FILED
JULY 17, 2015
Court of Appeals
Division III
State of Washington

**NO. 32735-3-III**

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

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**STATE OF WASHINGTON,**

**APPELLANT,**

**v.**

**MARCOS A. AVALOS BARRERA,**

**RESPONDENT.**

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# REPLY BRIEF OF APPELLANT

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**GARTH DANO
PROSECUTING ATTORNEY**

**By: Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney
Attorney for Appellant**

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## I. ARGUMENT

No case cited by either the State or the Defense is precisely on point. This is not surprising, given the limited number of published cases on sufficiency of evidence combined with the fact-specific analysis required to determine sufficiency.

Of the cases relied on by the State and by Mr. Avalos-Barrera, *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136 (2009), is most similar to the facts now before the Court. *Asaeli* does not assist Mr. Avalos-Barrera, whose argument mischaracterizes the evidence here in an effort to harmonize with the facts of *Asaeli*. In *Asaeli*, the Court held there was no evidence co-defendant Vaielua, with whom Asaeli's case had been consolidated, was aware of any plan to shoot or assault the victim before Asaeli, Vaielua's cousin and fellow gang member, leaned into the victim's car and shot him. *Asaeli*, 150 Wn. App. at 557-58, 569. The evidence there was, at best, "sufficient to suggest that Vaielua and the others agreed to meet at the park after the bar closed and that Vaielua may have known that someone from his group was trying to locate [the victim]. But the record contains no evidence, direct or indirect, establishing that Vaielua was aware of any plan, by Asaeli, Williams, or anyone else, to assault or shoot [the victim]."

Mr. Avalos Barrera argues that Vaielua's knowledge of the shooting after the fact, acquired because he was present, is analogous to his own knowledge in this case. But the witness testimony and the video clearly show Mr. Avalos Barrera's prior knowledge. Not only did he specifically threaten harm to the victim earlier in the evening, he is shown in the video shouting in the direction of the victim before the gunfire broke out. His body posture is aggressive. It is obvious that he could see what was going on and inserted himself into the altercation. While the video does not allow us to hear what he was saying, a reasonable juror could conclude that it was something along the lines of the threats he made earlier in the evening.

In *Asaeli*, there was no evidence that Vaielua had any particular beef with the victim nor that he had threatened him in the past. Mr. Avalos Barrera was the person assaulted earlier in the evening by the victim in this case. He had told law enforcement that he would deal his own assault through "street justice."

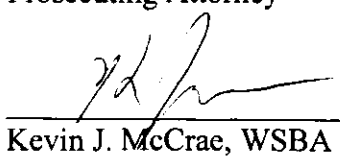
In sum the State does not have to distinguish *Asaeli*. The State here produced the evidence that the *Asaeli* court found lacking. A fair reading of the Court's rationale in *Asaeli* supports a finding of sufficient evidence in this case. A reasonable juror could conclude that Mr. Avalos Barrera was present and ready to assist, based on his threats made to

officers and the Munoz family earlier in the evening, followed by his aggressive participation as captured in the video. The trial court should be reversed and the case remanded for trial.

DATED: July 17, 2015

Respectfully submitted:

GARTH DANO,
Prosecuting Attorney



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| STATE OF WASHINGTON, | ) | |
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| Appellant, | ) | No. 32735-3-III |
| | ) | |
| v. | ) | |
| | ) | |
| MARCOS A. AVALOS BARRERA, | ) | DECLARATION OF SERVICE |
| | ) | |
| Respondent. | ) | |
| | ) | |

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 Reply Brief of Appellant in this matter on Susan Marie Gasch, Attorney for Respondent, by e-mail, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch
gaschlaw@msn.com

Dated: July 17, 2015.

Kaye Burns