

65239-7

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NO. 65239-7-I

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

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STATE OF WASHINGTON,

Respondent,

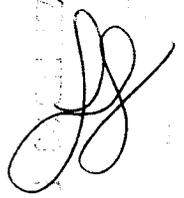
v.

WENDY MOSLEY,

Appellant.

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

The Honorable Stephen J. Mura, Judge

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. THE EVIDENCE WAS INSUFFICIENT BECAUSE NO EVIDENCE CONNECTED MOSLEY TO THE CRIMES; MERE IDENTITY OF NAME IS NOT ENOUGH.....	1
2. PHOTOGRAPHS TAKEN FROM THE INTERNET BY SOMEONE WITH NO PERSONAL KNOWLEDGE OF THE CONDITIONS UNDER WHICH THE PHOTOGRAPHS WERE TAKEN ARE NOT ADMISSIBLE EVIDENCE. ....	3
3. THE PROSECUTOR UNFAIRLY COMMENTED ON MOSLEY’S CONSTITUTIONAL RIGHT TO SILENCE BY ARGUING DEFENSE COUNSEL DID NOT SAY IT WASN’T HER.....	5
B. <u>CONCLUSION</u> .....	8

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Ashby  
77 Wn.2d 33, 459 P.2d 403 (1969)..... 5

State v. Burke  
163 Wn.2d 204, 181 P.3d 1 (2008)..... 5, 7

State v. Hill  
83 Wn.2d 558, 520 P.2d 618 (1974)..... 1, 2

State v. Johnson  
\_\_\_ Wn. App. \_\_\_, 243 P.3d 936 (2010)..... 7

State v. Ramirez  
49 Wn. App. 332, 742 P.2d 726 (1987)..... 5, 6

State v. Tatum  
58 Wn.2d 73, 360 P.2d 754 (1961)..... 4, 5

FEDERAL CASES

Griffin v. California  
380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)..... 6

A. ARGUMENT IN REPLY

1. THE EVIDENCE WAS INSUFFICIENT BECAUSE NO EVIDENCE CONNECTED MOSLEY TO THE CRIMES; MERE IDENTITY OF NAME IS NOT ENOUGH.

The evidence in this case showed that someone used bank accounts and identification in Wendy Mosley's name to commit theft via a check kiting scheme. But there was no evidence whatsoever that Mosley was personally involved.

The State claims that, under State v. Hill, 83 Wn.2d 558, 520 P.2d 618 (1974), there need be no in-court, on the record identification because bank employees testified they would have compared the identification to the person's face when conducting the transactions. Brief of Respondent at 8. But Hill bears little resemblance to this case. Hill was charged with unlawful possession of a narcotic drug. Hill, 83 Wn.2d at 558. The officer on the case saw him drop what appeared to be a Kleenex, arrested him, placed him in the patrol car, and then went back and found two capsules of heroin five to ten feet from where the Kleenex had fallen. Id. at 559. The officer thus had direct, personal knowledge of the defendant's identity and his connection to the criminal conduct. The officer testified it was "the defendant" he arrested at the scene. Id. at 560. Several other witnesses mentioned the defendant's name. Id. The officer essentially testified he saw the defendant commit the crime. He merely failed to name the defendant in

court. The asserted error was the “failure of the state to provide a specific in-court identification of the defendant.” Id. Despite that failure, the court held, “we are satisfied that the evidence as it developed in the instant case was adequate to establish the defendant’s identity in connection with the offense for which he stood accused.” Id.

By contrast, in this case, the evidence was insufficient because no evidence whatsoever established the “connection with the offense” for which Mosley stood accused. Detective Ferguson identified the defendant in court as the same Wendy Mosley he contacted during his investigation. RP 16. But unlike the defendant in Hill, he did not arrest Mosley at the scene of the crime. Detective Ferguson did not merely “fail to provide a specific in-court identification,” as in Hill. He had no basis upon which to do so because he did not have, and did not claim to have, any personal knowledge of who conducted these transactions.

Certainly the jury could compare the signatures on the various bank documents and could perhaps conclude they were written by the same person (or a skilled forger), but there was no testimony or evidence connecting any of these writings to Wendy Mosley personally. The State appears to have misunderstood Mosley’s argument regarding Marcus Mosley. Brief of Respondent at 9. Mosley admits, and so stated in the opening brief statement of facts, that teller Samantha Henthorn recognized Marcus Mosley

in surveillance video. Brief of Appellant at 9. But there is no evidence connecting Wendy Mosley with Marcus Mosley's crime aside from Detective Ferguson's claim she is his mother. The State claims Detective Ferguson "confirmed to the jury" that Mosley was Marcus Mosley's mother and Samanda Dillard's friend. Brief of Respondent at 9. Detective Ferguson claimed this was the case but admitted he had no firsthand knowledge to support that assertion. RP 14-15, 17-18, 20-21.

Even assuming Mosley resembles the photograph in Exhibit 2 and it was her authentic identification that was used in these transactions, there is no evidence she was the person who presented the identification and conducted these transactions, or even opened the account in the first place. There was no evidence the driver's license or municipal court document presented by the State were ever in Wendy Mosley's possession at all. Without evidence she was the one who presented these documents at the bank for the fraudulent transactions, the evidence is insufficient to prove guilt beyond a reasonable doubt.

