

FILED  
Dec 30, 2015  
Court of Appeals  
Division I  
State of Washington

NO. 73593-4-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

ADAN CORTES-GONZALEZ

Appellant.

---

---

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

The Honorable John H. Chun, Judge

---

---

BRIEF OF APPELLANT

---

---

JARED B. STEED  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENT OF ERROR</u> .....	1
<u>Issue Pertaining to Assignment of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Procedural History</u> .....	1
2. <u>Trial Testimony</u> .....	2
3. <u>Arrest Photograph</u> .....	8
C. <u>ARGUMENT</u> .....	9
ADMISSION OF A PHOTOGRAPH SHOWING CORTES- GONZALEZ STANDING WITH HIS HANDS BEHIND HIS BACK NEXT TO AN ARMED POLICE OFFICER VIOLATED HIS RIGHT TO A FAIR TRIAL.....	9
D. <u>CONCLUSION</u> .....	15

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>In re Detention of Halgren</u> 156 Wn.2d 795, 132 P.3d 714 (2006).....	10
<u>In re Parentage of Jannot</u> 110 Wn. App. 16, 37 P.3d 1265 (2002) aff'd, 149 Wn.2d 123, 653 P.3d 664 (2003) .....	10
<u>In re Parentage of Schroeder</u> 106 Wn. App. 343, 22 P.3d 1280 (2001).....	11
<u>State v. Brockob</u> 159 Wn.2d 311, 150 P.3d 59 (2006).....	10
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	9
<u>State v. Jackson</u> 75 Wn. App. 537, 879 P.2d 307 (1994) rev. denied, 126 Wn.2d 1003 (1995).....	9
<u>State v. Kendrick</u> 47 Wn. App. 620, 736 P.2d 1079 rev. denied, 108 Wn.2d 1024 (1987) .....	10
<u>State v. Lord</u> 161 Wn.2d 276, 165 P.3d 1251 (2007).....	10
<u>State v. Parr</u> 93 Wn.2d 95, 606 P.2d 263 (1980) .....	9
<u>State v. Rivers</u> 129 Wn.2d 697, 921 P.2d 495 (1996).....	12, 13
<u>State v. Smith</u> 106 Wn.2d 772, 725 P.2d 951 (1986).....	13

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Tate</u> 74 Wn.2d 261, 444 P.2d 150 (1968).....	11
<u>State v. Thang</u> 145 Wn.2d 630, 41 P.3d 1159 (2002).....	14

**RULES, STATUTES AND OTHER AUTHORITIES**

ER 403 .....	10
U.S. Const. amend. V .....	9
U.S. Const. amend. VI .....	9
Wash. Const. art. I, § 3.....	9
Wash. Const. art. I, § 22.....	9

A. ASSIGNMENT OF ERROR

Appellant's right to a fair trial was violated when the trial court admitted a photograph showing appellant standing with his hands behind his back next to an armed police officer.

Issue Pertaining to Assignment of Error

During appellant's trial for assault, the trial court admitted for purposes of identification, a photograph showing appellant standing with his hands behind his back next to an armed police officer. Appellant did not dispute his identity at trial. Rather, appellant's theory of the case was self-defense. Did the trial court err in admitting the photograph where appellant's identity was not at issue and the photograph was more prejudicial than probative?

B. STATEMENT OF THE CASE

1. Procedural History

The King County prosecutor charged appellant Adan Cortes-Gonzalez with one count each of second degree assault and fourth degree assault for an incident that occurred August 24, 2014. CP 43-44; 7RP<sup>1</sup> 3-

---

<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – March 13, 2015; 2RP – May 11, 2015; 3RP – May 12, 2015; 4RP – May 13, 2015; 5RP – May 14, 2015; 6RP – May 18, 2015; 7RP – May 19, 2015; 8RP – May 20, 2015; 9RP – June 5, 2015.

4. A jury found Cortes-Gonzalez guilty as charged. CP 45, 47; 8RP 57-60.

The court sentenced Cortes-Gonzalez to concurrent sentences of 6 months in prison on the second degree assault and a suspended sentence of 364 days on the fourth degree assault. CP 81-90; 9RP 24-25. The court also sentenced Cortes-Gonzalez to 12 months of community custody on the second degree assault conviction. CP 81-87. Cortes-Gonzalez timely appeals. CP 92-102.

