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STATE OF WASHINGTON
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No. 38234-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Pedro Beltran,

Appellant.

Lewis County Superior Court Cause No. 08-8-00191-1

Commissioner Tracy Mitchell

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The Information failed to charge Criminal Gang Intimidation because it omitted an essential element of that charge.
2. The deficient Information violated Mr. Beltran's right to notice under the Sixth and Fourteenth Amendments to the Federal Constitution and Wash. Const. Article I, Section 22.
3. Mr. Beltran's conviction violated his Fourteenth Amendment right to due process because it was based on insufficient evidence.
4. The prosecution failed to establish that either Mr. Beltran or Mr. Margart attends or is registered in a public or alternative school.
5. The prosecution failed to establish that the LVL qualifies as a gang under the statute.
6. The trial judge erred by adopting Findings of Fact Nos. 2, 5, and 7.
7. The trial judge erred by adopting Conclusions of Law Nos. 2 and 3.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A criminal Information must set forth all essential elements of an offense. The Information in this case failed to allege an essential element of Criminal Gang Intimidation. Must Mr. Beltran's conviction be reversed and the case dismissed without prejudice?
2. Due process requires the state to prove every element of a criminal offense beyond a reasonable doubt. Mr. Beltran was convicted despite the state's failure to prove two elements of Criminal Gang Intimidation. Must Mr. Beltran's conviction be reversed and the case dismissed with prejudice?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Pedro Beltran was charged with Criminal Gang Intimidation and Assault in the Fourth Degree, with an offense date of July 4, 2008. CP 14-15. The Information alleged in Count I that he “threaten[ed] another person with bodily injury because the other person refuses to join or has attempted to withdraw from a gang...” CP 14. The charging document did not allege that Mr. Beltran attends or is registered in a public or alternative school. CP 14.

Mr. Beltran pled guilty to assault prior to trial. CP 8. At his bench trial on the Criminal Gang Intimidation charge, Mr. Beltran testified that he had assaulted Jonathan Margart because the latter had made derogatory comments about him, and not for any reason related to gang membership. RP (8/14/08) 62-64. Prosecution witnesses testified that the assault was aimed at convincing Margart to join the “LVL” (“Little Valley Lokotes.”) RP (8/12/08) 21-22, 37, 70.

Jerry Hensley testified that for the past seven years he had been “lead teacher at Centralia, all the program services,” and that he was the disciplinarian for something called the “CAPS program.” RP (8/12/08) 52-53. He did not testify that “Centralia” was a public or alternative school, and did not explain what the CAPS program was, but said that Mr.

Beltran "was a student at CAPS for I believe the last two years." RP (8/12/08) 52. When asked if Mr. Beltran was still a student at CAPS, Hensley replied "[h]e would be considered to be a student that's capable of returning back to CAPS September 2nd." RP (8/12/08) 53. He explained that Mr. Beltran had received a long-term suspension from the program on May 21, 2008 "for gang-related activity." RP (8/12/08) 64. He agreed that Mr. Beltran was "completely suspended from the school program, not allowed to return," and went on to say that Mr. Beltran was "scheduled to be long-term out of school suspension meaning that he is out of school for a term longer than 15 days. So he was suspended and may reenter on September 2nd of '08." RP (8/12/08) 63-64.

Mr. Margart was 18 and worked at the Ayala Brothers furniture store. RP (8/12/08) 13. There was no testimony that he attended or was enrolled in a public or alternative school.

Centralia Police Sergeant Fitzgerald testified as a gang expert. He described the Centralia LVL as a local "clique or set of the Little Valley gang." RP (8/14/08) 27. Although he discussed the Little Valley gang of Yakima, and various Hispanic gangs from California, including the Sorenos, the Nortenos, the Mexican Mafia, and Nuestra Familia, he did not describe any direct connection (such as lines of communication, transfers of money, or other evidence of affiliation) between the Centralia

LVL and any larger organization. RP (8/14/08) 22-58. He said there were approximately fifteen “hard core” members of the LVL (and up to forty others who were fringe members or associates/“wannabes”), but did not claim that the LVL had any identifiable leadership. RP (8/14/08) 37-39. He did not testify that members of the LVL regularly conspired and acted in concert mainly for criminal purposes on an ongoing basis. RP (8/14/08) 22-58.

