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Nov 14, 2013
Court of Appeals
Division III
State of Washington

NO. 31208-9-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN BENTURA OZUNA,

Appellant.

AMENDED BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The State presented insufficient evidence of actual communication of the threat.
2. The State presented insufficient evidence to support the gang aggravator under RCW 9.94A.535(3)(s) and (aa).
3. The trail court improperly imposed a domestic violence assessment and costs of incarceration.
4. The trial courts Conclusions of Law II and III are incorrect
5. Officer Layman of the Sunnyside Police Department should not have been allowed to speak at sentencing.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The was sufficient evidence presented to support the conviction.
2. The was sufficient evidence to support the gang aggravator.
3. The court did improperly impose a domestic violence assessment and costs of incarceration.
4. The Court's Conclusion's II and III are legally correct.
5. Officer Layman is allowed pursuant to RCW 9.94A.500(1) to speak at sentencing.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

RESPONSE TO ASSIGNMENTS OF ERROR ONE – SUFFICIENCY OF THE EVIDENCE.

The evidence presented more than sufficient for the jury to find Appellant's guilty of Intimidation of a Witness as charged.

Mr. Avalos was a witness against Ozuna in a previous criminal case. (RP 190, 203, 215, 504) When Officer Volland was moving Ozuna from one cell to another he discovered letters in his personal affects that were addressed to an outside party but the return address did not list Mr. Ozuna, which was a violation of the jails mail policy. (RP 217-220) This policy violation was further explained by Lt. Costello during his testimony. (RP 269) Lt. Costello having read the letter believed that there was a threat contained in the letter that was a potential security issue. (RP 270, 278-80) Lt. Costello, a veteran of twenty-eight years as a corrections officer testified that not just a few words in the letter were threatening but "whole statements" he then testified about specific sections of the letter that were threats. (RP 265, 283-85) Lt Costello testified that those who "snitch" "Usually at the least they wind up getting beat." (RP 228) Officer Gamino testified that she observed Mr. Avalos "lying on the floor...bleeding...from a head injury." (RP 297-8) Officers testified that David Soto was written up for the assault on Mr. Avalos. (RP 300-1, 303-

6) Officer Hartley testified that she placed an officer safety alert on Mr. Avalos due to "this assault , form a fellow Sureno..." She then testified that the other Sureno she was referring to was David Soto. (RP 305-6)

There was earlier testimony from an expert document examiner from the Washington State Patrol Crime Laboratory that identified Mr. Ozuna as the writer of the letters and that the indication was that he also was the writer of the envelopes those letters were found in. (RP 264)

Det. Rollinger testified that she was present when Mr. Avalos testified against Ozuna as well as being present at the plea and sentencing of Ozuna where the recommended sentence range was one hundred twenty-nine months, the exact number listed in the letter seized. (RP 312-3, 374, 401-2)

She testified that both letters that were seized and turned over to her were marked such that they appeared to be from Mark Cole (RP 314) Both letters had a distinctive fold to them. (RP 315-17) And that they were both addressed to and signed by Primo (RP 318) Det. Rollinger expressed her opinion that the letters were referring to the victim and his previous testimony against the defendant. The letter specifically indicated that the person who was the object of the threat had "ridden" with the writer. The Detective had been the officer who physically stopped the car after a chase during the previous crime which was the

object of the charges wherein the victim here testified against the Appellant. In the case Det. Rollinger observed that at the time of the stop both the victim and the Appellant were physically in the car together. (RP 322-23, 363-4) The Det. testified that the victim was a BGL/Sureno (RP 323-24) Det. Rollinger was concerned enough and certain enough that Mr. Avalos was the target of this letter that she spoke to him about and in fact showed the letter to Avalos on June 22. (RP 325)

Det. Rollinger then got recordings of some inmate phone calls made by Ozuna; one specifically referenced the letters in question in this case. (RP 326-7) During this phone call, which was played to the jury and the recording is a portion of the record before this court; Ozuna specifically makes reference to the threatening letter. (RP 382-99) It must be noted that all calls by inmates to outside parties are recorded and notice of that recording is on the call itself. (RP 345-48, 382) There was also testimony from the phone call that Ozuna stated "they wrote me up for tampering with a witness.'

Det. Rollinger testified that the second letter seized was signed with a "moniker" of the Appellant, "Mr. Downer." The letter containing the threat was not signed with that moniker; it was addressed to and signed by "Primo." (RP 401-3)

Mr. Avalos, the victim, testified that he was friends with Ozuna and that he and Ozuna associated with the Sureno's. He testified that he did not know who had assaulted him and that he had a wound to his head. (RP 414-15, 418-9) He also identified that the letter he was shown contained references to "George" and that there was a George in the God Pod. (RP 416) When asked if he had been threatened he testified that "people talk a lot through doors and stuff." In an earlier interview Avalos had stated that he was threatened both verbally and in a letter. At the time of the trial he could remember none of that. (RP 412-23) Avalos was asked during his earlier interview who he thought the "George" referred to in the threatening letter was and he responded George Garza who was with Avalos in the God Pod. (RP 423-4)

It is of great importance to look at the exact language of the Information charging Ozuna with the crime of Intimidating a Witness. Nowhere in the Information does it state that the basis for the charge was the letter that was seized from Ozuna's cell and presented to the jury at trial. The information simply states;

> On, about, during or between June 8, 2010 and July 9, 2010, in the State of Washington, you directed a threat to Augustine Jaime Avalos, a former witness, because of the witness's role in an official proceeding.