2. Trial Testimony

On August 24, 2014, Cortes-Gonzalez and his wife, Rosa Cecilia Murillo Del Gadillo, went to Snoqualmie Falls to spend the day together. After viewing the falls, Cortes-Gonzalez and Del Gadillo walked down to the Snoqualmie River. 7RP 9-10, 25.

Maeva Nolan was also at the river that day with her grandfather, Michael Noonan. 4RP 25-27; 6RP 72-73. Nolan intended to drop Noonan off at the river so he could kayak. Nolan then planned to pick up Noonan and his kayak downriver. 4RP 28-29; 6RP 76. Nolan helped Noonan carry the kayak to the river. In the process, Nolan and Noonan had to maneuver around dozens of other people who were also enjoying the river. 4RP 28-31; 5RP 4; 6RP 78-80.

Del Gadillo felt something brush her head as she sat by the river and took pictures of Cortes-Gonzalez. 7RP 11-13, 26-27. She saw Nolan and Noonan carrying the kayak past her and toward the river. 7RP 12-13, 26. Del Gadillo, who only speaks Spanish, did not say anything to Nolan and Noonan. 7RP 13-14, 26-27. Cortes-Gonzalez however, told them to watch out for his wife. Del Gadillo did not understand Nolan's response in English. 7RP 14, 28. Noonan however, "struck a pose," which Del Gadillo believed was defiant. 7RP 15, 30.

Cortes-Gonzalez and Noonan approached each other and began arguing. 7RP 15-18, 28-30. Noonan stepped on Cortes-Gonzalez's bare foot. 7RP 16-18, 31. In response, Cortes-Gonzalez made a fist and held his arm back. 7RP 18, 31-32. Noonan then punched Cortes-Gonzalez, knocking his glasses off and scratching Cortes-Gonzalez's face. 7RP 19-20, 23-24, 31-33. Both men began punching each other. 7RP 20, 31-33. Nolan also punched Cortes-Gonzalez in the head. 7RP 20, 34. Del Gadillo did not see Cortes-Gonzalez hit Nolan or kick Noonan. 7RP 35-37. Del Gadillo saw injuries on both Noonan and Cortes-Gonzalez. 7RP 21, 37.

Noonan and Nolan's account of the incident differed from Del Gadillo's trial testimony. Nolan carried the back of the kayak while Noonan carried the front. 4RP 31; 5RP 4; 6RP 79. Nolan and Noonan

denied they hit anyone while carrying the kayak to the river. 4RP 32, 35; 6RP 80.

Nolan noticed Cortes-Gonzalez yelling once they got the kayak in the water. 4RP 32-33; 5RP 4, 19; 6RP 81-82, 102. Initially, Nolan and Noonan did not believe Cortes-Gonzalez, who was standing 50-feet away, was yelling at them. 4RP 33, 36; 5RP 4-5; 6RP 81-82, 102. Shortly thereafter, Cortes-Gonzalez approached Noonan and Nolan and asked, "didn't you see my wife?" 4RP 33-37; 5RP 6, 19; 6RP 83-85, 108. Nolan said Cortes-Gonzalez was aggressive and repeating himself. 4RP 34, 39; 5RP 6, 19. Noonan told Cortes-Gonzalez his wife was not harmed. 4RP 40; 6RP 84. Noonan then told Cortes-Gonzalez to leave them alone and "go the fuck away." 4RP 37-38; 5RP 19; 6RP 102-03, 108. Nolan also yelled at Cortes-Gonzalez. Nolan acknowledged that her attitude toward Cortes-Gonzalez likely escalated the situation. 6RP 163-64.

Cortes-Gonzalez waived his fist toward Noonan and feigned two or three punches. 6RP 84-86, 104. Cortes-Gonzalez pushed Noonan with two fingers. 4RP 40-41; 5RP 6-7. Noonan tried to backpedal but slipped on some rocks and fell backwards. 4RP 40, 43; 6RP 87, 108. Noonan said Cortes-Gonzalez then jumped on top of him and repeatedly struck him in the face. 4RP 42-43; 5RP 7; 6RP 87-89. Noonan denied stepping

on Cortes-Gonzalez's foot or touching Cortes-Gonzalez prior to when he fell. 6RP 87, 100-03.

Nolan said Cortes-Gonzalez held Noonan with one hand and struck him with the other. 4RP 44. Noonan's head was underwater at times causing him to have difficulty breathing. 4RP 44; 5RP 22; 6RP 88-90. Cortes-Gonzalez bit Noonan's thumb and stuck a finger in Noonan's eye. 6RP 88-89.

