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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

NO. 38568-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

AZAEL ORTIZ LOPEZ,

Appellant.

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

The Honorable John Nichols, Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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2. THE TRIAL COURT ERRED IN ENTERING THAT PORTION OF FINDING OF FACT 4 CONCLUDING THAT MR. LOPEZ HAD AN “ASSUMED CHARACTER.” 1

3. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW 1: 1

BASED ON THE ABOVE FACTS, DEFENDANT’S TRUE NAME IS AZAEL ORTIZ LOPEZ, NOT JONATHAN ORTIZ LOPEZ.

4. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW 2: 2

BETWEEN APRIL 5, 2007, AND APRIL 6, 2007, DEFENDANT DID ASSUME A FALSE IDENTITY, THAT OF JONATHAN ORTIZ LOPEZ, AND DID NUMEROUS ACTS IN THAT ASSUMED CHARACTER WITH THE INTENT TO DEFRAUD THE COURT BY HIDING HIS TRUE IDENTITY.

5. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW 3: 2

ON OR ABOUT APRIL 10, 2007, DEFENDANT, WITH THE INTENT TO DEFRAUD THE CLARK COUNTY SUPERIOR

COURT, SIGNED A RELEASE ORDER OF THE CLARK COUNTY SUPERIOR COURT UTILIZING A FALSE SIGNATURE, SIGNING THE DOCUMENT UNDER HIS ASSUMED IDENTITY OF JONATHAN ORTIZ LOPEZ.

6. THE TRIAL COURT ERRED IN ENTERING CONCLUSION OF LAW 4: 2

ON OR ABOUT APRIL 13, 2007, DEFENDANT, WITH THE INTENT TO DEFRAUD THE CLARK COUNTY SUPERIOR COURT, SIGNED A SCHEDULING ORDER OF THE CLARK COUNTY SUPERIOR COURT UTILIZING A FALSE SIGNATURE, SIGNING THE DOCUMENT UNDER HIS ASSUMED IDENTITY OF JONATHAN ORTIZ LOPEZ.

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IN APRIL 2007, MR. LOPEZ TOLD THE CLARK COUNTY SUPERIOR COURT THAT HIS TRUE AND CORRECT NAME WAS JONATHAN ORTIZ LOPEZ AND SIGNED TWO COURT DOCUMENTS. MONTHS LATER, IN MAY 2008, MR. LOPEZ TOLD OTHERS THAT HIS NAME WAS AZAEL ORTIZ LOPEZ. WITH NO PROOF OF WHICH NAME IS THE LEGAL NAME, IS THERE SUFFICIENT PROOF THAT IN APRIL 2007, MR. LOPEZ DEFRAUDED OR INTENDED TO DEFRAUD THE COURT WHEN HE REPRESENTED HIMSELF TO THE COURT AS JONATHAN ORTIZ LOPEZ? 2

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A. OVERVIEW OF CASE

Appellant, Mr. Lopez, originally filed his Brief of Appellant on June 5, 2009. In that brief, Mr. Lopez asserted that he could not effectively argue his appeal without the trial court, as the trier of fact at a bench trial, entering written findings of fact and conclusions of law on its verdict. As a remedy, he asked to be given an opportunity to file a Supplemental Brief of Appellant if the findings and conclusions were entered.

In response, the State caused verdict findings and conclusions to be entered by the trial court (see attached as Appendix) and subsequently filed its Brief of Respondent. By its Order of August 27, 2009, this Court authorized Mr. Lopez's Supplemental Brief.

B. SUPPLEMENTAL ASSIGNMENTS OF ERROR

- 1. The trial court erred in entering that portion of Finding of Fact 3 which states:**

Defendant's true name was actually Azael Ortiz Lopez, not Jonathan Ortiz Lopez.

- 2. The trial court erred in entering that portion of Finding of Fact 4 concluding that Mr. Lopez had an "assumed character."**

- 3. The trial court erred in entering Conclusion of Law 1:**

Based on the above facts, Defendant's true name is Azael Ortiz Lopez, not Jonathan Ortiz Lopez.