At trial and now on appeal Ozuna attempts to make the case solely on the letter. The fact is the charge could be proven beyond a reasonable doubt with the letter alone based on the nature of that letter and the case law relied upon by the trial court, however when this court looks to the totality of the evidence presented, from the stipulation that the victim Mr. Avalos testified against Mr. Ozuna in a previous criminal case to the testimony that the threatening letter was seized from Ozuna cell, the proof by the handwriting expert that he had penned the letters and the fact that he attempted to disguise that they were from him with the return address and the signature (Ozuna's trial counsel stated Ozuna had written the letter in his closing argument RP 547) the testimony from the victim who received a severe head wound, the testimony regarding the phone calls to Ozuna's family where he admitted he wrote the letters and that he was emotional when he wrote them, the testimony of a fellow gang member against Ozuna to the testimony of the two witnesses for Ozuna who explained the ease with which information is passed amongst inmates and interestingly testified that Mr. Ozuna had spread information that the victim was to be left alone – in essence admitting there was a "hit" out on the victim that had to be stopped now that the letter was public, the testimony from a Corrections Officer to the fact that Ozuna was a "shot caller" it is clear that the manifestation of this threat, of the intimidation,

was the letter. But the charge was not that the letter and the letter alone was the factual basis upon which the State rested it theory of the case and the actual proof of the case it was the totality of the direct and circumstantial evidence presented.

The trial court ruled the following at the close of the State's case;

> THE COURT: Well, the cases cited by the State, which are based not only upon the statute that -- that's in play here; but also on the related statute which uses the same language, direct threat, involving threats against a judge, have been construed to not require that the -- that the threat actually be -- be communicated -- to the person who is the target of the threat.
> ...
> I think that -- that looking at the evidence in the light most favorable to the State there is sufficient evidence for the matter to go forward.
> (RP 445-6)

In its brief to the trial court the State cited to State v. Anderson, 111 Wn.App. 317, 44 P.3d 857 (Wash.App. Div. 3 2002) (CP 75-86, RP 463-7) wherein this court ruling on a factually similar case stated "At the heart of Darrell Anderson's appeal is his argument that he did not intend, nor did he communicate directly, the threats that prompted this prosecution. The statute, however, is clear that the threat can be communicated "directly or indirectly." RCW 9A.04.110(25); RCW 9A.72.110(3)(a). Accordingly, we affirm the convictions." *Id* at 318.

This court then went on to state;

Mr. Anderson argues that the evidence is insufficient to support his conviction. He did not intend that his letter reach Ms. Carpenter. The question is whether that intention is necessary. And no Washington case directly addresses this question.

The issue has, however, been addressed in another context--intimidating a judge. State v. Hansen, 122 Wash.2d 712, 862 P.2d 117 (1993).

In Hansen, the court held that whether the defendant intended that his threats would reach the judge was irrelevant. *Id.* at 717-18, 862 P.2d 117. The court stated:

> [W]hoever threatens a judge, either directly or indirectly, *e.g.,* through a third person, because of an official ruling or decision by that particular judge, is chargeable under [the intimidating a judge statute]. *The threat may ultimately find its way to the judge, but that is irrelevant with regards to the commission of the crime. Id.* at 718, 862 P.2d 117 (emphasis added).

The rationale in Hansen is equally compelling here. Indeed, there the pertinent statute says: "A person is guilty of intimidating a judge *if a person directs a threat* to a judge because of a ruling or decision of the judge in any official proceeding...." RCW 9A.72.160(1) (emphasis added). Similarly, the intimidating a witness statute states: "A person also is guilty of intimidating a witness *if the person directs a threat* to a former witness because of the witness's role in an official proceeding." RCW 9A.72.110(2) (emphasis added). Both statutes use the identical action language, "if a person directs a threat." RCW 9A.72.160(1); RCW 9A.72.110(2). Both of these statutory schemes address the same subject matter and here the same purpose. *See* In re Pers. Restraint of Yim, 139 Wash.2d 581, 592, 989 P.2d 512 (1999) (statutes that relate to the same subject matter or have the same purpose should be read together).

RCW 9A.72.110(2) (intimidating a witness) requires no proof that the defendant intended his threats to reach the victim. Hansen is persuasive authority that such an intent is irrelevant. Hansen, 122 Wash.2d at 718, 862 P.2d 117. There was sufficient evidence to support Mr. Anderson's conviction

> for intimidating a witness based on the threatening letter. *See* Potts, 93 Wash.App. at 86, 969 P.2d 494.
> (All emphasis in original.)

State v. Williamson, 120 Wn.App. 903, 908, 86 P.3d 1221 (2004) citing and concurring with the Anderson ruling stated "A person violates the witness intimidation statute even if the threat is not communicated to the victim. State v. Anderson, 111 Wash.App. 317, 44 P.3d 857 (2002). And a person is guilty of intimidating a judge even if the threat is not communicated. State v. Hansen, 122 Wash.2d 712, 862 P.2d 117 (1993)."

Williamson was a witness tampering case, which statute is very similar to the intimidation statute charged in Ozuna's case, proof of actual communication with the victim, either directly or through intermediaries, is not required under either statute.

Further, our Supreme Court observed in State v. Rempel, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990). "The State is entitled to rely on the inferential meaning of the words and the context in which they were used." In other words, affirmative requests, threats, or promises of reward may be sufficient. See, e.g., Williamson, 131 Wn.App. at 5 bluntly asking a witness to "recant" and "take it back" or else "daddy and mommy are going to jail" constituted witness tampering). Direct statements are not necessary to convict for witness tampering. See State v. Scherck, 9 Wn.App. 792, 794, 514 P.2d 1393 (1973) "The jurors were

required to consider the inferential meaning as well as the literal meaning of [the accused's] conversation with the witness."

This Court has reviewed challenges of the sufficiency of the evidence presented at trial on hundreds if not thousands of occasions in the past. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd,* 136 Wash.2d 939, 969 P.2d 90 (1998).

These facts are without a doubt sufficient to meet the test set forth in, State v. Bucknell, 144 Wn.App. 524, 183 P.3d 1078 (2008);

> In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. State v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). (Emphasis mine)

Appellant challenges the sufficiency of the evidence to support the conviction. This court does not weigh evidence or sift through competing testimony; instead, the question presented here is whether there is sufficient evidence to support the determination that each element of the crime was proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). This Court will consider the evidence in a light most favorable to the prosecution Green, 94 Wn.2d at 221 and also will defer to the trier of fact "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). "Credibility determinations are for the trier of fact and are not subject to review." *Id.* at 874. This court does not have to decide if it believes that the evidence establishes guilt beyond a reasonable doubt, but rather it must decide if any rational trier of fact could find guilt. State v. Kilburn, 151 Wn.2d 36, 57, 84 P.3d 1215 (2004).

