans in the car. He says other people put them there. Where are those other people? They're not here.... There's just no evidence to back his story up. None.
RP 235-236.

Mr. Toth's objection to this argument was overruled. RP 235.

The jury returned a verdict of guilty. RP 247.

At the second part of the bifurcated trial (relating to Mr. Toth's prior DUI convictions), the state offered four documents to prove that Mr. Toth had four qualifying prior offenses. Supp. CP, Exhibits 1, 2, 3, 4 (admitted August 13, 2008); RP 252. These documents included a King county Judgment for DUI from 2007, a 2000 Jefferson county Order on Judgment (lacking a defendant's signature) for DUI, a 2005 Clallam County Judgment and Sentence for DUI, and an Order Granting Deferred Prosecution in Pacific county from 2004. Supp. CP, Exhibits 1, 2, 3, 4 (admitted August 13, 2008).

In order to tie these documents to Mr. Toth, the state offered the testimony of Clallam County deputy prosecutor Carol Case. She told the jury that she remembered Mr. Toth from the 2005 Clallam county case and identified Mr. Toth as the defendant. RP 251-254. No fingerprint analysis or other identification testimony was offered to tie the other documents to Mr. Toth. RP 249-259. The documents did not include any

personal identifying information such as a date of birth or a description.³
Supp. CP, Exhibits 1, 2, 3, 4 (admitted August 13, 2008).

While the jury deliberated, Mr. Toth moved to dismiss the felony charge, arguing that identity of names on court documents was insufficient evidence to prove that the convictions pertained to Mr. Toth. RP 260. The motion was denied. RP 273-278. During deliberations, the jury sent an inquiry to the judge, noting that “Exhibit #2 does not have a defendant’s signature,” and asking “[d]o we disregard lack of signature + decide with evidence presented?” The court responded “[y]ou have all the evidence before you[;] [p]lease continue to deliberate.” Inquiry from the Jury and Court’s Response, Supp. CP.

Mr. Toth was convicted as charged. CP 12. He filed a Motion for Arrest of Judgment, arguing that the evidence was insufficient to prove four prior qualifying offenses. Motion for Arrest of Judgment, Supp. CP. This motion was also denied. RP 286-287.

Mr. Toth was sentenced to 60 months in prison, and he timely appealed. CP 5, 6.

³ One document—the Clallam County Judgment and Sentence—did include a state ID; however, this ID number was not included in any of the other documents. Exhibit 3 (admitted August 13, 2008), Supp. CP.

ARGUMENT

I. MR. TOTH'S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT HE HAD FOUR PRIOR QUALIFYING CONVICTIONS.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). 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); *Colquitt*, *supra*.

The Supreme Court has long held that where a prior conviction is an element of an offense,

[t]he record of [the] 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. *State v. Harkness*, 1 Wn.2d 530, 543, 96 P.2d 460 (1939).

To sustain this burden, the prosecutor “must do more than authenticate and admit the document; it also must show beyond a reasonable doubt ‘that the person named therein is the same person on trial.’ ...[T]he State cannot do this by showing identity of names alone.” *State v. Huber*, 129 Wn. App. 499, 502, 119 P.3d 388 (2005) (footnotes omitted) (quoting *State v. Kelly*, 52 Wn.2d 676, 678, 328 P.2d 362 (1958)).

In this case, the state presented insufficient evidence to prove that Mr. Toth was the person named in all four prior convictions. First, the prosecutor presented independent evidence of identity for only one prior conviction.⁴ Second, none of the records (including the Clallam County Judgment and Sentence) contained identifying information that could be tied to Mr. Toth. Third, even if the jury were permitted to find beyond a reasonable doubt that a given prior offense belonged to Mr. Toth through comparison of signatures, one of the documents (the 2000 Jefferson county Order on Judgment) lacked a defendant’s signature. Exhibit 2, Supp. CP. Indeed, the jury noted this lack in its inquiry to the judge. Inquiry from the Jury and Court’s Response, Supp. CP.

⁴ The independent evidence consisted of Ms. Case’s testimony that the 2005 Clallam County DUI conviction pertained to the same Mr. Toth on trial for the current offense. RP 251-255; Exhibit 3 (admitted August 13, 2008), Supp. CP.

Under these circumstances, the state's proof of felony DUI was insufficient under *Harkness, supra*. The felony conviction must be reversed, the charge dismissed, and the case remanded for entry of a judgment for the gross misdemeanor of DUI. *Smalis, supra*.

II. THE TRIAL JUDGE VIOLATED MR. TOTH'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY ALLOWING THE PROSECUTOR TO SHIFT THE BURDEN OF PROOF IN HIS CLOSING ARGUMENT.

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, at 362. Because of this, due process limits use of the 'missing witness' doctrine in criminal cases. *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008). A prosecutor risks shifting the burden of proof by arguing that an accused person failed to produce evidence. *Montgomery, supra*.

A missing witness argument may be made only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the accused, (3) the witness's absence is not satisfactorily explained, (4) the argument does not shift the burden of proof, and (5) the argument was "raised early enough in the proceedings to provide an opportunity for rebuttal or explanation." *Montgomery*, at 598-599.

Here, the prosecutor argued (over objection) that Mr. Toth should have called his brother and others to corroborate his testimony. RP 235-236. The state did not meet the requirements outlined in *Montgomery*, and the argument violated Mr. Toth's constitutional right to due process by shifting the burden of proof. First, any "corroborating" evidence would necessarily have been cumulative. Second, the argument shifted the burden of proof, because it suggested to the jury that Mr. Toth was required to prove his innocence by supplying corroborating evidence. Third, the argument was raised late in the proceedings—after all the evidence had been presented—and Mr. Toth had no opportunity for rebuttal or explanation. RP 210.

