

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 3

I. The state’s concession requires dismissal of the charge without prejudice. 3

II. The state is unable to point to sufficient evidence to prove each essential element beyond a reasonable doubt...... 3

A. Nothing in the record establishes beyond a reasonable doubt that CAP is a public or alternative school, or that Mr. Beltran was attending or was registered at CAP at the time of the offense..... 3

B. The state failed to prove that the “LVL” group referenced by the evidence constitutes a “gang.” 4

III. Certain findings of fact are not supported by substantial evidence. 4

TABLE OF AUTHORITIES

FEDERAL CASES

Glover v. Cole, 762 F.2d 1197 (4th Cir.1985)..... 4

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 3, 4

United States v. Herrera-Ochoa 245 F.3d 495 (5th Cir. 2001)..... 3

WASHINGTON CASES

State v. Franks, 105 Wn.App. 950, 22 P.3d 269 (2001)..... 3

ARGUMENT

I. THE STATE'S CONCESSION REQUIRES DISMISSAL WITHOUT PREJUDICE.

The state has conceded that the Information charging Criminal Gang Intimidation was defective. Brief of Respondent, p. 1. The proper remedy is dismissal without prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

II. THE STATE IS UNABLE TO POINT TO SUFFICIENT EVIDENCE TO PROVE EACH ESSENTIAL ELEMENT BEYOND A REASONABLE DOUBT.

A. Nothing in the record establishes beyond a reasonable doubt that CAP is a public or alternative school, or that Mr. Beltran was attending or was registered at CAP at the time of the offense.

Respondent concedes that no evidence was introduced establishing that "CAP" is a public or alternative school within the meaning of the statute, but contends that this was because of the parties "general familiarity with this program." Brief of Respondent, p. 3. However, conviction requires proof beyond a reasonable doubt, through evidence actually introduced at trial. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Respondent's claim that the trial court could have taken judicial notice does not remedy the problem. *See, e.g., United States v. Herrera-Ochoa* 245 F.3d 495, 502 n. 6 (5th Cir. 2001)

(“Judicial notice is an inappropriate device for remedying a failure of proof”) (quoting *Glover v. Cole*, 762 F.2d 1197, 1200 n. 6 (4th Cir.1985)).

Respondent next argues that Mr. Beltran was registered in school on the offense date, relying on a dictionary definition of the term “registered” to mean “entry of the student’s name on the ‘school district’s rolls.” Brief of Respondent, p. 9. But no evidence was introduced to prove that Mr. Beltran’s name was entered on the school district’s rolls at any time, much less during the period of suspension from CAP. In the absence of such evidence, Respondent’s definition of “registered” does not help the state’s case.

Because the evidence was insufficient, Mr. Beltran’s conviction must be reversed and the case dismissed with prejudice. *Winship, supra*.

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

Mr. Beltran rests on the arguments made in the Opening Brief.

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

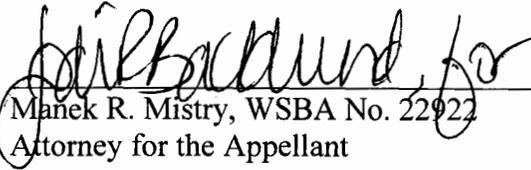
Mr. Beltran rests on the arguments made in the Opening Brief.

Respectfully submitted on May 18, 2009.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

FILED
COURT OF APPEALS
DIVISION II

09 MAY 19 AM 11:45

STATE OF WASHINGTON
BY E
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Pedro Beltran
407 E. Main St.
Centralia, WA 98531

and to:

Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 18, 2009.

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 May 18, 2009.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant