

IN THE COURT OF APPEALS FOR THE STATE OF  
WASHINGTON  
DIVISION II

NO. 38763-8-II

STATE OF WASHINGTON

Respondent,

vs.

**MOSES BELIZ, JR.**

Appellant.

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY  DEPUTY

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ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR JEFFERSON COUNTY  
Cause Number: 08-1-00054-6  
The Honorable Craddock Verser

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**BRIEF OF RESPONDENT**

JUELANNE DALZELL  
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Date: September 16, 2009

 ORIGINAL

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## STATEMENT OF THE CASE

### **I Restatement of Issues Presented**

- A. The evidence was sufficient to convict Mr. Beliz.**
- B. The trial court properly prohibited the defense from cross-examining a witness about a pending charge.**
- C. The trial court properly denied the defense's motion for a new trial.**
- D. Mr. Beliz was properly sentenced to a firearm enhancement.**

### **II Statement of Facts**

Mr. Bruce Bratton resides in Quilcene, Jefferson County, WA. RP 169. He has a house and shop located on Highway 101. On December 19, 2007, Mr. Bratton returned home and discovered things were out of place in his shop. RP 173-4. He noticed his stove was on. RP 175. He also determined someone had cooked food in his house while he was gone. RP 176-8. He went to the store and returned at about 6:00 p.m. when he saw a shadow lurking behind a container near the shop. RP 187-8. He determined the shadow was a man wearing a ski mask, holding a gun. RP 187. Mr. Bratton assumed it was the same person who had broken into his house earlier and eaten his food. RP 188.

Mr. Bratton said to the man: "You better just get out of here!"  
RP 190.

The masked man ordered Mr. Bratton to his knees. RP 191. Then he held his gun to Mr. Bratton's head and demanded to know where the "stuff" was.. RP 191. He demanded Mr. Bratton's money. RP 191. Mr. Bratton handed over the money in his wallet, slightly more than \$100. RP 192. Then the masked man demanded Mr. Bratton's cell phone. RP 192. Mr. Bratton threw his cell phone at the masked man who then shot Mr. Bratton . RP 192. The bullet struck Mr. Bratton's leg. RP 193. The masked man then attempted to cycle the gun's action to chamber another round. CP 7, RP 193. Mr. Bratton grabbed the masked man and they fought. RP 192-3. During the struggle, although he was hit in the head several times with the gun, Mr. Bratton managed to pull the ski mask off of his assailant's head. RP 195-6. Mr. Bratton testified that during the fight he had poked his thumb into the assailant's eye. RP 195. Finally, the assailant broke free and fled on foot. RP 197-8. Mr. Bratton saw his assailant run up his driveway to the highway and run along the shoulder. Mr. Bratton pursued him for a short way but lost sight of him.

The next day, a neighbor of Mr. Bratton's reported his red jeep had been stolen from his yard. RP 284, 305 The vehicle was

later recovered and a pair of blood stained jeans were found in the jeep. RP 443-4. Later testing of the jeans found Mr. Beliz' DNA on them. RP 449.

The police recovered the ski mask from Mr. Bratton's property. RP 268. The police also collected the food containers and utensils which were used by the intruders in Mr. Bratton's house. RP 273-5. Later testing found Mr. Beliz's DNA on the ski mask and one fork. RP 452, 455. Mr. Bratton's DNA was not present on the ski mask. RP 451.

During the investigation of the shooting the police identified Mr. Beliz as the masked gunman and located several of his acquaintances who testified about Mr. Beliz' activities before and after the shooting. Mr. Beliz testified he had previous business dealings with Mr. Bratton. RP 592-3.

Mr. Beliz was charged by amended information with attempted second degree murder while armed with a firearm, first degree burglary, attempted first degree robbery, and unlawful possession of a firearm in the second degree. CP 20.

Mr. Beliz made a pre-trial motion that he be allowed to impeach Mr. Bratton with his pending drug charges. CP 45-48. The trial court heard testimony from Mr. Bratton on this issue. RP 81-84. The trial court heard arguments on this issue. RP 79-80, 84-88.