Nolan punched Cortes-Gonzalez in the head about 20 times to "try and ease the tension." 4RP 44-45; 5RP 7-8, 13, 21-22. In response, Cortes-Gonzalez struck Nolan in the face with a closed fist. 4RP 44-46; 5RP 8; 6RP 91.

Several people at the river also witnessed the incident. Jonathan Halk was hiking near the river when he noticed Cortes-Gonzalez and Noonan yelling at each other. 5RP 25-27, 48-49. Halk could not make out what was being said. 5RP 28, 48. Halk saw both men with raised hands, "like they were going to fight." 5RP 29-32, 48-50. Halk believed Cortes-Gonzalez raised his hand first. 5RP 30, 32, 50-51. Halk saw Cortes-Gonzalez strike Noonan who then fell backwards into the water. 5RP 32-33, 51. Halk did not see Noonan strike Cortes-Gonzalez. 5RP 51. Halk did not see how the incident first began. 5RP 48-50.

Halk began video recording the incident on his cell phone after the first punch occurred. 5RP 38-40. Halk's recording did not capture the beginning of the incident, including the argument and first punches. 5RP 44. Cortes-Gonzalez struck Noonan in the face about 10 times. 5RP 36-37. Noonan's face and nose was bleeding. 4RP 49; 6RP 94, 135. Cortes-Gonzalez struck Nolan after she began punching him. 5RP 32-34, 36-37. Cortes-Gonzalez kicked Noonan in the face once as he tried to get up. 5RP 34, 36-37.

Joel Egberg also witnessed the incident while at the river with his family. 6RP 114-15. Egberg heard Cortes-Gonzalez say that his wife had been struck by the kayak. 6RP 115-17, 121-22. Egberg did not see anyone hit or injured by the kayak. 6RP 119-21. Egberg saw Cortes-Gonzalez hit Noonan in the face, causing him to fall backwards. 6RP 124-27, 150. Egberg did not see Noonan strike Cortes-Gonzalez or make any threats toward him. 6RP 126, 147-49. Egberg tried to separate Cortes-Gonzalez and Noonan but was unsuccessful. 6RP 128-30. Cortes-Gonzalez struck Nolan after she punched Cortes-Gonzalez several times. 6RP 131. The incident ended after Cortes-Gonzalez kicked Noonan as he tried to get up. 6RP 132.

Nolan called 911. 5RP 12, 39. Cortes-Gonzalez made no attempt to flee. 5RP 39; 6RP 133. Police officer, Nigel Draveling, saw that

Noonan's face "had been badly beat up." 6RP 151, 154-55, 157. Nolan had a large red mark on the side of her face and an eight inch scratch extended from her left breast to her rib. 5RP 13, 16-17; 6RP 157. Cortes-Gonzalez's face was also red and he had "numerous" marks around his face and eyes. 6RP 165-66; 7RP 21, 37. Nolan told Draveling she did not know whether Noonan touched Cortes-Gonzalez first, or vice-versa. 6RP 164.

Noonan was taken to the hospital by ambulance. 5RP 13; 6RP 25, 37. Noonan complained of pain in his eyes, ears, nose, and throat. 6RP 42-43. He denied having any pain in his neck, back, chest, or abdominal area. Noonan did not lose consciousness or have any changes in his vision. 6RP 40-41, 56-57, 65-66. Noonan's nose was broken in several places. 6RP 51-52, 60, 65, 68. Physician Jonathan Halper opined the injuries were consistent with blunt force trauma. 6RP 52. Noonan had no sinus, skull, or jaw fractures. 6RP 58-59, 68.

Noonan's left thumb was treated for a bite mark. 6RP 48, 53-55, 61, 94-95. Noonan's facial injuries were cleaned and sutured. 6RP 55, 98. Noonan declined pain medication. 6RP 54. Noonan was discharged from the hospital less than four hours after arriving. 6RP 38, 62. Noonan had surgery on his nose 10 days after the incident to repair dislocated

bones. Noonan had a second surgery to fix his septal bone once the swelling in his nose subsided. 6RP 99-100.

3. Arrest Photograph

During trial the State sought to admit a photograph of Cortes-Gonzalez to establish his identity. 6RP 136. The State argued the photograph was relevant to identity because it showed Cortes-Gonzalez in the same clothing as the individual in the video and neither Noonan nor Nolan had identified Cortes-Gonzalez. 6RP 138-41. The State also opined Cortes-Gonzalez appeared differently in court than he did on the day of the incident. 6RP 140. The State did not explain how Cortes-Gonzales' appearance was different, however.