When an Appellant is claiming insufficiency they must admit the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) the elements of that crime can be established by both direct and

circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986)

Ozuna argues there was insufficient evidence to show that the "any communication of an actual threat occurred" (Appellant's brief at 7.) In determining the sufficiency of the evidence presented to support the charge of Intimidation of a Witness, this court's standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) (citing State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005)); State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The facts set forth above clearly support the States allegation. The circumstantial evidence presented is considered to be as reliable as direct evidence. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Credibility determinations are for the fact finder and are not reviewable on appeal.

The State indicated at the time of the motion to dismiss at the close of the State's case that the court need not look just to the information that

regarding the letter and the phone call but must look also to the fact that after the letter and the call, the victim was in fact brutally assaulted by another inmate who was also a Sureno.

The trial court made the correct decision at the close of the State's case. There was more than sufficient evidence both direct and circumstantial to prove the elements of Intimidation of a Witness beyond a reasonable doubt.

RESPONSE TO ASSIGNMENTS OF ERROR TWO – GANG AGGRAVATOR.

The State charged this original information alleging that Ozuna had committed the intimidation of this witness alleging;

Furthermore, you committed the current offense with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for criminal street gang as defined RCW 9.94A.030, its reputation, influence, or membership, and the court may impose an exceptional sentence above the standard sentence range for this crime. (RCW 9.94A.535(3)(aa).)

Furthermore, you committed the current offense to obtain or maintain your membership or to advance your positron in the hierarchy of an organization, association, or identifiable group, and the court may Impose an exceptional sentence above the standard sentence range for this crime. (RCW 9.94A 535(3)(s).)
(CP

The jury answered "yes" to both special verdict forms. (CP 147-8) The State had notified Appellant that it would call an officer to testify as an expert on gang culture and the Appellant's gang involvement. (CP 6)

Officer Jaime Ortiz testified under oath without objection as a gang expert describing and discussion gangs and gang culture. This testimony covers over thirty pages. The final testimony is indicative of the fact that this was not some sort of generalized testimony about gangs and gang activity, the officer when asked about whether Ozuna was some sort of "poser" stated "Oh, he's not a poser; he's -- he's legit. He's the - - he's in it." (RP 428-59)

He was asked specific questions based on his expertise regarding vernacular, signs, rules and orders. The officer testified specifically about the content of the letters pointing out sections that were specific to the gang, the BGL's (Bel Garden Locos or Lokotes) which Appellant identifies with and is a self admitted and confirmed member of. (RP 439, 441)

Officer Ortiz was questioned specifically, once again without objection to the content of the testimony or the fact that this officer was testifying in the capacity of an expert, about the letters which were seized from Appellant's cell, that were matched by the handwriting expert as having been written by Appellant and which Appellant admitted having written in the recorded call that was admitted earlier in the trial. Officer Ortiz pointed to specific passages and sections as well as the signature that would identify that this letter was written by a person who was a BGL.

(RP 440-46) He also identified that Appellant was known by the nickname of "Mr. Downer." The officer testified that in the letter the "name" Mr. Downer Lokote is found. (RP 445) Officer Ortiz testified regarding specific sections that were obviously meant as threats and what type of action would and could be taken against a person who was declared a "ratta" or rat, a snitch. (RP 446) The Officer testified as follows regarding actual content of the letter and what it means "...let him know that this is the campana – the campana gang – so campana is Spanish for – for bell, he puts the crack in our bell – so no loyalty." (RP 442) The Officer goes on regarding phrases used "So you have here where he says that he'd rather break an honor (sic) our sacred code of silence – that falls under the snitch code." (RP 442-3) The Officer testifies that if a member snitched against another that retaliation was "Likely, no there will be (retaliation)... There's – there's no doubt about it, there – there will be (retaliation.)...There has to be something done about it, otherwise it's a show of weakness within the ranks and to other groups that they're not taking care of their own." (RP 443) Officer Ortiz goes on to testify that the reputation of the gang member who had been snithched on would be hurt if that gang member did not do something. (RP 443-4) He testified that:

> "...a tank boss would be synonymous with a shot caller which would be synonymous with, you know, the guy that's going to call the shots. Anything that happens in that tank, this individual is directing it or has his fingers in it. They're well -- they're well aware of what's going on." (RP 456)

On cross-examination the Officer Ortiz explained that the basis for retaliation on a member is not something that is just done. The act must be backed by some sort of proof "paper work" or witnesses, information such as court papers and that in an instance where a member testified against another member "...the rival gangs they will keep totally -- completely away from him, on the internal stuff the same thing but there is going to be some -- some sort of justice meted out to that individual." (RP 458)

The record is replete with testimony, there was in fact a stipulation regarding, with the fact that the victim had testified against Appellant in a previous trial. RP 418

Officer Ortiz identified that the victim, Jaime Avalos was an associate of the BGL's and the BLS. (RP 441)

Once gain this was all regarding a letter that the Defendant never contested that he did not write the letter and which he admitted to writing in his phone call to his family. It is clear that the evidence that was introduced regarding this specific letter and the culture that Appellant was

a part of that the assault on Mr. Avalos was done for no other reason than to insure that the rules of this branch of the Sureno's was complied with.

State v. Bluehorse, 159 Wn.App. 410, 423-4, 248 P.3d 537 (2011) sets out the standard of review when a court of appeal is presented an allegation of this nature:

> We review the jury's findings of aggravating factors under the clearly erroneous standard. Hale, 146 Wash.App. at 307, 189 P.3d 829. In applying the "clearly erroneous" standard in reviewing the fact finder's reasons for imposing an exceptional sentence, we reverse the findings only if substantial evidence does not support them. State v. Jeannotte, 133 Wash.2d 847, 856, 947 P.2d 1192 (1997). "Substantial evidence" is defined as "'evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.' "Jeannotte, 133 Wash.2d at 856, 947 P.2d 1192 (internal quotation marks omitted) (quoting Olmstead v. Dep't of Health, Med. Section, 61 Wash.App. 888, 893, 812 P.2d 527 (1991)).

The testimony of the gang expert, Officer Ortiz, was not generalized information regarding gangs. His testimony was very specific regarding Ozuna, the Sureno's, the actions of Jaime Avalos in testifying against a gang member and the letter that was seized. The testimony of this officer must be taken in conjunction with the testimony of Officer Merriman that Ozuna was "a shot caller" and from Ozuna's compatriot, Mr. Perren, a self admitted ten year member of the Sureno's, who testified that he and Ozuna were Sureno's and that Ozuna had not called for a hit on Avalos but had in fact requested that no one assault Avalos. Mr. Perren

testified that he knew that Ozuna was in trouble for what had occurred against Mr. Avalos. Perren stated that he received a letter from Ozuna while they were both in jail. Perren testified that this letter told him to forward the message to leave Avalos alone. A statement which clearly could be interpreted by the jury as meaning that there had in fact been an earlier message from the Ozuna the shot caller to harm Avalos. (RP 473-80)

Ozuna contends that there is insufficient evidence to support the jury's finding that he committed the drive-by shooting "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang its reputation, influence, or membership." (CP 1, 147-8); *see* RCW 9.94A.535(3)(aa). This court will review findings that support an exceptional sentence for substantial evidence. State v. Moreno, 173 Wn.App. 479, 495, 294 P.3d 812 (2013).

This aggravating factor at issue is relatively new; there is little guidance from case law. In cases addressing a similar gang-related aggravating factor, this court has held that expert testimony about generalized gang motivations was insufficient. State v. Bluehorse, 159 Wn.App. 410, 429, 248 P.3d 537 (2011). Rather, there must be some evidence of the defendant's actual gang-related motivation behind the crime charged. *Id.* at 428.

Ozuna compares the testimony here to that to those in Bluehorse. In Bluehorse, Crips gang members did a drive-by shooting at the house of a rival Blood gang member named Francis. Bluehorse, 159 Wn.App. at 416. At the time of the shooting, Mr. Bluehorse was in a particular sport utility vehicle associated with his gang and somebody yelled out a Crip-related phrase before the shooting. *Id.* at 416-17. For a period several months before the shooting, Francis and Mr. Bluehorse exchanged gang hand signs, particularly when Mr. Bluehorse walked in front of Francis's house. *Id.* at 418. An expert testified that gang members must maintain their status by retaliating against gang members who encroach on their territory and disrespect their gang by making the hand signs of their own gang in rival territory. *Id.*

The Court of Appeals reversed Mr. Bluehorse's gang aggravating factor because the exchange of gang signs several months prior was the only evidence of gang-related motivation aside from generalized expert testimony. *Id.* at 430. The court explained that [t]he State presented no evidence that Bluehorse announced a rival gang status contemporaneously with the shooting or that he had recently confronted and been disrespected or provoked by rival gang members, which would .. . give rise to a contemporaneous gang requirement or desire to retaliate. Further, the State presented no evidence that Bluehorse made any statements that he wanted

to advance his position in a gang or committed the drive-by shooting for reasons related to gang status. *Id.* at 430-31 (footnote omitted).

Ozuna indicates that the State is apparently relying on the testimony of Officer Ortiz to support these two aggravators. This is disingenuous. The facts are overwhelming that Mr. Ozuna is a confirmed member of the Sureno's. There was a stipulation that Mr. Avalos had testified against Mr. Ozuna. There was testimony from numerous sources that there is a very strict "snitch code" in gangs and that is strictly enforced within the gang itself if members snitch on members. The letter written by Ozuna was replete with statements that the code had been broken and that there had to be action taken to enforce the rules. Mr. Ozuna was identified by his own witness Officer Merriman as being a "shot caller" which is synonymous with "tank boss" who is an individual who is in effect in charge of a part of the inmate population. There was not dispute and Ozuna admitted in the recorded call that the object of his anger was in fact the victim Mr. Avalos. There was testimony that Mr. Avalos was a companion of Mr. Ozuna and that Mr. Avalos associated with or was a member of the Sureno gang, perhaps belonging to either the BGL's or the BLS branch of the Sureno's.

There is no doubt that the actions of Ozuna was a gang member therefore the issue here is whether Ozuna intended "to directly or

indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang ... its reputation, influence, or membership." RCW 9.94A.535(3)(aa). RCW 9.94A.535(3)(aa) does not require gang membership. The testimony clearly indicates that without taking action both Ozuna and the gang would have been ridiculed at the least.

Moreno is the only case that addresses the aggravating factor at issue here. In Moreno, this court concluded that there was sufficient evidence to support the aggravating factor when Mr. Moreno committed what appeared to be a random act of violence against a nongang member. Moreno, 173 Wn.App. at 495. In Moreno an expert testified that the Nortenos and Sureno's were rivals, there was usually a specific reason for encroaching on rival territory, and gang members often commit random crimes as a way to maintain or improve their status within the gang. *Id.* at 497. Evidence also showed that Mr. Moreno had ties to the Nortenos gang, he and his cohorts were in Surenos territory, and somebody in Mr. Moreno's car yelled out a gang-related phrase moments before the shooting. *Id.* at 496-97. That evidence in connection with the expert testimony was sufficient to support the inference that Mr. Moreno intended to advance his position in his gang by shooting at the pedestrian. *Id.* at 497.

Here, like in Moreno, there is sufficient evidence for the jury to infer that Mr. Ozuna intended to directly or indirectly cause a benefit or advantage to the membership of a criminal street gang.