The trial court ruled that the defense could question Mr. Bratton to the extent of showing he had a pending felony charge, but not on the specific charge. The trial court cited *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *State v. Thompson*, 13 Wn.App. 526, 536 P.2d 683 (1975); and *State v. Tate*, 2 Wn.App. 241, 469 P.2d 999 (1970) as authorities for its ruling. RP 97-105. In his ruling the trial judge stated, "...you can go as far as felony charges pending against him here that have arisen after the incident. The nature of the charges I don't think goes to whether or not he's got a bias." RP 102-3.

Mr. Joseph Martinez testified under a cooperation agreement with the prosecutor's office. RP 132. He testified that he, Mr. Beliz, a man named Zack, and the driver, whose name he did not know (RP 158-9), traveled by car from Omak to Quilcene the day before the shooting (RP 142); went to Mr. Bratton's residence; and, finding no one home, entered the residence and ate some of Mr. Bratton's food. RP 144-5. Mr. Martinez testified he left Mr. Bratton's residence before the shooting. RP 155.

Mr. Joseph Morris testified that Mr. Beliz came to his house driving a red jeep (RP 469-70), his clothes were dirty (RP 475), and that Mr. Beliz also told him the police were after him. RP 475. He also testified that Mr. Beliz told him that he was staying in a shed,

he was wearing a ski mask and when he encountered a man, his gun jammed. RP 477.

Ms. Susan Bishop testified that about three days after the shooting, Mr. Beliz came to her house looking like he had been running hard and told her he had been on the run for three days. RP 315. She testified he had a black eye. RP 316.

Ms. Rebecca Presler, a former girlfriend of Mr. Beliz, was called to testify by the prosecution. The prosecutor discussed her criminal record with her and she testified she had been convicted of four misdemeanor theft charges, one felony theft charge, and one charge of providing false information to a police officer. RP 515. She testified that she had a conversation with Mr. Beliz in which he asked her to tell the police that Mr. Bratton was shot by "Michael", another former boyfriend of hers. RP 520. She also testified that he told her he needed to get back to Joey Morris' house where there were some items of his he needed to retrieve. RP 521-2

Ms. Lisa Collins, a DNA analyst with the Washington State Patrol Crime Lab testified that she tested a ski mask, jeans, and two forks for the presence of DNA consistent with Mr. Beliz. Her testimony was that all items tested showed the presence of DNA from Mr. Beliz with the following error probabilities: jeans (RP 445, 449) one in 380 trillion; ski mask (RP 451-2) one in 5,500; one fork

(RP 455) one in 1.6 billion. The other fork tested positive for Mr. Martinez.

The case proceeded to a jury trial and on December 5, 2007, he was convicted on all charges. CP 138-140. The jury also returned a Special Verdict that Mr. Beliz was armed with a firearm during the time of the commission of the crime of Attempted Murder in the Second Degree. CP 137.

After Mr. Beliz was convicted, he filed two post-trial motions. The first was to arrest judgment on the attempted murder charge because there was insufficient evidence to support the jury's verdict. The trial court considered the motion and made the following determinations:

1. He had to review the evidence in a light most favorable to the state and determine whether any rational trier of fact could find the essential elements of attempted murder in the second degree beyond a reasonable doubt. *State v. Bencivenga*, 137 Wn.2d 703, 706, 974 P.2d 832 (1990). RP 747.
2. He had to take all reasonable inferences from the evidence in a light most favorable to the state. *State v. Joy*, 121 Wn.2d 333, 338-9, 851 P.2d 654 (1993). RP 747.
3. He had to defer to the finder of fact on any issues of conflicting testimony, credibility of the witnesses, and persuasiveness of the evidence. *State v. Watson*, 64 Wn.App. 410, 415-6, 824 P.2d 533 (1992). RP 748.

Citing these requirements and reviewing the evidence presented in the case, the trial court denied the motion.

In his second post-conviction motion, Mr. Beliz requested a new trial because the state did not reveal that one of their witnesses, Rebecca Presler, had once had a contract with the Jefferson County Sheriff's Department giving her sentencing consideration in exchange for her cooperation in an unrelated drug case.