2. PHOTOGRAPHS TAKEN FROM THE INTERNET BY SOMEONE WITH NO PERSONAL KNOWLEDGE OF THE CONDITIONS UNDER WHICH THE PHOTOGRAPHS WERE TAKEN ARE NOT ADMISSIBLE EVIDENCE.

To authenticate a photograph requires testimony from someone with personal knowledge of both the subject matter of the photograph and the

circumstances under which it was created. State v. Tatum, 58 Wn.2d 73, 75, 360 P.2d 754 (1961). Tatum does not support the State's argument that the Myspace photographs were admissible because no witness had any knowledge of the circumstances under which they were made.

The photographs in Tatum were taken by a grocery store "regiscope." 58 Wn.2d 74. The store employee testified that when cashing a check, she inserts it into the regiscope, which photographs both the check and the person making the transaction. Id. Thus, she had personal, first-hand knowledge of the circumstances under which the photograph was produced. She recognized the initials on the check as hers, indicating she had performed the transaction for the defendant. Id. She also recognized the background of the store in the photograph. Id. at 75. An expert witness also testified at length about the regiscope technology. Id. Thus, the court concluded the photographs were sufficiently authenticated. Id. The court held that authentication requires "some witness (not necessarily the photographer) be able to give some indication as to when, where, and under what circumstances the photograph was taken." Id. That foundation requirement was met in Tatum. It was not met here.

The State argues the photograph was authenticated because Samantha Henthorn and Detective Ferguson identified Mosley and Dillard in the photograph. Brief of Respondent at 11. This is insufficient. There must

also be some indication of the circumstances under which the photograph was taken. Tatum, 58 Wn.2d at 75. No witness in this case had any such knowledge. The court erred in admitting these photographs without the authentication required by law.

3. THE PROSECUTOR UNFAIRLY COMMENTED ON MOSLEY'S CONSTITUTIONAL RIGHT TO SILENCE BY ARGUING DEFENSE COUNSEL DID NOT SAY IT WASN'T HER.

The State may not argue a person is guilty because she exercised her constitutional right to silence. State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). That is what occurred in this case when the prosecutor argued in rebuttal that defense counsel “didn’t say that it wasn’t her.” RP 118.

The State analogizes the prosecutor’s argument to a mere assertion that the State’s evidence is uncontroverted without suggesting a burden on the defense to present any particular evidence, relying on State v. Ramirez, 49 Wn. App. 332, 742 P.2d 726 (1987). In Ramirez, the court affirmed the conviction despite the prosecutor’s improper comments because the evidence of guilt was “overwhelming.” Id. at 333. The Ramirez court stated the rule that “The prosecutor may state that certain testimony is undenied, without reference to who could have denied it.” Id. at 336 (citing State v. Ashby, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969)). Additionally, “The prosecutor may also comment that evidence is undisputed when these

comments are so brief and so subtle that they do not emphasize the defendant's testimonial silence." Ramirez, 49 Wn. App. at 336 (citing State v. Crawford, 21 Wn.App. 146, 152, 584 P.2d 442 (1978)).

This case is utterly unlike Ramirez. The prosecutor here did not merely state that evidence was uncontroverted "without reference to who might have denied it." Ramirez, 49 Wn. App. at 336. The prosecutor specifically argued Mosley must be guilty because her own attorney "didn't say it wasn't her." RP 118. This was an impermissible comment on her right to silence in violation of her constitutional rights.

According to the Ramirez court, "Drawing attention to the defendant's failure to testify is constitutional error." 49 Wn. App. at 339 (citing Griffin v. California, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965)). It is presumed prejudicial unless the State proves it was harmless beyond a reasonable doubt. Ramirez, 49 Wn. App. at 339. In Ramirez, the overwhelming evidence showed Ramirez murdered his wife. Id. at 339-40. In this case, the evidence connecting Mosley to these transactions is far from overwhelming. Indeed with no evidence she was the person who conducted any of these transactions, it was insufficient to prove guilt beyond a reasonable doubt as discussed above.

However, even if this court declines to apply a constitutional harmless error standard, the prosecutor's comments were so flagrant and ill-

intentioned as to be incurable by instruction. It is well established that prosecutors may not comment on the right to silence and may not argue silence implies guilt or that the defense has any burden to present evidence. Burke, 163 Wn.2d at 217. A misstatement of the law regarding the presumption of innocence and the burden of proof requires reversal, even without defense objection. See State v. Johnson, \_\_\_ Wn. App. \_\_\_, 243 P.3d 936 (2010) (reversing conviction despite lack of objection because prosecutor argued jury had to “fill in the blank” to find reasonable doubt). Even under this standard, Mosley’s conviction should be reversed. Mosley was unfairly prejudiced when the prosecutor’s closing argument shifted the burden of proof and commented on her right to silence in violation of her constitutional rights.

B. CONCLUSION

For the foregoing reasons and for the reasons discussed in the opening Brief of Appellant, Mosley requests this Court reverse her conviction.

DATED this 23<sup>rd</sup> day of February, 2011.

Respectfully submitted,

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 65239-7-1
	)	
WENDY MOSLEY,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23<sup>RD</sup> DAY OF FEBRUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE  
WHATCOM COUNTY COURTHOUSE  
311 GRAND AVENUE  
BELLINGHAM, WA 98225

**SIGNED** IN SEATTLE WASHINGTON, THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2011.

x. 