NO. 31208-9-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ADRIAN BENTURA OZUNA,

Defendant/Appellant.

APPELLANT'S BRIEF

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2. The State did not present sufficient evidence of the gang aggravators as charged under RCW 9.94A.535(3)(s) and (aa).

3. The trial court improperly assessed a domestic violence (DV) assessment and costs of incarceration.

4. The trial court's Conclusions of Law II and III, entered following the CrR 3.6 hearing, are legally incorrect. (CP 192; Appendix "A")

5. Officer Layman of the Sunnyside Police Department should not have been allowed to speak at Adrian Bentura Ozuna's sentencing hearing.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Was any threat ever actually communicated?

2. Did the State prove, beyond a reasonable doubt, each and every element of the gang aggravators as charged under RCW 9.94A.535(3)(s) and (aa)?

3. a. Can a DV assessment be imposed on a non-DV offense?

b. Does the trial court's failure to determine ability to pay costs of incarceration require removal of that amount from the Judgment and Sentence?

4. Are the trial court's CrR 3.6 Conclusions of Law II and III contrary to existing case law?

5. Should a law enforcement officer, who is not a victim of the charged offense, be allowed to present recommendations at a criminal defendant's sentencing hearing?

STATEMENT OF CASE

Mr. Ozuna was incarcerated at the Yakima County Jail during the month of June 2010. On June 8, 2010 he was moved from one (1) unit to another unit. As part of the transition between units a search of his belongings occurred. Corrections officers found two (2) letters with another inmate's name and return address. (RP 218, ll. 4-12; ll. 14-23)

Officer Volland located the letters. They were in Mr. Ozuna's belongings on the floor outside of his cell. There were no stamps on the letters. The officer could not remember if they were sealed. (RP 91, l. 22 to RP 92, l. 1; RP 216, ll. 19-20; RP 224, l. 18 to RP 225, l. 3; RP 225, ll. 14-24)

The letters were turned over to Lieutenant Costello as a possible violation of the inmate mail policy. (RP 265, ll. 16-18; RP 268, l. 18 to RP 269, l. 11)

The letters were undated. They did not identify any individual by name. The letters were then turned over to Detective Rollinger of the Sunnyside Police Department. (RP 286, ll. 7-15; RP 311, ll. 18-23)

She submitted them to the Washington State Patrol Crime Lab for forensic analysis by a handwriting expert. Brett Bishop examined the letters. He determined that the handwriting was Mr. Ozuna's. (RP 231, ll. 4-7, ll. 11-13; RP 241, ll. 17-24)

Detective Rollinger believed that the letters referred to Jaime Avalos who had been a witness in Mr. Ozuna's prior trial. She was present in the courtroom when Mr. Avalos testified in that trial. (RP 312, ll. 11-14; RP 318, ll. 1-5; ll. 9-14; RP 319, l. 21 to RP 320, l. 9)

Detective Rollinger showed the letters to Mr. Avalos on June 14, 2010. Mr. Avalos was later attacked in a jail holding cell. He received a

six (6) cm. laceration to the posterior scalp and a cut to his upper lip. Stitches were needed. He was transported to Yakima Regional Hospital emergency room. (RP 325, ll. 10-19; RP 341, ll. 2-4; ll. 12-14; RP 343, ll. 1-11)

On June 25, 2010 Mr. Ozuna made a telephone call from the jail. The call indicated that he had been written up for witness tampering. He was going to explain to the judge that he was mad when he wrote the letters. (RP 346, ll. 2-17; RP 347, ll. 14-16; RP 348, ll. 3-10)

An Information was filed on October 24, 2011 charging Mr. Ozuna with intimidation of a witness. Mr. Ozuna had already been transferred to the Department of Corrections. His preliminary appearance occurred on January 26, 2012. (RP 63, ll. 16-24; CP 1; CP 7)

A *Knapstad*[1] hearing was conducted on March 13, 2012. The trial court denied the motion. Findings of Fact and Conclusions of Law were not entered until October 17, 2012. (RP 20, l. 18 to RP 21, l. 8; CP 10; CP 212)

Multiple continuances were granted prior to the commencement of trial on October 3, 2012. (CP 40; CP 42; CP 43; CP 44; CP 45; CP 46; CP 47; CP 49; CP 50; CP 60; CP 63; CP 68; CP 69)

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[1] *State v. Knapstad,* 107 Wn. 2d 346, 729 P. 2d 48 (1986)

A CrR 3.6 motion was filed on June 29, 2012. The motion sought to suppress the letters that had been seized by jail staff. (CP 51)

