

NO. 42374-0-II  
Cowlitz Co. Cause NO. 10-1-00572-0

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Respondent,

v.

**ROSTISLAV V. ISHEVSKIY,**

Appellant.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

	<b>PAGE</b>
<b>A. PROCEDURAL FACTS .....</b>	<b>1</b>
<b>B. SUBSTANTIVE FACTS .....</b>	<b>1</b>
<b>C. ISSUES ON APPEAL.....</b>	<b>3</b>
<b>D. ANSWERS.....</b>	<b>3</b>
<b>E. ARGUMENT.....</b>	<b>3</b>
<b>1. TAKEN IN A LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO CONVICT IZHEVSKIY OF CRIMINAL IMPERSONATION IN THE FIRST DEGREE. ....</b>	<b>3</b>
<b>2. IF THE COURT DOES FIND THERE WAS ANYTHING INSUFFICIENT, IT SHOULD BE THE CHARGING DOCUMENT. ....</b>	<b>5</b>
<b>3. IZHEVSKIY SHOULD NOT BE RELIEVED OF THE REQUIREMENT TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.....</b>	<b>7</b>
<b>F. CONCLUSION .....</b>	<b>10</b>

**TABLE OF AUTHORITIES**

Page

**Cases**

*Auburn v. Brooke*, 119 Wash.2d 623, 836 P.2d 212 (1992) ..... 6, 7

*Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 2149 (1978) ..... 6

*State v. Baldwin*, 63 Wash.App. 303, 818 P.2d 1116 (1991)..... 7

*State v. Bertrand*, 165 Wash.App. 393, 267 P.3d 511 (2011) ..... 9

*State v. Delmarter*, 94 Wn.2d 634, 618 P.2d 99 (1980) ..... 4

*State v. Kjorsvik*, 117 Wah.2d 93, 812 P.2d 86 (1991)..... 6

*State v. Nordby*, 106 Wash.2d 514, 23 P.2d 1117 (1986)..... 8

*State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 4

*State v. Simon*, 120 Wash.2d 196, 840 P.2d 172 (1992)..... 6

*State v. Vangerpen*, 125 Wash.2d 782, 888 P.2d 1177 (1995) ..... 6

*State v. Walton*, 64 Wn.App. 410, 824 P.2d 533, review denied, 119  
Wn.2d 1011 (1992) ..... 3

*State v. Williamson*, 84 Wash.App. 37, 924 P.2d 960 (1996)..... 5

**Statutes**

RCW 10.01.160(3)..... 8

RCW 10.01.160(4)..... 8

RCW 9A.60.040(1)(a) ..... 4

**A. PROCEDURAL FACTS**

On June 17, 2010, Rostislav Izhevskiy was arrested by Kelso Police. On June 22, 2010, he was charged with criminal impersonation in the first degree and operating a motor vehicle without and ignition interlock device. CP 1-2. His first appearance on the crimes was June 18, 2010. The court reviewed a bail study and appointed counsel. CP 3.

Trial for his matter began on May 11, 2011. Prior to trial, Izhevskiy pled guilty to operating a motor vehicle without and ignition interlock device. RP 17. Izhevskiy also stipulated to the admissibility of evidence regarding the crimes of operating a motor vehicle without ignition interlock device and driving while license suspended in the third degree. RP 5. Limiting instructions were issued regarding the purpose of that evidence. RP 6.

The state presented its case and Izhevskiy made a motion to dismiss for lack of evidence. The court denied that motion. The jury was instructed of the law and returned a verdict of guilty.

**B. SUBSTANTIVE FACTS**

On June 17, 2010, Izhevskiy was contacted in the parking of a convenience store by Kelso Police Officer Sarah Hoffman. This was in

response to a reported traffic violation. When she made contact with Izhevskiy, he admitted to driving but denied committing any infraction.

Officer Hoffman requested Izhevskiy's driver's license. Izhevskiy pulled his wallet out of his pants, looked at his wallet, then put the wallet back in his pants and stated that he had left his identification at home. Hoffman requested his name, and Izhevskiy claimed to be Vitaliy Izhevskiy. Hoffman requested that Izhevskiy spell the name, which he did. Hoffman then had Izhevskiy confirm the spelling by looking at her notes. He confirmed the spelling was correct. Hoffman then requested a birthdate. Izhevskiy stated that his birth date and Izhevskiy told her his birthday was November 26, 1983. RP 57. Officer Hoffman then ran inquiries on the name and date of birth.

The interaction with Izhevskiy lasted approximately 5 minutes. RP 59. Before returning to Izhevskiy, Hoffman was informed by Officer McFall that Izhevskiy may have provided her a false name. RP 57. Hoffman arrested Izhevskiy for obstructing a police officer. RP 57.

During the arrest, Hoffman retrieved Izhevskiy's wallet from his pants. Inside the wallet was identification for Rostislav Izhevskiy. RP 59. Hoffman ran inquiries on this name, determining that Izhevskiy's license was suspended and he was required to have an ignition interlock device installed in his vehicle. RP 61.

**C. ISSUES ON APPEAL**

1. Was there sufficient evidence to convict the appellant of criminal impersonation in the first degree, where a jury heard that Izhevskiy provided a false name to an investigating officer, spelled that name, agreed to the spelling of the name, provided a date of birth and then chose not to disavow the investigating officer of the belief the name was correct because he was attempting to avoid arrest for two separate crimes?
2. Was it error to make a finding that Izhevskiy had present and future ability to pay his legal financial obligations when the court had a declaration in the form of a bail study prepared by the defendant?

**D. ANSWERS**

1. YES
2. NO

**E. ARGUMENT**

1. **TAKEN IN A LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE TO CONVICT IZHEVSKIY OF CRIMINAL IMPERSONATION IN THE FIRST DEGREE.**

A claim of insufficiency admits the truth of the State's evidence and all the inferences that reasonably can be drawn from them. *State v. Walton*, 64 Wn.App. 410, 415, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992); see *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068

(1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Under RCW 9A.60.040(1)(a), a person is guilty of criminal impersonation in the first degree if the person “assumes a false identity and does an act in his or her assumed character with intent to defraud another or for any unlawful purpose.”

The evidence established that Izhevskiy had been driving and was contacted by police on a suspected driving related offense. The evidence also established that he did more than just tell Kelso officers that his name was Vitaliy Izhevskiy. In addition to giving a false name, he stated the name, he spelled the name, and then after being asked to confirm the spelling by looking at the written words, he agreed that the spelling was correct. RP 56. He then provided Officer Hoffman with a birthdate. He also waited for several minutes before he disavowed officers of the false impression he had given them. The entire interaction with Izhevskiy before arrest took 5 minutes. RP 60. During the entire interaction, he took no steps to disavow officers of the false claims and actions he took to insure they believed those false claims. RP 60. It was later confirmed that Izhevskiy had was driving with a suspended license and was required to have an ignition interlock device installed in any vehicle he was driving. RP 60. Sufficient evidence exists that Izhevskiy assumed a false identity,

and maintained that identity for any unlawful purpose. In this case, the unlawful purpose was to avoid arrest on a new crime. RP 60.

Viewing the evidence in a light most favorable to the State, sufficient evidence supports the jury's verdict that Izhevskiy assumed a false identity, did an act within that identity by spelling the name of the false identity, confirming the fact the spelling was correct, providing a date of birth, and then by refraining from informing the investigating officers of his true identity within the 5 minutes of police interaction police were under the impression he was Vitaliy Izhevskiy. Sufficient evidence also exists to support the verdict that Izhevskiy assumed this identity for any unlawful purpose. In this instance, that unlawful purpose was to avoid two separate criminal charges: driving while his license was suspended and driving a vehicle that was not equipped with an operable ignition interlock device.

**2. IF THE COURT DOES FIND THERE WAS ANYTHING INSUFFICIENT, IT SHOULD BE THE CHARGING DOCUMENT.**

A charging document is generally constitutionally sufficient if it notifies a criminal defendant of the nature of the accusation with reasonable certainty. *State v. Williamson*, 84 Wash.App. 37, 42, 924 P.2d 960 (1996).

The appellate court should apply a two-pronged analysis when reviewing an information. *State v. Kjorsvik*, 117 Wash.2d 93, 105-06, 812 P.2d 86 (1991). First, if the information does not state all elements of the crime, the court determines whether it contains any language, or reasonable inferences, that would give the accused notice of the missing element or elements. *Kjorsvik*, 117 Wash.2d at 106, 812 P.2d 86. If there is some language, but it is vague, the court then considers whether the defendant has shown actual prejudice from the defect. 117 Wash.2d at 106, 812 P.2d 86.

The proper remedy for a conviction based on a defective information is dismissal without prejudice to the State to refiling the information. *State v. Simon*, 120 Wash.2d 196, 199, 840 P.2d 172 (1992); *State v. Vangerpen*, 125 Wash.2d 782, 888 P.2d 1177 (1995) quoting *State v. Simon*, 120 Wash.2d 196, 199, 840 P.2d 172 (1992). The principle that does not preclude the Government's retrying a defendant whose conviction is set aside because of error in the proceedings that lead to a conviction is well established. *Burks v. United States*, 437 U.S. 1, 14, 98 S.Ct. 2141, 2149 (1978); *Auburn v. Brooke*, 119 Wash.2d 623, 639, 836 P.2d 212 (1992)(there is no double jeopardy bar to retrial after a reversal necessitated by a defective charging document).