RESPONSE TO ASSIGNMENT OF ERROR THREE – DOMESTIC VIOLENCE ASSESSMENT AND COST OF INCARCERATION.

It would appear that Appellant is correct that the domestic violence assessment was improperly imposed and therefore should be removed from the Judgment and Sentence.

However, with regard to the payment of any and all other assessments and Ozuna's ability to pay this court need only look to the letters that were seized to determine that Ozuna is able bodied and has the ability to pay his obligations at some time in the future. These letters were exhibits that have now been filed with this court. In one of those letters he discusses getting thousands of dollars, where Ozuna describes (the verbiage set forth below is an actual reproduction of the letters including all misspelled words) ;

> "Out mission is to make thoue is gonna be to make money and to take care of each other, to make sure everybody's needs are token care of as our team starts to grow, we're gonna find women with new hustle new resources, there (sic) own income, with brain's girl...
>
> My mission is business! By the time I get out, I want to get out to a legit running business and mija, your gonna help me do it, ok.
>
> ...

> I want to get something going to start saving up some money cause you all ready know money makes money. together we can make shit happen...
>
> So that hopefully we can get some money flowing. I got a hustle...All that I can tell you is that it makes a lot of money, at least 10G's a month. But you need to get your mind rite and be on point..."
>
> (CP 19-31, Exhibit SE-1(D))

The letter goes on and on about getting a group of girls together and using them to make money, hustles to make money, etc. There need not be some long detailed presentation regarding the defendant's ability to pay these obligations. State v. Lundy, supra;

> The State's burden for establishing whether a defendant has the present or likely future ability to pay discretionary legal financial obligations is a low one. In Baldwin, for instance, this burden was met by a single sentence in a presentence report that the defendant did not object to:
> The presentence report contained the following statement, "Mr. Baldwin * describes, himself as employable, and should be held accountable for legal financial obligations normally associated with this offense." Baldwin made no objection to this assertion at the time of sentencing. . .. [information contained in the presentence report may be used by the court if the defendant does not object to that information. [State v. Southerland, 43 Wn.App. 246, 250, 716 P.2d 933 (1986).] Therefore, when the presentence report establishes a factual basis for the defendant's future ability to pay and the defendant does not object, the requirement of inquiry into the ability to pay is satisfied. 63 Wn.App. at 311.

The information set out by Ozuna own hand is more than sufficient to determine that he has the present and/or future ability to pay these very minimal discretionary fees. The total amount which was assessed is

$1,810.00 of which $850.00 are mandatory fees, crime victims, criminal filing fee, DNA collection fee. The $100.00 "Domestic Violence" fee must be removed from the Judgment and Sentence which leaves the $850.00 in discretionary fees that were imposed consisting of $600.00 in recoupment of attorneys fees, $60.00 Sheriff service fee and, $250.00 Jury fee.

As was recently stated in State v. Blazina, 301 P.3d 492 (Wash.App. Div. 2 2013) which stated that Bertrand was a fact specific decision;

> Blazina next argues that the trial court erred in finding that he had the present or future ability to pay his LFOs.[3] He argues that the record does not support boilerplate finding 2.5 because there was no discussion on the record and no documentary evidence presented to support it. He relies on State v. Bertrand, 165 Wash.App. 393, 404, 267 P.3d 511 (2011), review denied, 175 Wash.2d 1014, 287 P.3d 10 (2012). Before making such a finding, the trial court must " ' [take] into account the financial resources of the defendant and the nature of the burden' " imposed by the legal financial obligations. Bertrand, 165 Wash.App. at 404, 267 P.3d 511 (quoting State v. Baldwin, 63 Wash.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).
>
> The discretionary legal financial obligations that Blazina challenges are the $400 fee for court appointed counsel and the $2,087.87 extradition costs. Blazina did not object at his sentencing hearing to the finding of his current or likely future ability to pay these obligations. While we addressed the finding of current or future ability to pay in Bertrand for the first time on appeal under RAP 2.5(a), that rule does not compel us to do so in every case. We noted that Bertrand had disabilities that might reduce her likely future ability to pay and that she was required to begin

> paying her financial obligations within 60 days of sentencing. Bertrand, 165 Wash.App. at 404, 267 P.3d 5111. Nothing suggests that Blazina's case is similar. Because he did not object in the trial court to finding 2.5, we decline to allow him to raise it for the first time on appeal.

Ozuna argues that the record does not support the trial court's finding that he had the current or future ability to pay LFOs. Because a trial court is prohibited from imposing LFOs only when the record shows that there is no likelihood that the defendant's indigency will end and because there is no evidence in the record that Ozuna will be unable to pay LFOs in the future, this court should hold that the trial court's finding was not clearly erroneous.

A trial court may not order a defendant to repay court costs unless the defendant "is or will be able to pay them." RCW 10.01.160(3). RCW 10.01.160(3) further provides, "In determining the amount and method 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."

Although neither RCW 10.01.160(3) nor the constitution requires the trial court to enter formal, specific findings about a defendant's ability to pay LFOs, if the trial court makes such an unnecessary finding, this court will review it under the clearly erroneous standard. State v. Lundy, No.

42886-5, 2013 WL 4104978, at *3 (Wash.Ct.App. Aug. 13, 2013). "'A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all of the evidence leads to a definite and firm conviction that a mistake has been committed.'" Lundy, 2013 WL 4104978, at *3 (internal quotation marks omitted) (quoting Schryvers v. Coulee Cmty. Hosp., 138 Wn.App. 648, 654, 158 P.3d 113 (2007)).