The suppression hearing was conducted on July 20, 2012. Lieutenant Costello advised the Court that Mr. Ozuna was on a watch mail list. Inmates are put on a watch mail list if any suspicious mail is found. The inmate's mail is always opened if he/she is on the list. Mr. Ozuna had been placed on that list on January 11, 2009. (RP 38, ll. 6-7; RP 38, l. 17 to RP 39, l. 3; RP 41, ll. 20-23; RP 43, ll. 3-8; RP 47, ll. 15-17)

Mr. Ozuna was never given notice that he was on the watch mail list. Lieutenant Costello indicated that inmates can be removed from the list at a later date. (RP 53, ll. 21-25; RP 54, ll. 15-22)

The trial court denied the CrR 3.6 motion. Findings of Fact and Conclusions of Law were entered on October 16, 2012. (CP 190)

On September 4, 2012 a motion to dismiss for lack of timely arraignment was filed with the Court. The trial court denied the motion. Findings of Fact and Conclusions of Law were entered on October 17, 2012. (CP 64; CP 214)

Prior to Mr. Avalos being attacked in the jail a safety alert had been issued. David Soto was the inmate who attacked Mr. Avalos. Mr. Ozuna, Mr. Avalos and Mr. Soto all have ties with the Sũrenos. (RP 296,

ll. 23-25; RP 297, ll. 9-10; ll. 17-25; RP 300, l. 16 to RP 301, l. 2; RP 305, l. 12 to RP 306, l. 1; RP 323, l. 24 to RP 324, l. 5)

The State did not present any evidence of a relationship between Mr. Soto and Mr. Ozuna. Mr. Ozuna was not present at the time Mr. Avalos was attacked. (RP 301, ll. 11-18)

Mr. Avalos testified at trial. He indicated that Mr. Ozuna was his friend prior to 2008. He denied any gang association. He stated he was not concerned about Mr. Ozuna. Mr. Ozuna never threatened him. (RP 414, ll. 9-19; RP 418, ll. 2-7; RP 425, ll. 20-22)

Officer Ortiz of the Sunnyside Police Department testified as a gang expert at trial. He stated that gangs commit various crimes to enhance their personal status and to further group interests. All gangs have a snitch code. (RP 428, ll. 12-18; RP 437, ll. 15-25; RP 438, ll. 13-18)

Officer Ortiz indicated that the word "campana," which was contained in one (1) of the letters, means the English word "bell." This references the BGL gang. Both Mr. Avalos and Mr. Ozuna are members of the BGL. (RP 439, ll. 16-17; RP 441, ll. 3-15; RP 442, ll. 14-21)

Officer Ortiz further indicated that if one (1) gang member snitches on another retaliation will occur. The phrase "rest in piss" contained in one (1) of the letters is a phrase of disrespect. (RP 443, ll. 11-17; RP 447, ll. 1-5)

The trial court denied Mr. Ozuna's motion to dismiss for lack of proof of communication. (RP 463, l. 8 to RP 466, l. 17)

The jury found Mr. Ozuna guilty. It entered special verdicts concerning the gang enhancements that were set forth in the Information. (CP 145; CP 147; CP 148)

Judgment and Sentence was entered on October 16, 2012. Mr. Ozuna filed his Notice of Appeal that same date. (CP 194; CP 203)

SUMMARY OF ARGUMENT

The State failed to prove, beyond a reasonable doubt, that any communication of an actual threat occurred.

The State failed to prove, beyond a reasonable doubt, the presence of gang aggravators.

The trial court improperly imposed a DV assessment and costs of incarceration.

The trial court's Conclusions of Law II and III, entered after the CrR 3.6 hearing, are legally erroneous.

Allowing a non-victim police officer to speak at a sentencing hearing is impermissible under RCW 7.69.020(3) and RCW 7.69.030.

ARGUMENT

I. LACK OF COMMUNICATION

RCW 9A.72.110 defines intimidating a witness as follows:

> …
>
> (2) A person … 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.
>
> (3) As used in this section:
> (a) "Threat" means:
> (i) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
> (ii) Threat as defined in *RCW 9A.04.-110(27).

There was no immediate threat to use force against Jaime Avalos. Any alleged threat was contained in a letter. Mr. Avalos was not present at the time that the alleged threat was made. Thus, any threat would have to be a threat as defined in RCW 9A.04.110(28). "Threat" is defined as:

> … to communicate, directly or indirectly the intent:
>
> (a) To cause bodily injury in the future to the person threatened or to any other person; or
> …

> (j) To do any other act which is intended to harm substantially the person threatened or another with respect to his or her health, safety, business, financial condition, or personal relationships ….