4. The trial court erred in entering Conclusion of Law 2:

Between April 5, 2007, and April 6, 2007, Defendant did assume a false identity, that of Jonathan Ortiz Lopez, and did numerous acts in that assumed character with the intent to defraud the Court by hiding his true identity.

5. The trial court erred in entering Conclusion of Law 3:

On or about April 10, 2007, Defendant, with the intent to defraud the Clark County Superior Court, signed a Release Order of the Clark County Superior Court utilizing a false signature, signing the document under his assumed identity of Jonathan Ortiz Lopez.

6. The trial court erred in entering Conclusion of Law 4:

On or about April 13, 2007, Defendant, with the intent to defraud the Clark County Superior Court, signed a Scheduling Order of the Clark County Superior Court utilizing a false signature, signing the document under his assumed identity of Jonathan Ortiz Lopez.

C. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

In April 2007, Mr. Lopez told the Clark County Superior Court that his true and correct name was Jonathan Ortiz Lopez and signed two court documents. Months later, in May 2008, Mr. Lopez told others that his name was Azael Ortiz Lopez. With no proof of which name is the legal name, is there sufficient proof that in April 2007, Mr. Lopez defrauded or intended to defraud the court when he represented himself to the court as Jonathan Ortiz Lopez?

D. SUPPLEMENTAL STATEMENT OF THE CASE

On April 6, 2007, Mr. Lopez appeared in the Clark County Superior Court for a first appearance on a possession with intent to deliver charge. RP¹ 40. In open court, the prosecutor asked Mr. Lopez if his true and correct name was Jonathan Lopez. RP 41. Mr. Lopez, with the assistance of a Spanish-language interpreter, responded that it was. RP 40-41. On the clerk's docket notes, the underlying cause was listed as State of Washington v. Jonathan Ortiz Lopez. RP 41.

Mr. Lopez made two other court appearances in rapid succession. On April 10, he appeared and signed a release order. RP 66-68. On April 13, he appeared and signed a scheduling order. RP 65-69. (See Supplemental Designation of Clerk's Papers, Exhibits 8 and 8). Deputy Prosecutor Bob Shannon testified that the two signatures appeared to be the same, but the name signed was illegible. RP 70.

In May 2008, Mr. Lopez was contacted by two members of the Vancouver Police Department. RP 46, 49. One of the officers, Officer Brian Billingsley, spoke with Mr. Lopez in Spanish. RP 44-47. At that time, Mr. Lopez gave his name as Azael Ortiz Lopez. RP 47. Another officer, Spencer Harris, also communicated with Mr. Lopez. Mr. Lopez gave his first name as Azael. RP 49. Mr. Lopez also had a Washington

State identification card and a Washington State driver's license under the name Azael Ortiz Lopez. RP 49-50. The driver's license was issued in either February or March 2008. RP 51. (See Exhibit 1, Supplemental Designation of Clerk's Papers).

After the May 1 booking, Nancy Druckenmiller of the Clark County Sheriff's Office compared the fingerprints from the April 2007 booking record of Jonathan Ortiz Lopez with the May 2008 booking record of Azael Ortiz Lopez. She determined that the fingerprints on the two booking records were for the same person. RP 53-59.

In June 2008, the Clark County prosecutor charged Mr. Lopez with three crimes as they related to the April 2007 court appearances: first degree criminal impersonation, and two counts of forgery for the April 10 and 13 signatures on the court documents. Mr. Lopez did not testify and presented no witnesses. RP 71-72. Mr. Lopez appeals from the trial court's finding him guilty of these three charges.

E. ARGUMENT

THERE IS INSUFFICIENT EVIDENCE THAT MR. LOPEZ IS GUILTY OF FIRST DEGREE CRIMINAL IMPERSONATION OR OF FORGERY. THE EVIDENCE FAILS TO ESTABLISH THAT HE DEFRAUDED OR ATTEMPTED TO DEFRAUD THE SUPERIOR COURT.