Ozuna challenges both discretionary and mandatory costs, there are clear differences between mandatory LFOs, for which the trial court need not consider the defendant's ability to pay, and discretionary LFOs, which are subject to the requirements of RCW 10.01.160(3). See Lundy, 2013 WL 4104978, at *2. A $500 victim assessment is required by RCW 7.68.035, irrespective of the defendant's ability to pay. State v. Curry, 62 Wn.App. 676, 681, 814 P.2d 1252 (1991), aff'd, 118 Wn.2d 911, 829 P.2d 166 (1992). A $100 deoxyribonucleic acid collection fee is required by RCW 43.43.7541, also irrespective of the defendant's ability to pay. State v. Thompson, 153 Wn.App. 325, 336, 223 P.3d 1165 (2009). A $200 criminal filing fee is required by RCW 36.18.020(2)(h). Lundy, 2013 WL 4104978, at *2. And a $100 crime lab fee is required by RCW 43.43.690(1). "Because the legislature has mandated imposition of these legal financial obligations, the trial court's 'finding' of a defendant's current or likely future ability to pay them is surplusage." Lundy, 2013 WL

4104978, at *2. Accordingly, the requirement that a trial court consider the defendant's current or future ability to pay only applies to discretionary LFOs. Lundy, 2013 WL 4104978, at *3.

The non-mandatory fees at issue, although not set forth by Appellant with any specificity, are the $600 attorney recoupment fee, the $60 Sheriff service fee and the $250 Jury fee. There are Costs of Incarceration and Medical costs also designated. There is no indication that any medical costs were incurred and none indicated on the record at the time Ozuna was sentenced. These are all LFOs that the trial court may impose under RCW 9.94A.760. Therefore, this court need only review the trial court's finding on Ozuna's ability to pay only as it relates to these discretionary LFOs.

Once again Ozuna does not specifically assign error to the trial court's finding number 2.7 on his judgment and sentence however it would appear that is what he has challenged. It states therein:

> The court has considered the total amount owing, the defendant'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 196)

He argues that substantial evidence does not support this finding because the trial court failed to first consider anything specifically on the record concerning Ozuna's financial resources, relying on State v. Bertrand, 165 Wn.App. 393, 404, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014 (2012).

In Bertrand, the court held that in order to uphold such a finding on appeal, the record must be "sufficient for us to review whether 'the trial court judge took into account the financial resources of the defendant and the nature of the burden' imposed by LFOs." 165 Wn.App. at 404 (quoting State v. Baldwin, 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991)).

But in Bertrand, the defendant had disabilities that may have reduced or possibly eliminated her future ability to pay LFOs and the trial court ordered the defendant to pay the LFOs within 60 days of the judgment and sentence while still incarcerated. 165 Wn.App. at 404 n. 15. Here, the record does not show that there was an issue of Ozuna's ability to pay, that any alleged inability to pay would continue indefinitely, or that the trial court ordered Ozuna to pay the LFOs shortly after sentencing while still incarcerated. Accordingly, the State asks this court to find that the trial court's finding that Ozuna had the current or future ability to pay LFOs was not clearly erroneous. See Lundy, 2013 WL 4104978, at *4

("Although the trial court at sentencing did not specifically address Lundy's future ability to pay [LFOs,] there is nothing in the record suggesting that Lundy's indigency (if present) would extend indefinitely. Because a showing of indigence is Lundy's burden, the record suggests that Lundy will have the ability to pay these fees in the future.").

The State would suggest that is issue is not ripe. As was stated in Lundy,

> As a final matter, we note that generally challenges to orders establishing legal financial sentencing conditions that do not limit a defendant's liberty are not ripe for review until the State attempts to curtail a defendant's liberty by enforcing them. Compare State v. Ziegenfuss, 118 Wn.App. 110, 112, 74 P.3d 1205 (2003) ("Because [the defendant] has not yet failed to pay her legal financial obligations ... her argument is not yet ripe for review."), review denied, 151 Wn.2d 1016 (2004), and Baldwin, 63 Wn.App. at 310 ("[T]he meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation."), with Bertrand, 165 Wn.App. at 404-05 (reviewing the merits of the trial court's sentencing conditions because a disabled defendant was ordered to commence payment of legal financial obligations within 60 days of entry of judgment and sentence while still incarcerated).
>
> Here, nothing in the record reflects that the State has attempted to collect legal financial obligations from Lundy or even when Lundy is expected to begin repayment of these obligations. Accordingly, any challenge to the order requiring payment of legal financial obligations on hardship grounds is not yet ripe for review.

RESPONSE TO ASSIGNMENT OF ERROR FOUR – CONCLUSIONS OF LAW II AND III.

The testimony from Officer Volland and Lt. Costello was very specific, the letters that were seized would have been taken even if they did not contain threats, which they did, because the letter both there in envelopes that were addressed to parties outside the facility, were found in Ozuna's cell but had for a return address the name of a third party. This was in violation of the jail policy.

This court must note that Ozuna does not assign error to any of the trial court's written, or oral, findings of fact. Thus, this court shall consider them verities on appeal. State v. Brockob, 159 Wash.2d 311, 343, 150 P.3d 59 (2006) (citing State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994)). In addition, even where a trial court's written findings are incomplete or inadequate, this court can look to the trial court's oral findings to aid our review. State v. Robertson, 88 Wash.App. 836, 843, 947 P.2d 765 (1997, review denied, 135 Wash.2d 1004, 959 P.2d 127 (1998). In its oral ruling before issuing its written findings and conclusions, the trial court discussed in great detail the various reasons the letters were seized, the fact that Ozuna had prior notice of the mail list that he was on and the fact that while the law cited might allow for a possible criminal charge that same law did not allow for suppression of the letters that were seized. A review of the trial court's written findings and conclusions together with its very lengthy oral ruling will persuade this

court that the trial court clearly and thoroughly considered this issue after briefing from both parties and came to a correct decision.

Office Brian Volland:

A. And when I was going through that I found two letters.
Q. Okay. And were those things that you collected or -- or decided he couldn't take with him?
A. They had somebody else's name on it so I walked them down to the corporal and he took care of everything after that.
Q. Okay. And by somebody else's name do you recall what part of the letter had somebody else's name on it?
A. It was the return address part.
Q. Okay. And was that on the letter or the envelope?
A. It was on the envelope.