Mr. Beltran was convicted of Criminal Gang Intimidation, and the trial judge entered an Order on Adjudication and Disposition. CP 8. Subsequently the court entered Findings of Fact and Conclusions of Law. CP 1. Mr. Beltran timely appealed. CP 7.

ARGUMENT

I. THE STATE VIOLATED MR. BELTRAN’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO BE INFORMED OF THE ACCUSATION (AND HIS CORRESPONDING RIGHT UNDER WASH. CONST. ARTICLE I, SECTION 22) BY FAILING TO ALLEGE AN ESSENTIAL ELEMENT OF CRIMINAL GANG INTIMIDATION.

The Sixth Amendment to the Federal Constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI. Through the action of the Fourteenth Amendment’s Due Process Clause, this right is also guaranteed to people charged in state court. U.S. Const. Amend. XIV; *Cole v.*

Arkansas, 333 U.S. 196, 201, 68 S. Ct. 514, 92 L. Ed. 644 (1948). A similar right is secured by the Washington State Constitution. Wash. Const. Article I, Section 22.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case must be dismissed without prejudice.¹ *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

Criminal Gang Intimidation is defined in RCW 9A.46.120. Under that statute,

A person commits the offense of criminal gang intimidation if the person threatens another person with bodily injury because the other person refuses to join or has attempted to withdraw from a gang...if the person who threatens the victim or the victim attends or is registered in a public or alternative school.

¹ If the missing element can be found by fair construction of the charging document, the appellant must show prejudice. *Kjorsvik, supra*.

RCW 9A.46.120. Under the plain language of the statute, conviction requires proof that either the defendant or the victim “attends or is registered in a public or alternative school.” RCW 9A.46.120. Accordingly, this is an essential element of the offense.

The Information in this case did not allege that either Mr. Beltran or Mr. Margart attends or is registered in a public or alternative school. Nor can this element be found by fair construction in the charging document. Because the element is completely lacking, the Information is deficient, and prejudice need not be examined. *Kjorsvik*. Accordingly, Mr. Beltran’s conviction for Criminal Gang Intimidation must be reversed and the case dismissed without prejudice. *Kjorsvik, supra*.

II. MR. BELTRAN’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Colquitt*, 133 Wn. App. 789, 796, 137

P.3d 892 (2006). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269, 274, 110 P.3d 1179 (2005). Questions of statutory construction are addressed *de novo*. *State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); *State Owned Forests v. Sutherland*, 124 Wn.App. 400, 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186, 194, 102 P.3d 789, (2004). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

A. The state failed to prove that either Mr. Beltran or Mr. Margart attends or is registered at a public or alternative school.

Conviction of Criminal Gang Intimidation requires proof that either the defendant or the victim "attends or is registered in a public or alternative school." RCW 9A.46.120. The phrase "attends or is registered" is in the present tense; under the plain language of the statute,

conviction requires proof of current attendance or registration, contemporaneous with the alleged offense. RCW 9A.46.120.

The state did not prove that the CAPS program was a public or alternative school; nor did the state prove that Mr. Beltran attended or was enrolled in a public or alternative school at the time of the offense. Instead, the evidence showed that as of May 2008 he had been suspended from the CAPS program (whatever it is) and wouldn't be eligible to rejoin the program until September of 2008. RP (8/12/08) 53, 63-64.

This was insufficient to show that Mr. Beltran attended or was registered in a public school at the time of the offense. Because of this, the conviction must be reversed and the case dismissed with prejudice.

Smalis, supra.

B. The state failed to prove that the "LVL" group referenced by the evidence constitutes a "gang."

In order to find Mr. Beltran guilty of Criminal Gang Intimidation, the jury was required to find that the "LVL" group was a "gang" as defined in RCW 28A.600.455. That statute provides, in relevant part, that a gang is "a group which (a) Consists of three or more persons; (b) has identifiable leadership; and (c) on an ongoing basis, regularly conspires and acts in concert mainly for criminal purposes."

The evidence at trial was insufficient to establish that the Centralia LVL is a gang, or that it is actually tied to any other organization that qualifies as a gang. First, Sergeant Fitzgerald testified that LVL is a “clique or set” of the “Little Valley” gang, but did not explain what he meant by the words “clique” and “set.” RP (8/14/08) 27. Nothing in the record established that the Centralia LVL had any direct connections to any larger organization. There was no testimony about orders from above, reports from below, or a transfer of money in either direction. Second, nothing in the record established that the “Little Valley” gang, the LVL, or the Centralia LVL had identifiable leadership. RP (8/14/08) 22-58. Third, although Sergeant Fitzgerald used the word “gang” and the phrase “Mexican mafia,” he did not define these terms, and nothing in the record establishes that the “Little Valley” gang, the LVL, or the Centralia LVL “regularly conspires and acts in concert mainly for criminal purposes” on an ongoing basis, as required under RCW 9A.46.120 and RCW 28A.600.455(c).

In light of these failures, the evidence was insufficient to convict Mr. Beltran of Criminal Gang Intimidation under RCW 9A.46.120. The conviction must be reversed, and the case dismissed with prejudice.

Smalis, supra.

III. CERTAIN FINDINGS OF FACT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A trial court's findings are reviewed for substantial evidence.

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 391, 97 P.3d 745 (2004). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Rogers Potato*, at 391; *State v. Carlson*, 130 Wn.App. 589, 592, 123 P.3d 891 (2005). It is more than "a mere scintilla" of evidence, and must convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470, 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

Here, the trial judge made several findings that are not supported by the evidence. First, in Finding of Fact No. 2, the court characterized the LVL as a "street gang;" however, no testimony referred to the group as a street gang. RP (8/14/08) 22-58, CP 1. Second, in Finding No. 1, the court found that Mr. Beltran "attends an alternative high school, Centralia Alternative Program (CAP)..." CP 2. The testimony does not support this finding. RP (8/12/08) 51-67. Third, in Finding No. 5, the court found that "the LVL consists of 15 members, 25 associates, and several additional 'fringe' participants all tied into the sorenos out of southern California."

CP 2. In fact, the testimony was that there are “probably 15” “hard core actual members” of the LVL, and that “associates,” “fringe guys,” and “wannabes” totaled “as high as 40” in number. RP (8/15/08) 37.

Furthermore, as previously outlined, no testimony directly linked the LVL with any sorenos. Fourth, the court found that “Mr. Beltran is enrolled in school, and eligible to return to the education program with CAPS.”

Finding No. 7, CP 3. There was no testimony that Mr. Beltran is currently enrolled in school; nor was there testimony that “CAPS” is an education program. RP (8/12/08) 51-67.

In addition, two of the court’s Conclusions of Law include erroneous factual findings. In Conclusion No. 2, the court indicated that “LVL qualifies as a gang...” CP 3. However, the testimony did not establish that LVL had the required characteristics of a gang, as outlined above. RP (8/14/08) 22-58. In Conclusion No. 3, the court implied that Mr. Beltran was a student during the summer months, ignoring the fact that he had been suspended and was ineligible to return to CAP until September 2, 2008. RP (8/12/08) 51-67, CP 3.

Because these factual findings are not supported by substantial evidence, they should be stricken. *Rogers Potato, supra*.

CONCLUSION

Because the evidence was insufficient, Mr. Beltran's conviction must be reversed and the case dismissed with prejudice. In the alternative, the case must be dismissed without prejudice because of the deficiency in the charging document.

Respectfully submitted on February 13, 2009.

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

Signed at Olympia, Washington on February 13, 2009.



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