Instruction 8 defined "threat" for the jury. It included subparagraphs (a) and (j) of RCW 9A.04.110(28). (CP 160; Appendix "B")

Instruction 8 includes the following language:

> To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat.

The alleged threat(s) is/are contained in a letter written by Mr. Ozuna. The letter was never mailed. The letter was never given to another person. The letter was seized by jail officials. No actual communication occurred.

The Legislature has not seen fit to define the word "communicate." "Communicate" means:

> **1. to impart** knowledge of; **make known** …
> **2. to give to another**; impart; **transmit** …
> **5. to give or interchange thoughts**, feelings, **information**, **or the like, by writing**, speaking …

WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.). (Emphasis supplied.)

It is obvious from the definition of "communicate" that there must be some transmittal of information from one (1) person to another in order to effect a communication. "Communication" is defined as:

> **1.** the act or process of communicating … **2. the imparting or interchange of thoughts**, opinions, **or information by** speech, **writing**, or signs. **3. something imparted, interchanged, or transmitted. …**

WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.). (Emphasis supplied.)

Mr. Ozuna was identified as the individual who wrote the letters. However, the contents were never communicated by him to anyone else. In the absence of any communication, no crime could be committed.

Synonyms for the word "communicate" include: "divulge, announce, disclose, reveal." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

It is obvious that nothing was divulged to anyone else.

It is obvious that nothing was announced to anyone else.

It is obvious that nothing was disclosed to anyone else.

It is obvious that nothing was revealed to anyone else.

A further definition of "communication" is found in BLACK'S LAW DICTIONARY (9^{th} ed.):

> **1.** the expression or exchange of information by speech, writing, gestures, or conduct; **the process of bringing an idea to another's perception**. **2. the information so expressed or exchanged**.

(Emphasis supplied.)

If the letter had been mailed then a communication would have occurred. Since it was not mailed, no communication could occur.

The cases that have dealt with either intimidation of a witness or intimidation of a judge involve actual communications: *i.e.,* transmittal of the "threat" to another person.

The Court, in *State v. Hansen,* 122 Wn.2d 712, 718, 862 P.2d 117 (1993), stated:

> This language evidences a clear intent by the Legislature that RCW 9A.72.160 [intimidation of a judge] includes threats communicated in an indirect fashion as well as direct threats. To carry out this legislative intent and realize the proper interpretation of RCW 9A.72.160, the statute must be construed as a whole by incorporating the definition of threat into subsection (1) of the statute. Under this interpretation, whoever threatens a judge, either directly or indirectly, *e.g.,* **through a third person … is chargeable under RCW 9A.72.160.**

(Emphasis supplied.)

In *State v. Anderson,* 111 Wn. App. 317, 44 P.3d 857 (2002), Mr. Anderson sent a letter to his mother with a threat toward a CPS worker.

Even though Mr. Anderson requested that his mother destroy the letter afterwards, it was turned over to law enforcement.

The *Anderson* Court relied upon *State v. Hansen* in concluding that a communication occurred.

Instruction No. 5 is the to-convict instruction. It correctly states that a threat must be directed to a former witness. If the threat is never conveyed to another person, then it is nothing except self-expression. (CP 157; Appendix "C")

II. GANG AGGRAVATORS

RCW 9.94A.535(3)(s) states:

> The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

The identifiable group is the Sũrenos. Mr. Ozuna is a member of the Sũrenos.

Since Mr. Ozuna is a member, the State was required to prove that the charged offense was committed in order to maintain his membership in, or to advance his position in the hierarchy of, the Sũrenos.

No testimony was presented that the alleged offense was committed to maintain membership.

Officer Ortiz's testimony was generalized testimony concerning gang activity without specification to Mr. Ozuna. This generalized testimony is inadequate to establish the aggravating factor under subparagraph (3)(s). *See: State v. Yarbrough,* 151 Wn. App. 66, 96-97, 210 P.3d 1029 (2009); *State v. Bluehorse,* 159 Wn. App. 410, 428-31, 248 P.3d 537 (2011).

The State did not present any testimony that the alleged actions by Mr. Ozuna advanced his position in the hierarchy of the Sũrenos.