¹ There is a single volume of verbatim for this appeal. "RP" refers to that single volume of verbatim.

Mr. Lopez did not commit the crimes of first degree criminal impersonation or forgery. The evidence that he defrauded or attempted to defraud the court is insufficient. As the evidence is insufficient, his convictions must be reversed and dismissed.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. Amend. 14; Wash. Const. Art. 1, § 3. “The reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’” *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).²

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. *State v. Devries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing

² The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court need only be satisfied that substantial evidence supports the state's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) *review denied*, 119 Wn. 1003, 832 P.2d 487 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994).

A person being tried on a criminal charge can be convicted only on evidence, not by innuendo." *State v. Yoakum*, 37 Wn.2d 137, 144, 22 P.2d 181 (1950). In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 932 (1999). Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn. 2d 634, 638 P.2d 99 (1980).

government cannot adjudge him guilty of a criminal offense without convincing a proper

(1) *The evidence of criminal impersonation is insufficient.*

As charged, Mr. Lopez could only be guilty of first degree criminal impersonation if he assumed a false identity and did an act or acts in his assumed character with intent to defraud the Clark County Superior Court or for any other unlawful purpose. But the evidence did not establish that Mr. Lopez, by giving his name to the court as Jonathan Ortiz Lopez, or doing any other act before the court, acted in an assumed character. The court's choice of Azael Ortiz Lopez as Mr. Lopez's true name is arbitrary and is nothing more than the choice of one name over another. As there is no proof that Mr. Lopez is anyone other than Jonathan Ortiz Lopez, there is no proof that he acted in the character of anyone else before the court.

(2) *The evidence of forgery is insufficient.*

As charged, Mr. Lopez could only be guilty of both counts of forgery if, with the intent to defraud, he falsely made, completed, or alternated a written instrument. The State's proof of these two charges is that Mr. Lopez, while in court, signed a release order on April 10 and a scheduling order on April 13. Although the two signatures appeared to be the same, the signature was illegible and although the court thought it looked like it began with a letter "j". RP 86. As argued above, there is no proof that Mr. Lopez is anyone other than Jonathan Ortiz Lopez. As such,

fact finder of guilt with utmost certainty." *In re Winship*, 397 U.S. at 364.

there is no proof that the April 10 and the April 13 signatures are other than a valid signature or a real person. Without such proof, there is no showing of an intent to defraud the court.

F. CONCLUSION

All three of Mr. Lopez's convictions should be dismissed. Dismissal is required following reversal for insufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1081 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence). A person whose conviction has been reversed based upon insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), *cert. denied*, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981); *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 1 (1978)).

Respectfully submitted this 16th day of September 2009.

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LISA E. TABBUT/WSBA #21344
Attorney for Appellant

APPENDIX

FILED

2009 AUG 18 PM 2: 51

Sherry W. Parker, Clerk
Clark County

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

AZAELO RTIZ LOPEZ, AKA JONATHAN
ORTIZ LOPEZ,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR BENCH TRIAL HELD 9
SEPTEMBER 2008

No. 08-1-00956-4

(DTF 622004171)

THIS MATTER having come before the above-entitled Court for a bench trial on 9 September 2008, the Defendant being personally present and represented by his trial attorney of record, Neil Anderson, and the Plaintiff being represented by Randolph J. St. Clair, Deputy Prosecuting Attorney for Clark County, State of Washington, and the Court having heard and considered testimony, physical evidence, and pleadings and argument of counsel in this case, now enters the following:

I. FINDINGS OF FACT:

1. Between the 5th and 6th of April, 2007, Defendant was asked by Deputy Prosecuting Attorney Jeff McCarty if his name was Jonathan Ortiz Lopez and Defendant answered in the affirmative.
2. This act occurred during the course of a criminal docket while on the record during a proceeding in Clark County Superior Court.
3. The testimony of Nancy Druckenmiller, a support specialist from the Clark County Sheriff's Office Identification Unit, indicated that based on checks of Defendant's fingerprints, running Defendant's former Clark County booking photos and fingerprints through the

1
2 Automated Fingerprint Identification System (AFIS), and her own comparison of
3 Defendant's fingerprints, Defendant's true name was actually Azael Ortiz Lopez, not
4 Jonathan Ortiz Lopez.