Defense counsel objected, arguing the photograph was more prejudicial than probative. 6RP 137. Defense counsel noted that the photograph showed Cortes-Gonzalez "in the process of being arrested" with his hands behind his back. 6RP 137. Cortes-Gonzalez further noted that in the picture he was handcuffed and standing next to a police officer and visible gun. 6RP 139.

The State maintained any prejudice was "completely mitigated" because the photograph did not show Cortes-Gonzales in handcuffs, standing by a police car, or with police officers who had "hands on him." 6RP 138.

The trial court questioned whether Cortes-Gonzalez's identity was at issue. 6RP 139. The State maintained it had the burden of proving each element of the charged assaults even though the "defense doesn't believe that there is an issue as to identity[.]" 6RP 139.

The trial court noted that defense counsel's objection was "well taken." 6RP 142. The trial court admitted the photograph to prove identify however, explaining, "it doesn't show cops. It doesn't show police cars. His [Cortes-Gonzalez] hands are behind his back, though." 6RP 142.

C. ARGUMENT

ADMISSION OF A PHOTOGRAPH SHOWING CORTES-GONZALEZ STANDING WITH HIS HANDS BEHIND HIS BACK NEXT TO AN ARMED POLICE OFFICER VIOLATED HIS RIGHT TO A FAIR TRIAL.

A criminal defendant has a constitutional right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. I, §§ 3, 22. The failure to provide the defendant with a fair trial violates minimal standards of due process. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994), rev. denied, 126 Wn.2d 1003 (1995). The right to a fair trial includes one free of unnecessary and prejudicial evidence. State v. Parr, 93 Wn.2d 95, 104, 606 P.2d 263 (1980).

ER 403<sup>2</sup> requires the trial court to exclude evidence, even if it is relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. In balancing the probative value against the prejudice, courts consider the importance of the fact of consequence that the evidence is offered to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. State v. Kendrick, 47 Wn. App. 620, 628, 736 P.2d 1079, rev. denied, 108 Wn.2d 1024 (1987).

A trial court's decisions to admit evidence under ER 403 is reviewed for an abuse of discretion. State v. Brockob, 159 Wn.2d 311, 348, 150 P.3d 59 (2006), In re Detention of Halgren, 156 Wn.2d 795, 802, 132 P.3d 714 (2006). "The abuse of discretion standard is not, of course, unbridled discretion." In re Parentage of Jannot, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002), aff'd, 149 Wn.2d 123, 653 P.3d 664 (2003). A court abuses its discretion if its decision is contrary to relevant law, or is exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-284, 165 P.3d 1251 (2007); Jannot, 110 Wn. App. at

---

<sup>2</sup> The rule states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

22. A decision is based on untenable reasons if the facts do not establish the legal requirements of the correct legal standard. In re Parentage of Schroeder, 106 Wn. App. 343, 349, 22 P.3d 1280 (2001).

Here, the trial court abused its discretion by admitting a photograph which showed Cortes-Gonzalez “in the process of being arrested.” 6RP 137. A visible inspection of the photograph shows why it is prejudicial. Cortes-Gonzalez is shown standing near the location of the incident with his hands behind his back in an unnatural position. Emergency response vehicles are directly behind him. Moreover, standing next to Cortes-Gonzalez is an apparent police officer with a visible gun on his belt. Ex. 8; Compare State v. Tate, 74 Wn.2d 261, 267, 444 P.2d 150 (1968) (use of defendant’s booking photographs not error where State removed identifying serial numbers from photos and refrained from using term ‘mug shot’).

Despite acknowledging defense counsel’s prejudice argument was “well taken,” the trial court nonetheless admitted the photograph to prove Cortes-Gonzalez’s identity. 6RP 142. Cortes-Gonzalez did not dispute his identity at trial however. Cortes-Gonzalez did not claim he was misidentified or was not at the scene of the incident. On the contrary, in arguing self-defense, Cortes-Gonzalez acknowledged he was at the

Snoqualmie River and involved in the incident with Noonan. Thus, Cortes-Gonzalez's identity was never in dispute.