A hearing was held on December 30, 2008, where Detective Apeland testified about the prior contract between Rebecca Presler and the Jefferson County Sheriff's Department. He testified that:

1. Ms. Presler was not under any contract with the Sheriff's Department during Mr. Beliz' trial. RP 778.
2. Her prior contract ended September 6, 2008. RP 779
3. The prior contract had nothing to do with Mr. Beliz. RP 780
4. Under the prior contract Ms. Presler received a free pass on a driving infraction in exchange for her cooperation with the Sheriff's Department on another case. RP 781.

The judge found that the prior contract did not have anything to do with Mr. Beliz' trial, it would not have undermined her testimony, and she did not receive any benefit in exchange for her testimony in Mr. Beliz' trial. RP 796. The trial judge denied the motion for a new trial. RP 796.

A Sentencing Hearing was held on December 30, 2008. The prosecution asked for a 60 month firearm enhancement. The trial

judge noted that the information improperly cited RCW 9.94A.602, the Deadly Weapon Special Verdict statute, rather than 9.94A.533, which specifies adjustments to standard sentences. The judge notes that this is not an issue since the charge that Mr. Beliz was armed with a firearm was included in the Information. The judge advises the Prosecutor to “clean it up in the future” and “it may well be an issue on appeal.” RP 814.

This appeal followed.

### **III. ARGUMENT**

#### **A. The evidence was sufficient to convict Mr. Beliz.**

Mr. Beliz argues the evidence was insufficient to convict him of attempted murder in the second degree.

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007).

When sufficiency of evidence is challenged in criminal case, all reasonable inferences from evidence must be drawn in favor of

state and interpreted most strongly against defendant. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

Mr. Beliz cites *State v. Dunbar*, 117 WN.2d 587, 817 P.2d 1360 (1991), for the proposition that the crime of attempted murder requires the specific intent to cause the death of another. However, *Dunbar* is distinguishable. In *Dunbar* the defendants were convicted of attempted first degree murder after firing bullets from their car into a group of people standing in a parking lot. The *Dunbar* court's holding reads, "We hold the crime of first degree murder by creation of a grave risk of death defined by RCW 9A.32.030(1)(b) *does not require a specific intent to kill*. Therefore, RCW 9A.32.030(1)(b) may not serve as a basis for the crime of attempt, and the charge was properly dismissed. *State v. Dunbar*, 117 Wash.2d 587, 594-5, 817 P.2d 1360 (1991). (*emphasis added*).

In this case, Mr. Beliz was convicted of Attempted Murder in the second Degree in violation of RCW 9A.32.050(1). RCW 9A.32.050(1)(a) states: "With intent to cause the death of another person, but without premeditation, he or she causes the death of such person or of a third person." In *Dunbar*, RCW 9A.32.030 requires premeditation and here, RCW 9A.32.050 does not.

A person commits attempted second degree murder by taking a substantial step toward intending to cause the death of another. RCW 9A.32.050(1)(a); RCW 9A.28.020.

The well-established test for challenging the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

There is substantial evidence showing Mr. Beliz was properly convicted of attempted second degree murder: Mr. Beliz knew Mr. Bratton from previous dealings; Mr. Beliz entered Mr. Bratton's home and waited for his return; Mr. Beliz confronted Mr. Bratton while armed with a handgun; Mr. Beliz robbed Mr. Bratton of his wallet, watch, and cell phone; when Mr. Bratton threw his cell phone at Mr. Beliz, Mr. Beliz shot Mr. Bratton. Then, after shooting Mr. Bratton, Mr. Beliz immediately, and unsuccessfully, attempted to chamber another round in his gun. The only likely inference to be drawn from this attempt is that Mr. Beliz intended to shoot Mr. Bratton again.

Reviewing the trial evidence in the light most favorable to the State and drawing all reasonable inferences from evidence in favor

of the state, Mr. Beliz' conviction was supported by substantial evidence and this appeal should be denied.

**B. The trial court properly prohibited the defense from cross-examining a witness about a pending charge.**

Mr. Beliz alleges the trial court erred by not allowing him to impeach the victim with his prior criminal history. Appellant's Brief 18. This misstates what occurred in trial. Mr. Beliz filed a motion to allow him to impeach Mr. Bratton with a *pending* criminal charge, not his criminal history.