On the other hand, RCW 9.94A.535(3)(aa) sets forth an aggravating factor that pertains to the gang itself, as opposed to the individual. The statute reads:

> The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

Instructions 18 and 20 set forth the aggravating factors and the definition of "criminal street gang." No definitional instruction was given with regard to the phrase "pattern of criminal street gang activity." (CP 171; CP 173; Appendices "D" and "E")

It appears that the State relied upon Officer Ortiz's testimony that retaliation will occur if a gang member snitches on another gang member.

Yet, Corporal Merriman, from the Yakima County Jail, stated that gang membership is not a prerequisite to retaliation when an inmate testifies against someone. The rumor spreads through the jail quickly. (RP 485, ll. 17-20; RP 486, l. 18 to RP 487, l. 5; RP 488, ll. 10-15)

The evidence presented by the State does not meet its burden of proof concerning the aggravating factor under either RCW 9.94A.535(3)(s) or (aa).

III. JUDGMENT AND SENTENCE

A. DV Assessment

The Judgment and Sentence contains a one hundred dollar ($100.00) DV assessment. RCW 10.99.080(1) states:

> All superior courts, and courts organized under Title 3 or 35 RCW, may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence. The assessment shall be in addition to, and shall not supersede, any other penalty, restitution, fines, or costs provided by law.

It is readily apparent that the DV assessment can only be imposed on a crime involving domestic violence. Intimidation of a witness, under the facts and circumstances of Mr. Ozuna's case, does not constitute a crime of domestic violence.

RCW 10.99.020(5) provides, in part: "'Domestic violence' includes but is not limited to any of the following crimes when committed by one family or household member against another …."

There is no evidence in the record that Mr. Ozuna and Mr. Avalos are related.

There is no evidence in the record that Mr. Avalos and Mr. Ozuna were household members as defined in RCW 10.99.020(3).

B. Ability to Pay

The trial court made no determination on the record of Mr. Ozuna's ability to make payment of the costs of incarceration or other legal financial obligations. As announced in *State v. Bertrand,* 165 Wn. App. 393, 404 (2011):

> … [T]he 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 under the clearly erroneous standard. *Baldwin,* [*State v. Baldwin,* 63 Wn. App. 303, 818 P2.d 1116, 837 P.2d 646 (1991)] at 312.

As in the *Bertrand* case, the appropriate remedy is to strike the requirement for the payment of costs of incarceration and other legal financial obligations with the exception of the crime victim assessment and filing fee.

IV. CrR 3.6 CONCLUSIONS

The trial court determined that Mr. Ozuna had no reasonable expectation of privacy with regard to his mail. The trial court described the letters as "contraband."

The trial court also determined that the jail had a legitimate governmental interest in maintaining order and discipline as well as to preserve the safety of staff and other individuals in the jail.

Mr. Ozuna contends that even though he was placed on a mail watch list in 2009, the fact that he was transferred to prison and then returned to the Yakima County Jail, with no new incident occurring, did not justify again placing him on a mail watch list.

Mr. Ozuna recognizes that

> '… many rights and privileges are subject to limitation in penal institutions because of paramount institutional goals and policies.' *State v. Hartzog,* 96 Wn.2d 383, 391, 635 P.2d 691 (1981); *see also Hudson v. Palmer,* 468 U.S. 517, 524, 104 S. Ct. 3194, 82 L. Ed.2d 393 (1984). In particular, considerable deference must be given to prison administrators to regulate communications between prisoners and the outside world. *Thornburgh v. Abbott,* 490 U.S. 401, 408, 109 S. Ct. 1874, 104 L. Ed.2d 459 (1989); *see also Sappenfield v. Dep't of Corr.,* 127 Wn. App. 83, 110 P.3d 808 (2005) ….

Livingston v. Cedeno, 164 Wn.2d 486, 53, 186 P.2d 1055 (2008).

The ability of prison/jail officials to interfere with an inmate's mail does have certain limitations.

> When an inmate's mail is restricted, **the requirements for due process are satisfied if the inmate receives notice of the restriction and has a reasonable opportunity to protest, and if the restriction is reviewed by a third party** who did not participate in the original decision. *See Procunier v. Martinez,* 416 U.S. 396, 418-19, 94 S. Ct. 1800, 40 L. Ed.2d 224 (1974).

Personal Restraint of Arseneau, 98 Wn. App. 368, 378, 989 P.2d 1197 (1999). (Emphasis supplied.)

The record is devoid of any information that Mr. Ozuna was given notice of the mail restriction.

Moreover, since Mr. Ozuna had been transferred from jail to prison, and then returned, the restriction should be deemed abrogated in the absence of a further violation.

