

NO. 42374-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROSTISLAV IZHEVSKIY,

Appellant.

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

The Honorable Michael Evans, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
A. ASSIGNMENTS OF ERROR	1
Issues pertaining to assignments of error	1
B. STATEMENT OF THE CASE.....	2
1. Procedural History.....	2
2. Substantive Facts.....	3
C. ARGUMENT	5
1. THE STATE FAILED TO PROVE THAT IZHEVSKIY COMMITTED AN ACT IN AN ASSUMED CHARACTER, AND THE CRIMINAL IMPERSONATION CHARGE MUST BE DISMISSED.....	5
2. THE RECORD DOES NOT SUPPORT THE COURT’S FINDING THAT IZHEVSKIY HAS OR WILL HAVE THE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS IT IMPOSED.....	10
D. CONCLUSION	12

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Baldwin</u> , 63 Wn.App. 303, 818 P.2d 1116 (1991).....	10
<u>State v. Bertrand</u> , ____ Wn. App. ____ (Cause No. 40403–6–II, decided 12/8/2011)	10, 11, 12
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992).....	6
<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	6
<u>State v. Grant</u> , 89 Wn.2d 678, 575 P.2d 210 (1978).....	7
<u>State v. Green</u> , 94 Wn. 2d 216, 616 P.2d 628 (1980)	6
<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	6
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	6
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003)	7
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533, <u>review denied</u> , 119 Wn.2d 1011 (1992)	6
<u>State v. Williams</u> , 171 Wn.2d 474, 251 P.3d 877 (2011).....	7
<u>State v. Williamson</u> , 84 Wn. App. 37, 924 P.2d 960 (1996).....	8, 9, 10

Federal Cases

<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970)	6
--	---

Statutes

RCW 46.20.740.....	2
RCW 9A.60.040(1)(a).....	2, 4, 6, 7, 9

Constitutional Provisions

Const. art. 1, § 3	5
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U.S. Const. amend. 14..... 5

A. ASSIGNMENTS OF ERROR

1. The State failed to prove an essential element of first degree criminal impersonation.

2. The trial court's finding that appellant has the ability to pay legal financial obligations is clearly erroneous and must be stricken from the judgment and sentence.

Issues pertaining to assignments of error

1. Appellant was convicted of first degree criminal impersonation, which requires the State to prove both that appellant assumed a false identity and that he did some act in the assumed character for an unlawful purpose. While there was evidence that appellant gave the police officer a false name and provided other information when asked, there was no evidence that he did any act in the assumed character. Must the conviction and charge be dismissed for insufficient evidence?

2. Although the record contains no evidence as to appellant's financial resources or the burden placed on him by the legal financial obligations, the trial court entered a finding that he had the present or likely future ability to pay the legal financial obligations. Must the court's clearly erroneous finding be stricken from the judgment and sentence?

B. STATEMENT OF THE CASE

1. Procedural History

On June 22, 2010, the Cowlitz County Prosecuting Attorney charged appellant Rostislav Izhevskiy with criminal impersonation in the first degree and operating a vehicle without an ignition interlock. CP 1-2; RCW 9A.60.040(1)(a); RCW 46.20.740. Prior to trial, Izhevskiy pleaded guilty to the ignition interlock charge, and the State did not pursue a charge of third degree driving with a suspended license. CP 11-20. The case proceeded to jury trial on the criminal impersonation charge before the Honorable Michael Evans, and the jury entered a guilty verdict. CP 59.

The court imposed a standard range sentence of 5 days on the criminal impersonation charge consecutive to the sentence on the ignition interlock charge. CP 90. On that offense the court imposed 90 days, with 88 days suspended. CP 92. The court also imposed \$1973.69 in legal financial obligations, entering a finding that Izhevskiy had the present or likely future ability to pay. CP 87-88.

Izhevskiy filed this timely appeal. CP 98.

2. Substantive Facts

On June 17, 2010, Kelso Police Officer Sarah Hoffman responded to a report of a traffic violation. RP¹ 52. She found the reported car parked in a convenience store parking lot and waited for the occupants to return. RP 52-53. She contacted Rostislav Izhevskiy when he returned to the car and told him she was investigating a traffic violation. RP 54. Izhevskiy admitted he had been driving but said he had not committed any traffic violations. RP 55

Hoffman asked to see Izhevskiy's driver's license. Izhevskiy took a wallet out of his pants, looked at it, put it back in his pocket and told Hoffman he had left his identification at home. RP 55. Hoffman then asked his name, and he said he was Vataliy Izhevskiy. RP 56. Hoffman asked him to spell the name and then asked him to look at her notebook to make sure the spelling was correct. RP 56. She then asked for a date of birth, and Izhevskiy responded. RP 57.

Hoffman ran the name Izhevskiy had given and found no record of a Washington driver's license. RP 57. Hoffman then spoke to her partner, who had been speaking with the passenger of Izhevskiy's vehicle, and

¹ The Verbatim Report of Proceedings from 5/11/11 and 6/23/11 is contained in a single volume, designated RP.

learned that Izhevskiy had provided a false name. RP 57. Hoffman arrested Izhevskiy for obstructing a police officer. RP 57.

