

FILED

JUL 12, 2013

Court of Appeals
Division III
State of Washington

No. 30945-2-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JORGE ENRIQUE RODRIGUEZ,
Defendant/Appellant.

APPEAL FROM THE FRANKLIN COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

Primarily Mr. Rodriguez relies upon his Brief of Appellant to address the issues raised by the State. Additionally he states as follows in direct Reply.

1. Mr. Rodriguez' constitutional right to unanimity was violated where there was evidence of several distinct criminal acts, the State did not elect which one it relied upon and instead argued each act could support the conviction, and a unanimity instruction was not given.

The pertinent facts are set forth in Brief of Appellant, pp. 1–3.

There was evidence of multiple acts the jury could have relied upon to convict. The acts took place on different dates and at different times. The prosecutor emphasized each of the distinct acts in closing:

The order – it's clear [Mr. Rodriguez] knew about it. It's also very clear in this case that he knowingly violated that order. The reactions you see throughout this case, the reactions you saw as the defendant testified earlier are reactions of someone who knew he did something wrong. He called the police for civil stand-by. He became concerned. Then he moved into the house despite the fact the no-contact order said he could not do that.

He also admits he violated the order in another [way]. He admitted he spoke to Diana Houck. On the stand he said I walked to her and told her she shouldn't do that because she would get in trouble. Clear case he knew about the provisions of this order because he told her she wasn't supposed to have any contact with him. He corrected that and said it was a neighbor, but he very clearly said he spoke to her.

So he violated the order by speaking to her and he violated the order at the same time by returning to the residence listed clearly on the order. Then on September 25th he is caught red-

handed. So this isn't a case where you have a layperson report he was seen here at this location. He was caught there by the evidence.

6/7/12 RP 88–89 [alteration added]. As emphasized by the prosecutor, the acts were speaking to Ms. Houck, going to the protected address and/or being found asleep in the house by police.

Regardless which side produced the evidence, the prosecutor relied on all of the evidence but did not elect which act the jury should rely on to convict. 6/7/12 RP 88–89. Nor was the jury instructed it must be unanimous as to which act it relied upon. CP 24–45. This violated Mr. Rodriguez' right to a unanimous jury verdict.

The lack of jury unanimity is constitutional error. It is presumed prejudicial and requires reversal unless the prosecution proves the error harmless beyond a reasonable doubt. State v. VanderHouwen, 163 Wn.2d 25, 38–39, 177 P.3d 393 (2008). Here, the State cannot meet its burden because a rational juror could have reasonable doubts about several of the contacts alleged.

Under both direct and cross examinations, Mr. Rodriguez' testimony was not a model of clarity. 6/6/12 RP 48–70. Mr. Rodriguez' rendition of how he came to be released from jail on bond was confusing enough that the prosecutor claimed in closing Mr. Rodriguez first said he'd

talked to Ms. Houck and then changed his story upon cross-examination to say he'd only talked to a neighbor. Mr. Rodriguez' testimony about returning to the house was unclear, and he could have been there one or more times. Ms. Houck did not testify at trial. And the State presented no independent evidence to corroborate these two (or more) events. Yet the State confidently argued in closing there were three distinct criminal acts any of which could support a conviction.

On this record, the State cannot meet its burden of showing no rational jury could have entertained a reasonable doubt that each incident established the crime of violating a no contact order beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1991). The conviction must be reversed.

2. Erroneous sentences may be addressed for the first time on appeal, and the unsupported findings regarding legal financial obligations as well as the imposition of discretionary court costs must be stricken from the Judgment and Sentence.

Mr. Rodriguez did not make this argument below. But, illegal or erroneous sentences may be challenged for the first time on appeal. State v. Calvin, No. 67627-0-I, 2013 WL 2325121 at *11 (Wash.Ct.App. May 28, 2013), citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

a. The directive to pay on a date certain must be stricken. Mr. Rodriguez is not challenging the imposition of mandatory fines or penalties. Because there is, however, insufficient evidence to support the trial court's finding that Mr. Rodriguez has the present and future ability to pay legal financial obligations, the directive to pay "\$100 per month commencing immediately" must be stricken. *See* Brief of Appellant at 9–14.

b. The imposition of discretionary court costs of \$1,676.75 must also be stricken. Since the record does not reveal that the trial court took Mr. Rodriguez' financial resources into account and considered the burden it would impose on him as required by RCW 10.01.160, the imposition of discretionary court costs must be stricken from the judgment and sentence.

A court's determination as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard. State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). The decision to impose discretionary costs requires the trial court to balance the defendant's ability to pay against the burden of his obligation. This is a judgment which requires discretion and should be reviewed for an abuse of discretion. Id.

Relevant statutory authority. Here, the court ordered Mr. Rodriquez to pay a \$500 Victim Assessment, a \$100 DNA collection fee, \$600 in fines, and \$1,676.75 in court costs, for a total legal financial obligation of \$2,876.75. CP 13 at ¶ 4.1.

The trial court may order a defendant to pay court costs pursuant to RCW 10.01.160. But,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3). It is well-established that this provision does not require the trial court to enter formal, specific findings. *See State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). Rather, it is only necessary that the record is sufficient for the appellate court to review whether the trial court took the defendant's financial resources into account. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). Where the trial court does enter a finding, it must be supported by evidence. In the absence of a specific finding, there must still be evidence in the record to show compliance with RCW 10.01.160(3). *Calvin*, No. 67627-0-I, 2013 WL 2325121 at *11.

Here, after considering Mr. Rodriguez’ “past, present and future ability to pay legal financial obligations” (in boilerplate language), the court imposed discretionary court costs of \$1,676.75. CP 12 at ¶ 2.5, 13 at ¶ 4.1. The court made an express finding that Mr. Rodriguez is or will be able to pay them. However, the record reveals no balancing done by the court through inquiry into Mr. Rodriguez’ financial resources and the nature of the burden that payment of LFOs would impose on him. 6/14/12 RP 99–103. Further, there was no evidence of Mr. Rodriguez’ past, present or future employment, his financial resources or employability. See Calvin, No. 67627–0–I, 2013 WL 2325121 at *11.

In sum, the record does not show that the trial court took Mr. Rodriguez’ financial resources and ability to pay into account, as required by RCW 10.01.160(3). The finding of ability to pay is unsupported by the record and clearly erroneous. Further, the court’s imposition of discretionary court costs without compliance with the requirements of RCW 10.01.160(3) was an abuse of discretion. The remedy is to strike the directive to pay on a date certain *and* the imposition of discretionary costs. Calvin, No. 67627–0–I, 2013 WL 2325121 at *12; Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

B. CONCLUSION

For the reasons stated here and in the brief of appellant, the conviction should be reversed. Alternatively, the matter should be remanded to strike the finding of ability to pay (and directive to pay commencing immediately) legal financial obligations *and* to strike the imposition of \$1,676.75 in discretionary costs from the Judgment and Sentence.

Respectfully submitted on July 12, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on July 12, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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