Under these circumstances, the court should not have allowed the prosecutor to make the missing witness argument. *Montgomery, supra*. The state bore the burden of proving intoxication beyond a reasonable doubt. With his testimony, Mr. Toth sought to raise a reasonable doubt on this element of DUI. By arguing that Mr. Toth should have called his brother and other witnesses to corroborate his testimony, the prosecutor unconstitutionally shifted the burden of proof. Accordingly, Mr. Toth's DUI conviction must be reversed and the case remanded for a new trial. *Montgomery, supra*.

**III. THE TRIAL COURT SHOULD HAVE SUPPRESSED MR. TOTH'S
PURPORTED BREATH TEST REFUSAL.**

RCW 46.20.308 (the “implied consent” statute) provides that “[a]ny person who operates a motor vehicle within this state is deemed to have given consent...to a test or tests of his or her breath or blood,” whenever there are reasonable grounds to believe the person drove a under the influence of alcohol or drugs. RCW 46.20.308(1). A person’s refusal “to submit to a test of the alcohol or drug concentration in the person’s blood or breath under RCW 46.20.308 is admissible into evidence at a subsequent criminal trial.” RCW 46.61.517.

- A. By providing a breath sample for a PBT, Mr. Toth fulfilled his obligations under the implied consent statute, and thus did not refuse a breath test.

Under the implied consent statute, a Washington driver is deemed to have consented to administration of a breath test; however, the statute does not require consent to a particular kind of breath test.⁵ RCW 46.20.308. Mr. Toth told the officer that he would “blow,” and then provided a breath sample for a PBT at the arrest scene. RP 42, 46. By

⁵ Instead, the statute makes the driver’s implied consent “subject to the provisions of RCW 46.61.506,” which outlines the protocol for breath tests admissible in court. RCW 46.20.308(1). By making a driver’s implied consent “subject to” these provisions, the legislature placed limits on the state’s use of implied consent; it did not place additional requirements on the driver.

providing a breath sample, he fulfilled his obligations under the implied consent statute. RCW 46.20.308. It is irrelevant that the test results were inadmissible; RCW 46.20.308 does not guarantee the state that any test results will be admitted at a subsequent criminal trial. *See, e.g., City of Seattle v. Clark-Munoz*, 152 Wn.2d 39, 49, 93 P.3d 141 (2004) (test results inadmissible because of failure to comply with quality assurance program).⁶

Because Mr. Toth fulfilled his obligations under the implied consent statute, the trial court should not have allowed the officer to testify that he had refused a breath test. Mr. Toth's conviction must be reversed, and the case remanded for a new trial with instructions to suppress his alleged breath test refusal.

B. The arresting officer denied Mr. Toth the opportunity to make a knowing and intelligent decision to take or refuse the breath test.

Under the implied consent statute, the arresting officer is required to warn the driver that refusal to take the test will result in revocation of the person's driver's license, and that the refusal may be used as evidence in a criminal trial. RCW 46.20.308(2). The driver must be given "the

⁶ Compare *State v. Cohen*, 125 Wn. App. 220, 226, 104 P.3d 70 (2005) ("Refusal evidence is relevant and admissible whether or not the test, if taken, would have resulted in admissible evidence.")

opportunity to make a knowing and intelligent decision whether to take or refuse to take a test of his blood alcohol,” and failure to provide such an opportunity requires suppression of the refusal. *Thompson v. Department of Licensing*, 138 Wn.2d 783, 791, 982 P.2d 601 (1999) (citing *State v. Trevino*, 127 Wn.2d 735, 747, 903 P.2d 447 (1995)). Where the driver objectively manifests confusion over the implied consent warnings, the arresting officer is required to clarify them. *Thompson*, at 797 n. 8; see also *Vance v. Dep't of Licensing*, 116 Wn. App. 412, 418, 65 P.3d 668 (2003). The burden is on the driver to show that his confusion was apparent to the officer. *Thompson*, at 797 n. 8 (citing *Department of Licensing v. Sheeks*, 47 Wn. App. 65, 68, 734 P.2d 24, review denied, 108 Wn.2d 1021 (1987)).

When given the implied consent warnings and asked if he understood them, Mr. Toth replied “no, I gave you a breath test and now you want another.” RP 56. The officer did not clarify that the PBT would not count as a breath test under RCW 46.20.308.⁷ Because Mr. Toth’s statements were an objective manifestation of his confusion, the arresting officer was required to clarify the implied consent warnings. His failure to

⁷ In the preceding section, Mr. Toth argues that he *did* fulfill his obligations by providing a sample for the PBT.

do so denied Mr. Toth the opportunity to make a knowing and intelligent decision on whether or not to submit to the test.

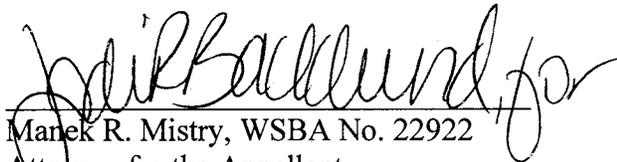
Accordingly, Mr. Toth's purported refusal should have been suppressed. *Thompson*, at 791. The DUI conviction must be reversed, and the case remanded with instructions to suppress the alleged refusal.

CONCLUSION

For the foregoing reasons, Mr. Toth's conviction for felony DUI must be reversed and the felony charge dismissed with prejudice. The case must be remanded for a new trial on the gross misdemeanor charge of DUI, with instructions to suppress Mr. Toth's purported refusal of the breath test and to prohibit the prosecutor from shifting the burden of proof during closing arguments.

Respectfully submitted on February 3, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief (Corrected Copy) to:

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All postage prepaid, on February 3, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 3, 2009.



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