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Court of Appeals
Division II
State of Washington
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NO. 52732-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER BROWN,

Appellant.

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

The Honorable James Orlando, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE PROSECUTION'S ATTEMPT TO ALTER THE OTHERWISE UNCHALLENGED RECORD ON APPEAL SHOULD BE REJECTED.

In its response brief, the prosecution argues Brown's claims on appeal should be rejected because they are based on an inaccurate verbatim report of proceedings. Brief of Respondent (BOR) at 1-2, 7, 10-11. Because the prosecution has failed to avail itself of the proper procedures for settling disputes over the accuracy of the record on appeal, this Court should reject the prosecution's argument.

The prosecution claims the following portion of the verbatim report of proceeding is inaccurate:

MS. CONTRIS: Your Honor, again, I would object to this line of questioning. It's not the witnesses' duties to be investigating a case.

MR. JONES: Your Honor, I believe there is.

THE COURT: Overruling the objection.

MR. JONES: Thank you, sir.

BOR at 10 (citing RP 357)(emphasis added).

The prosecution claims the highlighted text, in order to be accurate, should instead read: "Your Honor, I believe there is [-]," such that it would indicate the trial deputy's response was cut off by the trial court's ruling on the objection. BOR at 11. This claim should be rejected because it is well-settled that under the Rules of Appellate Procedure

(RAP), corrections to the verbatim report of proceedings fall within the purview of the trial court, not the appellate courts, and are not properly made to the appellate court in a response brief.¹ The relevant rule provides;

(c) Objections to Report of Proceedings. A party may serve and file objections to, and propose amendments to, a narrative report of proceedings or a verbatim report of proceedings within 10 days after receipt of the report of proceedings or receipt of the notice of filing of the report of proceedings with the appellate court. If objections or amendments to the report of proceedings are served and filed, any objections or proposed amendments must be heard by the trial court judge before whom the proceedings were held for settlement and approval, except objections to the form of a report of proceedings, which shall be heard by motion in the appellate court. The court may direct court reporters or authorized transcriptionists to pay for the expense of any modifications of the proposed report of proceedings. The motion procedure of the court deciding any objections shall be used in settling the report of proceedings.

RAP 9.5(c).

¹ See e.g., DeCaro v. Spokane Cty., 198 Wn. App. 638, 641 n.1, 394 P.3d 1042, review denied, 189 Wn.2d 1024, 406 P.3d 284 (2017) (appellant's failure to seek record correction in the trial court per RAP 9.5(c) precluded appellate court from accepting claim it was inaccurate); State v. Tilton, 149 Wn.2d 775, 782, 72 P.3d 735 (2003) (same); State v. Witherspoon, 171 Wn. App. 271, 289, 286 P.3d 996 (2012), aff'd, 180 Wn.2d 875, 329 P.3d 888 (2014), as corrected (Aug. 11, 2014), and disapproved of on other grounds by State v. Woodlyn, 188 Wn.2d 157, 392 P.3d 1062 (2017) (same); State v. Smith, 162 Wn. App. 833, 851 n.17, 262 P.3d 72 (2011) (same); State v. Powell, 150 Wn. App. 139, 158, 206 P.3d 703 (2009).

Failure to pursue the process outlined under RAP 9.5(c) should preclude this Court from considering the prosecution's unfounded claim that the record is inaccurate. The record is settled, it says what it says.

Based on the unchallenged record, the prosecutor's response to the objection to cross examination of Nolasco is reasonably interpreted as a completed statement by the trial deputy indicating he believed Nolasco did have a "duty" to come forward with exculpatory evidence, which is not a correct statement of the law. The prosecution's tardy claim on appeal that the verbatim report of proceedings is inaccurate should be rejected.

B. CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse Brown's judgment and sentence and remand for a new, fair trial.

DATED this 15th day of October 2019.

Respectfully submitted,

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