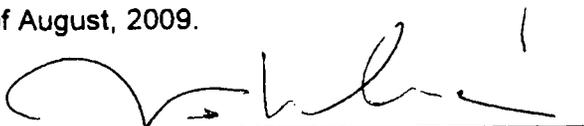
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6 4. That Defendant performed numerous acts in his assumed character: Defendant stated his
7 name was Jonathan at the time he was booked, Defendant confirmed that his name was
8 Jonathan during his First Appearance before Clark County Superior Court, and Defendant
9 subsequently signed a Release Order, on the 10th of April 2007, and a Scheduling Order,
10 on the 13th of April 2007; all with his assumed character/name of Jonathan Ortiz Lopez.
11
12 5. Defendant signed two separate court documents, a Release Order and a Scheduling
13 Order, on two separate dates, the 10th of April and the 13th of April 2007, using the name
14 of Jonathan Ortiz Lopez.
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16 6. The videos from the court hearings on 10 April and 13 April 2007 shows the Defendant
17 signing the above documents and the dates on the documents match the dates indicated
18 on each video.

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II. CONCLUSIONS OF LAW:

1. Based on the above facts, Defendant's true name is Azael Ortiz Lopez, not Jonathan Ortiz Lopez.
2. Between April 5, 2007 and April 6, 2007, Defendant did assume a false identity, that of Jonathan Ortiz Lopez, and did numerous acts in that assumed character with the intent to defraud the Court by hiding his true identity. The elements of Criminal Impersonation in the First Degree have been met.
3. On or about April 10, 2007, Defendant, with the intent to defraud the Clark County Superior Court, signed a Release Order of the Clark County Superior Court utilizing a false signature, signing the document under his assumed identity of Jonathan Ortiz Lopez.

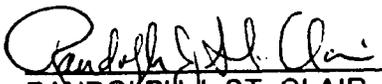
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4. On or about April 13, 2007, Defendant, with the intent to defraud the Clark County Superior Court, signed a Scheduling Order of the Clark County Superior Court utilizing a false signature, signing the document under his assumed identity of Jonathan Ortiz Lopez.
 5. The Court finds, beyond a reasonable doubt, that Defendant is guilty as charged of the crimes of Count 1, Criminal Impersonation in the First Degree, Count 2, Forgery, and Count 3, Forgery.

Done in Open Court this 15 day of August, 2009.



THE HONORABLE JOHN F. NICHOLS
JUDGE OF THE SUPERIOR COURT

Presented by:



RANDOLPH J. ST. CLAIR, WSBA #35235
Deputy Prosecuting Attorney



NEIL ANDERSON, WSBA # 26119
Attorney for Defendant

CERTIFICATE OF MAILING
Court of Appeals No. 38568-6-II
Clark County No. 08-1-00956-4

I certify that I mailed a copy of Appellant's Supplemental Brief to:

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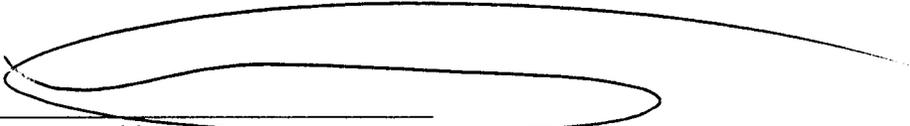
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All postage prepaid, on September 16, 2009.

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

Signed at Mazama, Washington, on September 16, 2009.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Appellant