...

Q. Okay. And so the return address part, it had a different name besides the defendant's name?
A. Yes..

...

Q. Okay. And is there a reason why it wasn't placed in his box and that -- and that you took that letter?
A. Just because it had somebody else's name on it with the rest of the property being his.
Q. Okay. And the other name was in the return address portion?
A. Yes.
Q. Okay. And why was that of concern to you?
A. We just -- other people trying to send out mail in other people's names. We get -- and there's -- you know, certain people have -- on the read mail list.

RP 281, 219, 221

Testimony of Lt. Costello
Q. Okay. And you mentioned that you thought you -- there might have been -- be an issue after you -- you read the letters. Why do you think there was an issue?
A. Well, to begin with there was a sticky note that was with the envelopes that the -- that stated that although there was an inmate's name on -- on the return address -- I don't remember who that inmate was; but they actually belonged to Ozuna. And so that would 1 be a violation of mail policy and

they would be inspected at that point just because it was a violation of mail policy.
Q. Okay. And can you explain what that mail policy is?
A. Inmates are not allowed to send mail without using their own name, their own booking number, their own housing [inaudible on tape -- muffled].
Q. Okay.
A. Their return add -- the return address has to be correct to the inmate sending the mail.
Q. Okay. And are there -- I guess, consequences if somebody does that?
A. Yes.
Q. Okay. Were -- were there any other issues you saw, other than potentially an inmate using somebody else's name?
A. When I first looked at it that's what I noticed so I knew that it was a violation of mail police. (sic) (The VPR says "police" it is clear the Lt. stated "policy.") I then looked at it and the contents of the mail itself was a -- what we would consider a safety or security breach.
Q. Okay. And why did you consider it a safety or security breach?
A. There was a threat to another person in it.
RP 268-9

The trial court's oral ruling is as follows;

> Lieutenant Costello comes into possession of these envelopes; they had been placed in his mailbox. Part of his duties, again, is reviewing this type of suspicious mail as he has identified it. And in this particular case what drew attention is Mr. Ozuna was being moved to a new cell and as part of the process of moving his belongings with him to a new cell these two letters are discovered in his cell.
>
> What draws attention to them, again, is the other inmate's name of Mark Cole. And Lieutenant Costello has testified today that, regardless this would, whether the envelopes had been sealed or not sealed; whether the envelopes would have had a stamp on them or not had a stamp on them, it would have made no difference as to how these letters were handled because once another inmate's name is associated with letters found in Mr. Ozuna's cell, that raises the letters to the reasonable

> suspicion pursuant the department's policies to then review those letters.
>
> Because he said, you know, and again, regardless about whether the defendant had been advised of a mail watch list, being on it; not being on it, it would have made absolutely no difference because the suspicion was developed by the address of another inmate being placed on there that is, again, against policy in -- in this particular facility.
>
> I think it was testified to that there is not inter -- intramail where the inmates can't be sending mail to each other while in the facility; that's not allowed. And so the -- the -- the concern about those communications, leading to safety issues or -- or a - a preservation, I'm going to indicate, as part of an internal or inside maintenance of an institutional security inside a penal institution.
>
> So I -- that's why I stated I'm not really sure this Court would've benefited from Officer Valland's testimony as to whether it was sealed or unsealed, where they were found, *et cetera,* because it would not have changed how this was handled.
>
> What we know about Mr. Ozuna is that he is at least familiar with the -- the mail list, the watch mail list or the read mail list, based upon an instant report from 2009 when he was placed on that list. And I think the only significance that has asked this Court's findings isn't anything to do with what that involved other than this wasn't news to Mr. Ozuna, that that was a potential thing that could happen with inmate mail because it had happened to him before. He had been placed on the list before. **So to say that he had absolutely no idea that that could happen would be a bit disingenuous I think to argue to this Court.** (RP 125-7)(Emphasis mine.)

The court acknowledged that there may have been a better method by which Ozuna would have been apprised of what the mail rights. However the court repeated on several occasions that it was "disingenuous" for Ozuna to claim that he had no knowledge of the

policies of the jail. The court also stressed that while there may be a criminal sanction for if there was a violation of the statute governing the opening of this mail, there also was no provision for the suppression of this same item. (RP 127-32, 133-36)

State v. Hill, 123 Wn.2d 641, 647-48, 870 P.2d 313 (1994) addresses the standard when this court reviews an allegation that a trial court improperly denied a motion to suppress;

> Within our appellate court system there is no reason to make a distinction between constitutional claims, such as those involved in a suppression hearing, and other claims of right. The trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. See Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 405, 858 P.2d 494 (1993); Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369- 70, 798 P.2d 799 (1990). This remains true regardless of the nature of the rights involved.
>
> There is adequate opportunity for review of trial court findings within the ordinary bounds of review. A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. Nord v. Eastside Ass'n Ltd., 34 Wn. App. 796, 798, 664 P.2d 4, review denied, 100 Wn.2d 1014 (1983); cf. Halstien. This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact. We hold that in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error has been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts will be binding on appeal.

Ozuna cites to RCW 72.09.015 however a far more applicable statute is RCW 9A.76 Obstructing Governmental Operations and specifically RCW 9A.76.010. Definitions - Chapter 9A.76. Obstructing governmental operation 9A.76.010. Definitions

The following definitions are applicable in this chapter unless the context otherwise requires:

(1) "Contraband" means any article or thing which a person confined in a detention facility or a secure facility under chapter 71.09 RCW is prohibited from obtaining or possessing by statute, rule, regulation, or order of a court;

(2) "Custody" means restraint pursuant to a lawful arrest or an order of a court, or any period of service on a work crew: PROVIDED, That custody pursuant to chapter 13.34 RCW and RCW 74.13.020 and 74.13.031 and chapter 13.32A RCW shall not be deemed custody for purposes of this chapter;

(3) "Detention facility" means any place used for the confinement of a person (a) arrested for, charged with or convicted of an offense, or (b) charged with being or adjudicated to be a juvenile offender as defined in RCW 13.40.020 as now existing or hereafter amended, or (c) held for extradition or as a material witness, or (d) otherwise confined pursuant to an order of a court, except an order under chapter 13.34 RCW or chapter 13.32A RCW, or (e) in any work release, furlough, or other such facility or program;

Livingston v. Cedeno, 164 Wn.2d 46, 52-3, 186 P.3d 1055 (Wash. 2008) states “The primary objective of the correctional system, on the other hand, is “to provide the maximum feasible safety" for the public, staff, and inmates. RCW 72.09.010(1). Accordingly, RCW 72.09.530 directs the Department to screen all incoming and outgoing materials and intercept any “contraband" in order to protect legitimate security concerns

within the state penal institutions. “Contraband" is defined as “any object or communication" banned by the Department from any institution under its control. RCW 72.09.015(4).

