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Court of Appeals
Division II
State of Washington
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NO. 52063-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

FERNANDO ANDRES CELAYA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley Rumbaugh, Judge

No. 17-1-02378-9

Respondent's Supplemental Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Can the defendant raise a claim of ineffective assistance of counsel where he failed to raise the issue in his Opening Brief, and where the State did not raise the claim in its Response Brief?

B. STATEMENT OF THE CASE.

The State adopts its Statement of the Case as stated in its Response Brief.

For the first time in his reply, the defendant argued that this Court should consider a claim of ineffective assistance of counsel. Reply Brief, 19. This Court denied the State's motion to strike but ruled that the State may "file a short supp reply brief to argue that this court should not consider the ineffective assistance argument in the reply. RAP 10.1(h)." Accordingly, the State submits the following brief, limited only to the issue of why the defendant's new argument should not be considered, as permitted by this Court.

C. ARGUMENT.

1. THIS COURT SHOULD NOT CONSIDER DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL ARGUMENT BECAUSE IT WAS RAISED FOR THE FIRST TIME IN A REPLY BRIEF.

This Court should not consider the defendant's ineffective assistance of counsel argument because it was raised for the first time in a reply brief. The scope of a reply brief is limited to a response to the issues raised in the response brief. RAP 10.3(c); *State v. Pleasant*, 38 Wn. App. 78, 81, 684 P.2d 761 (1984). "An issue raised and argued for the first time in a reply brief is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). A reply brief is not the forum to raise new issues because there is no opportunity for the opposing party to respond. *See Dykstra v. County of Skagit*, 97 Wn. App. 670, 676, 985 P.2d 424 (1999), *review denied*, 140 Wn.2d 1016, 5 P.3d 8 (2000). Thus, the defendant's argument regarding ineffective assistance of counsel, which he raised for the first time in his reply, is not properly before this Court.

For the first time in his reply brief, the defendant raises a claim of ineffective assistance of counsel for trial counsel's failure to bring a CrR

8.3(b) motion. Reply Brief of Appellant, 19-22. Not only is the defendant's argument first raised in his reply brief, but it is directly contrary to his assignments of error—that the trial court erred in failing to dismiss charges—and the context of the arguments in his opening brief. *See* Brief of Appellant, 1 (Assignment of Error 3, 4).

The defendant uses the *pro se* Statement of Additional Grounds as a springboard for his new argument, claiming ineffective assistance of counsel was raised in the Statement of Additional Grounds. Brief of Appellant, 19. The defendant does raise a claim of ineffective assistance in his Statement of Additional Grounds but based upon entirely different circumstances. In that document, the defendant raises claims of ineffective assistance based upon failure to cross examine the victim on text messages, failure to raise a speedy sentencing, and failure to investigate the defendant's background for sentencing. SAG, 1. He does not raise an ineffective assistance of counsel claim for failure to bring a CrR 8.3(b) motion.

Instead, he argues in his reply brief for the first time, that if this Court agrees with the State that a CrR 8.3(b) motion was not raised below,

then it should find that trial counsel was ineffective for failing to bring the motion. This issue is not raised in the Statement of Additional Grounds as the defendant claims. It is improperly raised and argued for the first time in his reply brief. Accordingly, the argument is directly contrary to the Rules of Appellate Procedure and the defendant's contentions in his opening brief, and this Court should not consider his argument.

The defendant also claims the State argued he received ineffective assistance for failing to file a formal CrR 8.3(b) motion without "using the words 'ineffective assistance'". Reply Brief, at 19. The State did not make any argument regarding defense counsel's effectiveness. The defendant's new argument should not be construed as a reply to an issue that was never raised by the State.

Rather, the defendant is attempting to add a new argument that he failed to raise in his opening brief and that the State has no opportunity in which to respond. A reply brief is not the proper forum for his argument. Accordingly, this Court should not consider the defendant's ineffective assistance of counsel argument.

D. CONCLUSION.

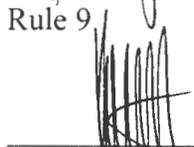
For the above stated reasons, the State requests that this Court decline to review the defendant's claim of ineffective assistance of counsel raised for the first time in his reply

DATED: June 19, 2019.

MARY E. ROBNETT
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Rule 9



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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6-24-19 Theresa Ka
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 24, 2019 - 1:54 PM

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