

FILED  
JULY 1, 2015  
Court of Appeals  
Division III  
State of Washington

**NO. 32659-4-III**

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**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**JOSE LUIS NIEVES,**

**Appellant.**

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**BRIEF OF RESPONDENT**

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**GARTH DANO  
PROSECUTING ATTORNEY**

**By: Kevin J. McCrae, WSBA #43087  
Deputy Prosecuting Attorney  
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## **I. ASSIGNMENTS OF ERROR**

- A. Did the trial court error in failing to explicitly consider the defendant's ability to pay LFOs on the record?
- B. Was trial counsel ineffective for not asking the court to consider the defendant's ability to pay?

### **Issues pertaining to assignments of error:**

- 1. Should the appellate court review an issue where there was no objection below, no exception to RAP 2.5 applies, no public policy statement needs to be made and the cost of correcting the technical procedural error that had no demonstrated substantive effect greatly outweighs any potential theoretical benefit to the defendant?
- 2. Was defense counsel ineffective for not asking the trial court to consider the defendant's ability to pay where it was clear on the record the defendant had no physical or mental infirmities that would restrict his ability to pay?

## II. STATEMENT OF THE CASE<sup>1</sup>

On October 31, 2010, Mr. Nieves, Mr. Eduardo Najera Cruz, Mr. Salvador Garcia, and Mr. Luis Enrique Flores Martinez attended a Halloween party in Othello. Around 11:00 p.m., the four men left together in Mr. Martinez's car to meet up with some young women in Soap Lake. When they got to Soap Lake, they picked up Ms. Vanessa Barajas, Ms. Sashea Hollis, Ms. Silvia Espino, and Ms. Rosamaria Montano. The enlarged group headed to a different party, but never arrived at it.

Shortly after midnight, Soap Lake Police Officer Dustin Slabach was in uniform and on patrol in a fully marked police car. Around this time, the officer's attention was drawn to Mr. Martinez's car because it had a taillight out. Officer Slabach followed for a while and eventually saw an illegal U-turn. The officer activated his lights and attempted to make a traffic stop.

Instead of stopping, Mr. Martinez kept going and started to speed up at Mr. Nieves's urging. As Officer Slabach looked down to report the speed to dispatch he heard what he believed to be eight to ten gunshots in

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<sup>1</sup> Except where noted the statement of the case is taken directly from *State v. Nieves*, 2013 Wash. App. LEXIS 1045, noted at 174 Wn. App. 1070 (unpublished) The court may rely on previous unpublished opinions as evidence of the facts established in earlier proceedings in the same case or in a different case involving the same parties. *State v. Arquette*, 178 Wn. App. 273, 280 n.3, 314 P.3d 426 (2013)

the span of about two seconds. At the time the shots were fired, he was about three car lengths behind Mr. Martinez's car. Upon hearing the shots, Officer Slabach slowed down to put a safer distance between him and the car. He quickly stopped pursuit and soon pulled over due to an unrelated vehicle malfunction.

According to various witness accounts, Mr. Nieves either pulled the gun from his sweater or was handed the gun at his request and started shooting out the window. Ms. Montano was the only person who actually claimed to see the direction in which Mr. Nieves shot the gun. According to her written statement to police, Mr. Nieves “pointed back towards the cop and fired about five more times.”

Mr. Martinez decided to abandon the car. Everyone immediately got out and started running. They walked for several hours from Soap Lake to Ephrata. RP 244-247. At one point during their flight, Mr. Nieves stopped the group, loaded his gun, and said, “whoever snitches me out, when I come out, I'm going to kill you guys.” (RP) at 246. Mr. Nieves then singled out Ms. Barajas and said, “especially you.” *Id.* He singled her out because he knew that her cousin was a “buster,” which is a Sureño slur for members of rival Norteño gangs. Mr. Nieves was a member of the South Side Locos, a local Sureño gang.

The next day, Mr. Martinez went to the police and reported the car stolen at the party. Mr. Martinez returned to the police on the following day, confessed to the incident, and informed them of Mr. Nieves's involvement. He said that he had falsely reported the first time out of fear of being a suspect in the drive-by shooting

After the identification of Mr. Nieves as the shooter, police went to his mother's house and arrested him on an unrelated probation violation. Later that day, police obtained and executed a search warrant for the house. During the search, police found a 9mm pistol wrapped in a blue bandana. In a nearby closet, police found a box of bullets that matched the brand of the two 9mm bullet casings that police found along the highway near the shooting. Ballistics testing later identified the gun as the weapon that fired the casings found along the highway.

The State filed seven felony charges against Mr. Nieves. He defended on the basis that he was not present during the shooting and flight, but was at a party. Nonetheless, the jury found Mr. Nieves guilty on all charges and found that five of them were committed with a deadly weapon.

On appeal Division III reversed the witness intimidation counts due to an inaccurate jury instruction. On remand the State elected not to

retry the counts, but simply resentence the defendant on the remaining counts. This appeal followed.