State v. Rivers<sup>3</sup> is instructive by way of contrast. During Rivers' trial for robbery the State sought to admit a booking photograph taken of Rivers the day after the charged incident. Rivers, 129 Wn.2d at 701-03, 710. Rivers argued the photograph was irrelevant and unduly prejudicial because identity was not an issue at trial. Rivers, 129 Wn.2d at 710. The trial court admitted the photograph, noting that Rivers had put the issue of identification before the jury when defense counsel stated during opening statement that, "every lawyer dreams of getting a case like this, based on a shaky ID." Rivers, 129 Wn.2d at 710-11.

On appeal, the Supreme Court agreed Rivers had raised the issue of identification during opening statements. Rivers, 129 Wn.2d at 711. The Court concluded the photograph of Rivers was relevant as it tended to show the complaining witness's description to police matched Rivers who was arrested shortly after the robbery. The Court further concluded admission of the photo was not prejudicial because the jury knew Rivers was arrested for the robbery charge he was being tried on, and the jury would reasonably have been aware that a booking procedure, including photographing Rivers, would have existed. Rivers, 129 Wn.2d at 712.

---

<sup>3</sup> 129 Wn.2d 697, 921 P.2d 495 (1996).

Unlike Rivers, here the photograph was not simply a booking photograph taken after arrest, but rather, a photograph of Cortes-Gonzalez actually being arrested. Moreover, defense counsel did not make an issue of Cortes-Gonzalez's identity. Even assuming identity was an issue however, the State had alternative means of proving identity aside from the arrest photograph. For example, Egberg identified Cortes-Gonzalez in court as the same individual he saw at Snoqualmie River at the time of the incident. 6RP 115.

Unlike Rivers, here the erroneous admission of this arrest photograph was prejudicial. Evidentiary error is grounds for reversal if it results in prejudice. State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986). An error is not harmless if, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Smith, 106 Wn.2d at 780.

Here, the outcome of Cortes-Gonzalez's trial was materially affected by admission of the arrest photograph because it undercut his argument of self-defense. Admission of the photograph showing Cortes-Gonzalez being arrested essentially told the jury that Cortes-Gonzalez's involvement in the incident justified his arrest. If a rational juror entertained any reasonable doubt as to whether the State disproved Cortes-Gonzalez acted in self-defense, that doubt was likely laid to rest by the

indelible inference that in the opinion of the police, Cortes-Gonzalez was the guilty party. Cortes-Gonzales anticipates the State will, nonetheless, point out that Del Gallido also testified that police arrested Cortes-Gonzalez and transported him to jail. 7RP 22-23, 37. By the time of Del Gallido's testimony however, the cat had already been let-out-of-the bag because the State admitted the arrest photograph during its case-in-chief. 6RP 143-44.

Moreover, a prosecutor exacerbates the prejudicial nature of erroneously admitted evidence by commenting on it in closing argument. State v. Thang, 145 Wn.2d 630, 645, 41 P.3d 1159 (2002). The prosecutor in Cortes-Gonzalez's case did just that by highlighting the picture of his arrest during its closing argument PowerPoint presentation. Supp. CP \_\_\_\_ (sub no. 68A, State's Closing Powerpoint, filed 5/20/15 at 18).

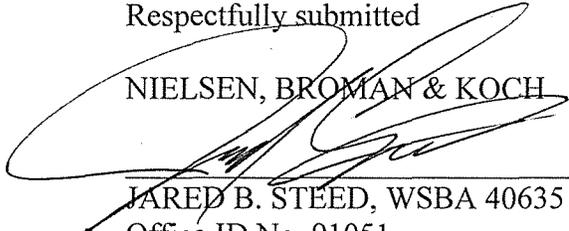
The trial court erred in admitting the arrest photograph. The admission of the arrest photograph unfairly prejudiced Cortes-Gonzalez because it undermined his theory of self-defense and allowed the jury to infer that police determined his guilt from the onset. Cortes-Gonzalez's convictions should be reversed because error in admitting the arrest photograph was not harmless.

D. CONCLUSION

For the reasons discussed above, this Court should reverse Cortes-Gonzalez's convictions and remand for a new trial.

Dated this 30<sup>th</sup> day of December, 2015.

Respectfully submitted

  
NIELSEN, BROMAN & KOCH

JARED B. STEED, WSBA 40635  
Office ID No. 91051

Attorney for Appellant

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 73593-4-1
	)	
ADAN CORTES-GONZALES,	)	
	)	
Appellant.	)	

---

**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 30<sup>TH</sup> DAY OF DECEMBER, 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ADAN CORTES-GONZALES  
712 10TH STREET NW  
AUBURN, WA 98002

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF DECEMBER 2015.

X *Patrick Mayovsky*