A charging document is constitutionally adequate only if all the essential elements of a crime, statutory and non-statutory, are included in the document so as to apprise the accused of the charges against him and to allow the defendant to prepare a defense. *Simon*, 120 Wash.2d at 198, 840 P.2d 172. Merely citing to the statute and naming the offense is insufficient to charge a crime unless the name of the offense appraises the defendant of all the essential elements of the crime. *Auburn v. Brooke*, 119 Wash.2d at 635, 836 P.2d 212.

In this case, it can be construed that the charging document did not adequately inform Izhevskiy of the crime against him; that it did not describe the complete crime of criminal impersonation in the first degree. If there is any issue of insufficiency, it would be due to the charging document. Consequently, the state should be allowed to re-file the information without any prejudice to Izhevskiy.

**3. IZHEVSKIY SHOULD NOT BE RELIEVED OF THE REQUIREMENT TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.**

Any inquiry at sentencing as to future ability to pay costs is speculative. Formal findings of fact are not required as a predicate for imposing financial obligations on a defendant. *State v. Baldwin*, 63 Wash.App. 303, 312, 818 P.2d 1116 (1991). A court's determination as to

a defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. *Baldwin*, 63 Wash.App. at 312, 818 P.2d 1116, citing *State v. Nordby*, 106 Wash.2d 514, 517-18, 23 P.2d 1117 (1986)(the inquiry is whether the court's determination is supported by the record).

The court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose. RCW 10.01.160(3) When Izhevskiy was seen at first appearance on these matters, the court considered his ability to afford an attorney. In doing so, the court reviewed a document prepared by Izhevskiy, where he listed his employment at Premiere Dental and his earnings at \$1800 a month. CP 3.

Furthermore, RCW 10.01.160(3) states that "the court may not order a defendant to pay costs unless he is able to pay them. In determining the amount and method of payment of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(4) at any time it may appear to be a hardship for the defendant or his immediate family, the defendant may petition the court and the court may modify the method of payment or remit payment. Through this procedure, Izhevskiy is entitled to judicial scrutiny of his obligation and

his present ability to pay at the relevant time. *Baldwin*, 63 Wash.App. at 311.

In *State v. Bertrand*, 165 Wash.App. 393, 517, 267 P.3d 511 (2011), the court of appeals reviewed the trial court's imposition of legal financial obligations and whether the record supported a finding that the defendant either had, or in the future would have, the ability to those legal financial obligations. In that case, the record did not indicate that trial court considered the defendant's financial resources or any burden the legal financial obligations might impose.

The court ruled that the finding was clearly erroneous, and ordered the finding to be struck from the judgment and sentence. But unlike what Izhevskiy would suggest, the court did not eliminate the defendant's requirement to pay because the defendant could apply for remission of her legal financial obligations with the state initiated collections. 165 Wash.App. at 517, 267 P.3d 511; *citing Baldwin*, 63 Wash.App. at 310, 818 P.2d 1116 (the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation).

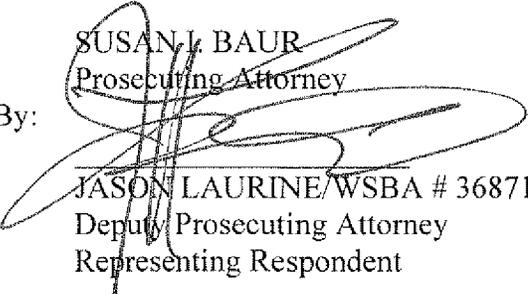
Here, Izhevskiy asks the court to relieve him of the obligation to pay any LFO's because he feels the record does not contain evidence that the court considered his ability to pay. Even if the court did not consider his ability to pay, that would only result in having the finding struck from

his judgment and sentence. Izhevskiy is still obligated to pay his LFO's, but can file for remission of those fees at the time collection begins if he is unable to meet his obligations. However, the court did have evidence available to review in the record, which indicated Izhevskiy did have the present and likely future ability to make payments.

**F. CONCLUSION**

For the above reasons, the state respectfully requests the court to find that sufficient evidence was presented to convict Izhevskiy of criminal impersonation in the first degree and that he is still obligated to pay his legal financial obligations.

Respectfully submitted this 16<sup>th</sup> day of March, 2012.

By:   
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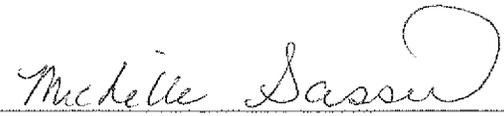
**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on March 16<sup>th</sup>, 2012.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**March 16, 2012 - 11:32 AM**

## Transmittal Letter

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