### III. ARGUMENT

#### ***A. The Court should decline to hear this appeal under both RAP 2.5(a) and (c).***

The Court should decline to exercise its discretion under RAP 2.5(a) and *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). (Each appellate court must make its own decision to accept discretionary review.) In *Blazina* the Supreme Court felt legal financial issues demanded review of the case as a matter of public policy, in order to send a message to trial courts and focus attention on this issue. That message has been sent and received. There is nothing to be gained by rehashing the issue in this case, and much to be lost. Defendant did not object to lack of consideration of LFOs either in the first sentencing or the second. Indeed, the prosecutor specifically asked how much the LFOs were in the first sentencing hearing, and the defense attorney raised no objection. RP<sup>2</sup> 151. There is also absolutely nothing in the record that would suggest the defendant lacked the ability to pay LFOs.

Now, after a resentencing on remand, after the appellant could have raised this issue twice in the trial court or on his first appeal, he now

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<sup>2</sup> Transcript of various hearings, prepared by Jo L. Jackson.

appeals over \$323 dollars in discretionary LFOs, that if he is truly unable to pay at the time of collection, he will not be forced to pay. RCW 10.01.160(4). The court can also forgive the interest as an incentive to pay the LFOs. RCW 10.82.090. If the court grants this appeal, which has already taken up the resources of a defense appellate counsel, a prosecutor, three appellate court judges and various staff members, then Mr. Nieves will come back for resentencing. That proceeding will require an appointment of a public defender, take up court time, time of another prosecutor, plus staff, plus the cost to transport the defendant from prison to Grant County and back and no doubt generate another appeal. That appeal will require another appellate defender to review that hearing and either file an *Anders* brief (*See Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967)) or come up with some other de minimus issue, which will then require the attention of another prosecutor and the appellate court. It is this sort of issue that RAP 2.5 was meant for, to conserve judicial resources by encouraging all issues to be raised at the lowest possible level and at once, instead of in serial proceedings.

RAP 2.5(a) allows the court to decline to hear this issue because it was not raised in the trial court. RAP 2.5(c) allows the court to decline to hear this issue because it was not raised in the first appeal under the law of the case doctrine. The trial court on remand did not reconsider the LFOs.

Indeed the issue was never brought up. Appellant does not explain why justice requires this issue to be heard now, when it could have been raised in the first appeal. “The purpose of RAP 2.5(c)(1) is to restrict the law of the case doctrine by permitting the trial court upon remand to exercise independent judgment, and by permitting the appellate court to review the resulting decision.” *State v. Sauve*, 33 Wn. App. 181, 183 n.2, 652 P.2d 967 (1982). The trial court did not exercise independent judgment as to the LFOs the second time, it left them the same as the first hearing. The case was remanded to deal with the witness intimidation counts, not LFOs. “RAP 2.5(c)(2) is likewise inapplicable. The rule is limited by its language to review of a prior appellate decision in the same case on the basis of the court's opinion of the law at the time of the later review.” *Id.* This issue could have easily been raised in the first appeal. It was not, and there is no good explanation for it, and justice does not demand that it be permitted now.

***B. Counsel was not ineffective for not asking the court to consider the defendant's ability to pay.***

A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668,

687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Id.*

Defendant fails his *Strickland* burden because he fails to show that the court would reduce his LFOs if asked. His discretionary LFOs were only \$323. The burden LFOs impose is a factor for the court to consider. RCW 10.01.160. Nieves would have to pay less than a dollar a month during his incarceration to pay off his discretionary LFOs. During the commission of the crime he was able to turn around in a car seat and fire a gun out the window. He left the car at a run and had to hike several miles through sagebrush. There is no indication in the record of a physical or mental condition that would indicate he would be unable to pay LFOs in the future. Defense counsel is not required to raise every conceivable issue that has no factual merit to be effective. Even if defense counsel breached the applicable standard, the appellant has not shown any sort of

probability that the outcome would have been any different had he raised the issue. The defendant fails his burden under *Strickland*.

#### IV. CONCLUSION

RAP 2.5 exists for the purposes of judicial economy. Its exceptions are safety valves that may be necessary to use in the interests of public policy. *Blazina* is an example of that safety valve. The trial court did not formally consider Nieves's ability to pay on the record, nor was it asked to by defense counsel, despite the prosecutor specifically referencing them. The appellant has not cited a public policy that would override RAP 2.5. *Blazina* has already made the necessary statement. This case adds nothing to it, and the cost of sending the case back far outweighs the technical violation of the statute as decided by *Blazina*. Appellant has not shown he would achieve any actual relief. This appeal should be denied.

DATED: June 29, 2015

Respectfully submitted:

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Kevin J. McCrae, WSBA #43087  
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32659-4-III
	)	
vs.	)	
	)	
JOSE LUIS NIEVES,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kristina M. Nichols  
Wa.Appeals@gmail.com

Dated: July 1, 2015.

  
\_\_\_\_\_  
Kaye Burns