RCW 9.73.020 states:

> Every person who shall, wilfully open or read, or cause to be opened or read, any sealed message, letter or telegram intended for another person, or publish the whole or any portion of such a message, letter or telegram, knowing it to have been opened or read without authority, shall be guilty of a misdemeanor.

Lieutenant Costello could not recall if the letters were sealed when he received them. (RP 53, ll. 1-9)

Officer Volland, who seized the letters, could not remember whether the letters were sealed. (RP 225, ll. 14-24)

Also, the trial court's determination that the letters were contraband is questionable. RCW 72.09.015(2) defines "contraband" as

> … any object or communication the secretary determines shall not be allowed to be: (a) Brought into; (b) possessed while on the grounds of; or (c) sent from any institution under the control of the secretary.

RCW 72.09.015 relates to prisons only. The State did not introduce any documentation to elucidate the Yakima County Jail policy concerning "contraband."

In the absence of the presentation of a specific documented policy the trial court's conclusions cannot be justified. The letters should have been suppressed.

V. SENTENCING

RCW 7.69.030 provides, in part:

> There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have the following rights, which apply to any criminal court …:
>
> …

> (14) With respect to victims and survivors of victims, to present a statement personally or by representation, at the sentencing hearing for felony convictions ….

Jaime Avalos was the alleged victim of the intimidating a witness charge. Officer Layman had no connection to the case. Officer Layman was not a victim.

RCW 7.69.020(3) defines a "victim" as "a person against whom a crime has been committed or the representative of a person against whom a crime has been committed."

Allowing a law enforcement officer, who is not a victim, to speak on behalf of the State and/or law enforcement at a sentencing hearing is inappropriate. There is no statutory authority allowing a law enforcement officer to speak at sentencing unless the officer is a victim of the charged offense.

CONCLUSION

Mr. Ozuna's conviction should be reversed and the case dismissed since the State failed to prove, beyond a reasonable doubt, an actual communication of an alleged threat.

If the conviction is not reversed, then the gang aggravators should be removed due to insufficient evidence that the crime was gang-related or gang-motivated.

If the conviction is not reversed, then the DV assessment and costs of incarceration must be stricken from the Judgment and Sentence.

The letters were improperly seized in violation of Mr. Ozuna's due process rights and should have been suppressed. Mr. Ozuna is entitled to a new trial.

A non-victim police officer has no right to speak at a sentencing hearing.

DATED this __10th__ day of June, 2013.

Respectfully submitted,

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APPENDIX "A"

CONCLUSIONS OF LAW

II.

The Defendant was placed on the mail watch list based on a prior incident. As an inmate with a prior similar incident, the defendant has no reasonable expectation of privacy with regards to his mail. In addition, the jail properly obtained those letters when the contraband was located in his cell when the defendant was being moved from his current unit to another one.

III.

The defendant also did not have a reasonable expectation of privacy because the jail had a legitimate governmental interest in maintaining order **and** discipline within its confines to preserve the safety of the staff and other individuals in and out of the jail as well as institutional security.

APPENDIX "B"

INSTRUCTION NO. 8

Threat means to communicate, directly or indirectly, the intent to cause bodily injury in the future to the person threatened; or to do any other act which is intended *to* harm substantially the person threatened with respect to his health or safety.

To be a threat, a statement or act must occur in a context or under such circumstances where a reasonable person, in the position of the speaker, would foresee that the statement or act would be interpreted as a serious expression of intention to carry out the threat rather than as something said in jest or **idle** talk.

APPENDIX "C"

INSTRUCTION NO. 5

To convict the defendant of the crime of intimidating a Witness, each of the following elements of the crime must be proved beyond a reasonable doubt:

(I)That on or about or between June 8, 2010 and July 9, 2010 the defendant directed a threat to a former witness because *of* the witness' role in an official proceeding; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "D"

INSTRUCTION **NO. 18**

If you find the defendant guilty of Intimidating a Witness or Attempted Intimidating a witness then you must determine if the following aggravated circumstances exist:

Whether the defendant committed the crime 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.

Whether *the* defendant committed the crime to obtain or maintain *his* membership or to advance his position in the hierarchy of an organization, association, or identifiable group.

APPENDIX “E”

INSTRUCTION NO**.** 20

"Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity.

NO. 31208-9-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff, Respondent, v. ADRIAN BENTURA OZUNA, Defendant, Appellant.	)))))))))))	YAKIMA COUNTY NO. 11 1 01529 2 **CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this _10th day of June, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

Court of Appeals, Division III
Attn: Renee Townsley, Clerk
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E-FILE

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