The victim, Mr. Bratton, had been charged with a felony drug crime several months after the events in this case. Mr. Beliz moved to impeach Mr. Bratton with this charge. The trial court heard testimony from Mr. Bratton, heard arguments from both sides, and determined Mr. Beliz could cross-examine Mr. Bratton about his pending felony charge and whether any bias existed. The court also ruled Mr. Beliz could not ask about the nature of the specific charge because it had no bearing on whether Mr. Bratton had any bias. RP 102-3.

Mr. Beliz incorrectly asserts that the trial court denied his motion to impeach Mr. Bratton with his prior criminal history and uses five pages of his brief to argue this issue. Mr. Beliz never

asked to impeach Mr. Bratton with his prior convictions, but only his pending criminal charges. CP 47. During cross-examination of Mr. Bratton the defense did not ask him about his prior convictions. RP 243-252.

This entire argument by Mr. Beliz is spurious since the defense never sought to impeach Mr. Bratton with his prior convictions.

However, since Mr. Beliz, at least indirectly, questions whether the trial court was correct in limiting the defense's impeachment of Mr. Bratton on his pending drug charges, the State will address that issue.

Mr. Beliz asserts the trial court cited two cases, *State v. Hardy*, 133 Wn.2d 701, 946 p.2d 1175 (1997); and *State v. Calegar*, 133 Wn.2d 718, 947 P.2d 235 (1997). Appellant's Brief 18. These cases both held that drug convictions should not be admitted against a defendant because they are not probative of the defendant's credibility. Mr. Beliz argues the trial court's error lies in failing to distinguish between a defendant's credibility and a victim's credibility. This is not correct. The trial court cited those two cases only with respect to impeachment of other witnesses, Mr. Morris and Ms. Christiansen, not Mr. Bratton. RP 76-79.

However, these two cases both support the trial court's decision allowing Mr. Beliz to impeach Mr. Bratton with the fact that he had a pending criminal charge, but not to go into the specifics of the charge. This was completely proper since the pending charge was a drug charge.

The trial court allowed the defense to question Mr. Bratton about his pending felony charge to establish the presence of bias, so long as it did not go into the specific charge. RP 102-3.

We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999). ER 607 governs the use of impeachment evidence and provides that the credibility of witness may be attacked by any party. Thus, a party has a right to cross-examine a witness to reveal bias, prejudice, or a financial interest in the outcome. *In re Detention of Law*, 145 Wash.App. 28, 204 P.3d 230 (2008), *quoting Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Mr. Beliz' arguments are misplaced because the trial court was asked to permit impeachment by pending charges under ER 607 to establish whether the witness was biased. The court found the nature of the charge against him did not contribute to a possible bias. RP 102-3.

Mr. Beliz mistakenly argues that he “sought to admit Mr. Bratton’s criminal history of drug convictions.” Brief of Appellant 21. That was not the issue raised in the trial court. RP 79-80.

Even if Mr. Beliz had tried to impeach Mr. Bratton by his prior drug convictions, it would have been properly excluded under ER 609 and case law. *C.f. Hardy and Calegar, supra*.

The trial court did not err and this appeal should be denied.

**C. The trial court properly denied the defense’s motion for a new trial.**

Mr. Beliz argues the prosecution violated his right to be given all exculpatory evidence. In this case, he argues that the fact that one of the prosecution’s witnesses, Ms. Presler, had formerly had a contract with the Sheriff’s Department was possibly exculpatory.

He cites *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct 1105, 39 L.Ed.2d 347 (1974), for the proposition that Mr. Beliz had the right to confront Ms. Presler with her motive and bias as an active confidential informant. However, *Davis* is distinguishable since Ms. Presler was not under contract at the time of Mr. Beliz trial, therefore she was not an active confidential informant. RP 778.