In searching Izhevskiy incident to his arrest, Hoffman removed his wallet from his pants. In the wallet was identification in the name Rostislav Izhevskiy. RP 59. She ran this name and found his license was suspended for unpaid tickets and that he had an ignition interlock requirement. RP 61.

Hoffman had spent about five minutes with Izhevskiy before arresting him. She talked to him for two and a half to three minutes before Izhevskiy gave a false name and for about two more minutes before the arrest. Once she arrested him and found the driver's license, Izhevskiy admitted he was Rostislav Izhevskiy. RP 62.

Izhevskiy was charged with criminal impersonation and driving without an ignition interlock device. He pleaded guilty to the ignition interlock offense. RP 21-22.

Defense counsel argued in a motion to dismiss, in closing argument, and in a post trial motion for arrest of judgment that the State failed to prove Izhevskiy did an act in an assumed identity, an essential element of criminal impersonation. See RCW 9A.60.040(1)(a). Counsel argued that merely giving a false name is not the same as assuming a false identity, and even if it was, giving a false name could not constitute both

assumption of a false identity and an act in the assumed character. RP 75, 77. In closing he argued that giving the false name and date of birth, and spelling the name for the officer were all part of assuming the false identity, but there was no evidence he committed some act in the assumed character. RP 133-34. And post-trial, counsel argued that Izhevskiy could not be convicted on speech alone, and the State had failed to prove he did any act in the assumed character. RP 149-50, 152-53.

The Court denied the motion to dismiss, finding that by stating the false name Izhevskiy was assuming a false identity, and spelling the name for the officer constituted the required act. RP 94-95. Post-trial, the court acknowledged that the State had proven only speech, not conduct. RP 159. It concluded, however, that by maintaining the assertion of the assumed character, Izhevskiy had committed criminal impersonation, and it denied the motion for arrest of judgment. RP 161.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THAT IZHEVSKIY COMMITTED AN ACT IN AN ASSUMED CHARACTER, AND THE CRIMINAL IMPERSONATION CHARGE MUST BE DISMISSED.

For a criminal conviction to be upheld, the State must prove every element of the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d

368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Walton, 64 Wn. App. 410, 415, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). But, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

The State charged Izhevskiy with first degree criminal impersonation under the following statutory provision:

(1) A person is guilty of criminal impersonation in the first degree if the person:

(a) Assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any other unlawful purpose;

RCW 9A.60.040(1)(a).

A court’s “primary duty in interpreting any statute is to discern and implement the intent of the legislature,” and that intent is usually

discerned from the plain language of the statute. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Under the plain language of the criminal impersonation statute, criminal liability may be imposed only if the State proves the defendant committed some act independent of the assumption of a false identity. Use of the conjunction “and” indicates that the legislature did not intend criminal liability to follow from the mere assumption of a false identity. There must be some act in addition to that assumption. Thus, to prove Izhevskiy committed criminal impersonation in the first degree as charged in this case, the State had to prove both that he assumed a false identity and that he did an act in his assumed character for any unlawful purpose. RCW 9A.60.040(1)(a); CP 1, 54.

An act requires conduct, the doing of a thing, a deed. <http://www.merriam-webster.com/dictionary/act>. Washington courts have long recognized that mere speech is distinct from conduct. See State v. Williams, 171 Wn.2d 474, 478-86, 251 P.3d 877 (2011) (detailing history of statutes prohibiting obstructing an officer, noting that such statutes have been held unconstitutional when applied to pure speech, rather than conduct); State v. Grant, 89 Wn.2d 678, 685-86, 575 P.2d 210 (1978) (portion of obstructing statute that focused on conduct rather than speech was constitutionally adequate); State v. Williamson, 84 Wn. App. 37, 43-

45, 924 P.2d 960 (1996) (statute that prohibited conduct not violated by mere speech).

In this case, the State alleged in the information that Izhevskiy assumed a false identity, that of Vitaliy Izhevskiy. It further alleged that he did an act in the assumed identity, “to-wit: claimed to be Vitaliy Izhevskiy.” CP 1. The “act” alleged in the information was not an act, but merely speech, and could not support a conviction for criminal impersonation. Nor did the evidence presented at trial establish this necessary element of the offense.

The evidence showed that when asked to identify himself, Izhevskiy gave a false name. RP 56. He spelled the name when asked, and he agreed that the officer had spelled it correctly when the officer showed him her notebook. RP 56. He also gave a date of birth when asked. RP 57. Within about two minutes of giving this information, Izhevskiy was arrested and searched, and he admitted his real name. RP 62. The evidence further showed that Izhevskiy’s license had been suspended, that he was prohibited from driving without an ignition interlock device, and that there was no ignition interlock device on the car he was driving. RP 61, 70. Thus, a trier of fact could find that he wanted to avoid arrest on driving charges by giving a false name.

But there was no evidence that Izhevskiy did anything other than speak to the officer in aid of his deception. He did not produce a false identification. He did not forge a signature. He only gave the officer false information when asked to identify himself. Consequently, there was no evidence of any conduct which could constitute an act done in an assumed character.

This Court addressed a similar fact pattern in Williamson. There, police encountered Spartacus Williamson when they responded to a report of a fight. Williamson told the officers several times that he was Christopher Columbus, and he was arrested for obstructing a public servant. Williamson, 84 Wn. App. at 40. This Court reversed Williamson's conviction, holding that the record showed only that Williamson gave false statements, when the obstructing statute required conduct. Williamson, 84 Wn. App. at 44-45. The Court rejected the State's argument that Williamson's response, "Christopher Columbus," was conduct, rather than speech. Williamson, 84 Wn. App. at 45.

Here, as in Williamson, the charged offense requires an act, not merely speech. See RCW 9A.60.040(1)(a). The State argued to the jury that the act necessary to establish the offense was maintaining the false identity for two and a half minutes. RP 130-31, 135-36. This Court rejected a similar argument in Williamson. There, every time the

defendant was asked his name, he responded, “Christopher Columbus,” and it took police 30 to 45 minutes to discover his real name. Williamson, 84 Wn. App. at 40. The State argued that the defendant’s repeated assertions were conduct, not speech, but this Court was unpersuaded, noting that the State’s approach would improperly blur the distinction between speech and conduct. Williamson, 84 Wn. App. at 45. Here, as in Williamson, the State proved nothing more than speech. Izhevskiy’s spelling of the false name when asked by the officer was no more conduct than Williamson’s repeated assertions that he was Christopher Columbus.

The State failed to present sufficient evidence to establish all the necessary elements of criminal impersonation. Izhevskiy’s conviction must be reversed and the charge dismissed with prejudice.

2. THE RECORD DOES NOT SUPPORT THE COURT’S FINDING THAT IZHEVSKIY HAS OR WILL HAVE THE ABILITY TO PAY THE LEGAL FINANCIAL OBLIGATIONS IT IMPOSED.

Although the sentencing court is not required to enter formal findings of fact about a defendant’s present or future ability to pay legal financial obligations, any findings entered by the court must be supported by evidence in the record. State v. Bertrand, ___ Wn. App. ___ (Cause No. 40403–6–II, decided 12/8/2011), Slip Op. at 4; State v. Baldwin, 63 Wn.App. 303, 312, 818 P.2d 1116 (1991). Where the record does not

show that the court took into account the defendant's financial resources and the nature of the burden of imposing legal financial obligations, a finding that the defendant has the ability to pay is clearly erroneous. Bertrand, Slip Op. at 4.

In Bertrand, the trial court's judgment and sentence included a finding that Bertrand had the present or future ability to pay the legal financial obligations imposed as part of the sentence. The record did not show that the court took Bertrand's financial resources into account in making this finding, however. Because there was no evidence in the record to support the trial court's finding, this Court ordered that it be stricken from the judgment and sentence. Bertrand, Slip Op. at 4-5. Further, because the erroneous finding was to be stricken, the Department of Corrections was precluded from collecting the legal financial obligations until a future determination of Bertrand's ability to pay had been entered. Bertrand, Slip Op. at 5, n.16.

In this case, the court imposed a total of \$1973.69 in legal financial obligations. CP 88. The court ordered that the obligations be paid in an amount not less than \$50 per month and that they be paid in full within 24 months. CP 89, 92. The judgment and sentence also contains a finding nearly identical to the one in Bertrand:

The court has considered the total amount owing the dependant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 87.

Also as in Bertrand, there is no evidence in the record to support the court's finding that Izhevskiy has the present or likely future ability to pay. No evidence was presented regarding Izhevskiy's financial resources or the nature of the burden imposed by the legal financial obligations. As in Bertrand, the court's finding is clearly erroneous.

This Court must remand with an order that the unsupported finding be stricken from the judgment and sentence and that the Department of Corrections is foreclosed from collecting the legal financial obligations until a determination has been made that Izhevskiy has the ability to pay. See Bertrand, Slip Op. at 5, n.16.

D. CONCLUSION

The State failed to present sufficient evidence to convict Izhevskiy of criminal impersonation. That conviction must be reversed and the charge dismissed with prejudice. Further, this Court must order that the trial court's clearly erroneous finding that Izhevskiy has the ability to pay the legal financial obligations be stricken from the judgment and sentence

and that the Department of Corrections is foreclosed from collecting those obligations until an appropriate determination is made.

DATED this 29th day of December, 2011.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

CATHERINE E. GLINSKI
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Certification of Service

Today I forwarded a copy of the Brief of Appellant in *State v.*

Rostislav Izhevskiy, Cause No. 42374-0-II via U.S. Mail to:

Rostislav Izhevskiy
3220 NE 148th Ave.
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski", written over a horizontal line.

Catherine E. Glinski
Done in Port Orchard, WA
December 29, 2011

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