There was lengthy discussion regarding these findings and conclusions. (RP 609-22) The trial court, in its discretion, adopted the findings and conclusions after taking into account the objections of Ozuna’s trial counsel. There were changes made to the original findings to reflect many of these objections. The challenge of the findings by Ozuna is not supported by the record or law. They accurately reflect the testimony and the law and should not be disturbed by this court.

RESPONSE TO ASSIGNMENT OF ERROR FIVE – SENTENCING.

There is a specific statute allowing for the testimony of an officer, RCW 9.94A.500(1) “The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and **an investigative law enforcement officer as to the sentence to be imposed.”** (Emphasis mine.)

The totality of the statement made by this Detective from the Sunnyside Police Department is as follows;

> OFFICER LAYMAN: My name is Detective Robert Layman, Sunnyside Police Department. We're asking for a higher than normal sentence based on the history of Mr. Ozuna. The original charge that this case stemmed from, he attempted to run over a police officer while in a stolen vehicle.
>
> Intimidation is the biggest key that keeps gangs in power. This is how they avoid the criminal justice system, and it's becoming more and more prevalent here in the recent years of gangs using intimidation through means on the outside or trying to get word to the outside, people contact witnesses and victims. We just would like, I guess, a message shown that that's not going to be tolerated. Thank you.

It is apparent from this statement that this Detective was a part of this case. He states information in the first person; he is not stating to the court what Det. Rollinger, the detective who was the lead investigator, wanted the court to hear in his absence. The crime that defendant was convicted of affects the entire community, it has a chilling affect on all cases of a similar nature.

As the cases cited below indicate the cases and the Revised Code of Washington state "an investigative law enforcement officer." There is no dispute that this case arose in Sunnyside, was investigated by the Sunnyside Police Department and that Detective Lyman is a member of that department. He therefore is "an investigative law enforcement officer" Detective is defined in Merriam-Webster Online dictionary;

Detective noun

> : a police officer whose job is to find information about crimes that have occurred and to catch criminals
> : a person whose job is to find information about something or someone
> : one employed or engaged in detecting lawbreakers or in getting information that is not readily or publicly accessible.

Clearly even the "text book" definition of Detective Layman's position would allow for this testimony.

Further, the law in this State is such that if a party does not object to information supplied at sentencing his waives later challenge. State v. Burkins, 94 Wn. App. 677, 697-8, 973 P.2d 15 (1999);

> In determining any sentence, the trial court may rely on no more information than was admitted, acknowledged, or proved in a trial or sentencing. RCW 9.94A.370(2). Information presented at sentencing without objection is deemed acknowledged by the defendant. State v. Handley, 115 Wn.2d 275, 283, 796 P.2d 1266 (1990).

See also, State v. Mail, 121 Wn.2d 707, 711, 854 P.2d 1042 (1993);

> The SRA mandates that the court "shall consider the presentence reports . . . and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed." RCW 9.94A.110. This section of the statute forms a baseline - a minimum amount of information which, if available and offered, must be considered in sentencing. By comparison, RCW 9.94A.370(2) identifies the information that the court "may rely on" in arriving at a sentence within the standard range, but does not limit in any way the sources of information a

> sentencing court may consider. State v. Handley, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990). See also David *Boerner, Sentencing in Washington* SS 6-13, at 6-21 (1985) (noting that the SRA places no limitations on the information a sentencing judge may consider in arriving at a sentence within the standard range). Hence, the sentencing court must consider information presented pursuant to RCW 9.94A.110, but may also consider other sources of information in arriving at a sentence within the standard range.

Even if this Court were to conclude there was error that error would be harmless. The argument put forth by Ozuna as a basis to overturn this sentence is as was stated by the dissent in State v. Crider, 78 Wn. App. 849, 862-3, 899 P.2d 24 (1995):

> To conclude that Mr. Crider was denied his right to allocution and further that the denial was prejudicial places form above substance. It is the kind of technical argument the doctrine of harmless error was developed to eliminate. Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (the purpose of the harmless error rule is to prevent setting aside convictions for small errors or defects that have little, if any, likelihood of changing the result of the trial); State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977) (a harmless error is one which is trivial, formal or merely academic and which affects in no way the outcome of the case). Even basic constitutional rights are subject to the harmless error analysis. See, e.g., State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995) (failure to instruct jury as to every element of a crime); State v. Lane, 125 Wn.2d 825, 839, 889 P.2d 929 (1995) (trial judge's comment on the evidence); State v. Buss, 76 Wn. App. 780, 789, 887 P.2d 920 (1995) (denial of right to cross-examine witness).

V. CONCLUSION

The actions of the trial court should be upheld, this appeal should be dismissed.

Respectfully submitted this 14th day of November 2013

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DECLARATION OF SERVICE

I, David B. Trefry, state that on November 14, 2013, be agreement of the parties, I emailed a copy of the Respondent's Amended Brief to: Mr. Dennis Morgan at nodblespk@cabletv.com and to by United States mail to;

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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.

DATED this 14th day of November, 2013 at Spokane, Washington.

s/ David B. Trefry
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