Mr. Beliz cites *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed 215, 83 S.Ct. 1194 (1963), and *State v. Benn*, 120 Wn.2d 631, 649, 845 P,2d 289 (1993) for the proposition that when a defendant is deprived of his right to be advised of exculpatory evidence through prosecutorial misconduct and there is a reasonable likelihood that the undisclosed testimony could have affected the jury's decision, then a conviction must be set aside. However, those conditions do not exist here. The trial court found the testimony was not exculpatory and the undisclosed testimony could not have affected the jury's decision. RP 796.

Since the trial judge determined that the prior contract had no bearing on Mr. Beliz trial, this appeal should be denied.

**D. Mr. Beliz was properly sentenced to a firearm enhancement.**

Mr. Beliz argues that he was improperly sentenced to a firearm enhancement when he was charged with a deadly weapon enhancement.

RCW 9A.32.050 defines Murder in the Second Degree as a class A felony.

RCW 9.94A.533(3)(a) requires a 5-year sentence enhancement be added for a class A felony committed with a firearm.

RCW 9.94A.533(4)(a) requires a 2-year sentence enhancement be added for a class A felony committed with a deadly weapon other than a firearm.

RCW 9.94A.602 requires that in a criminal jury trial where there has been a “special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime” ...”the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.” The statute also defines “deadly weapon” to include a “pistol, revolver, or any other firearm.”

Every person has the right to be put on notice of any enhancement that increases the maximum penalty for the offense. *Apprendi v. New York*, 430 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). Mr. Beliz was put on notice of a firearm

enhancement by the Information. CP 20. This fact was noted by the trial court at Sentencing. CP 814.

Mr. Beliz argues that because the Information listed RCW 9.94A.602, which does not distinguish between firearms and other deadly weapons, he was not put on notice of the potential 5-year sentence enhancement. This argument ignores the fact that the information clearly states he was armed with a firearm during the commission of the crime. RCW 9.94A.602 does not specify any sentence enhancement for firearms or other deadly weapons, it merely requires that if any deadly weapon enhancement is sought, the jury must make a special verdict that the firearm or other deadly weapon was used.

Mr. Beliz cites *State v. Recuenco*, 163 Wn.2d 428, 442, 180 P.3d 1276 (2008), for the proposition that when a defendant is put on notice for a deadly weapon enhancement and not put on notice that the State sought a firearm enhancement, that is reversible error. However, that is not what happened in *Recuenco*. There, the State charged a deadly weapon enhancement, the jury granted it, and the court imposed a firearm enhancement. *Recuenco* at 442. In addition, *Recuenco* is distinguishable. In this case, the State charged a firearm enhancement, the jury granted it, and the judge properly added the enhancement.

The state concedes it should have cited RCW 9.94A.533 rather than RCW 9.94A.602 or 9.94A.125 in the Information. However, as the court noted, this error was harmless since the Information did put Mr. Beliz on notice that he was being charged with using a firearm in commission of the crime of Attempted Second Degree Murder. CP 814.

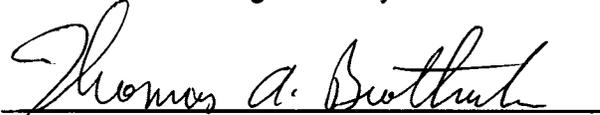
The firearm enhancement was properly charged, found, and added to Mr. Beliz' sentence. This appeal should be denied.

#### IV. CONCLUSION

The State respectfully requests that this Court affirm the trial court's verdict and sentence and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 16th day of September, 2009,

JUELANNE DALZELL, Jefferson County  
Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624  
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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY Ca  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
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MOSES BELIZ, JR.,  
Respondents.

Case No.: 38763-8-II  
Superior Court No.: 08-1-00054-6

**DECLARATION OF MAILING**

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 18<sup>th</sup> day of September, 2009, I mailed, postage prepaid, a copy of the BRIEF OF RESPONDENT to the following:

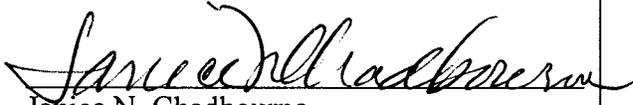
David C. Ponzoha, Clerk  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 18<sup>th</sup> day of September, 2009, at Port Townsend, Washington.

  
Janice N. Chadbourne  
Legal Assistant

DECLARATION OF MAILING  
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