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Division III  
State of Washington  
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No. 32919-4-III

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

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STATE OF WASHINGTON,

Respondent,

v.

LUIS GOMEZ-MONGES,

Appellant.

---

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

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **Under either a principal theory or accomplice theory, the State failed to prove Mr. Gomez-Monges was guilty of premeditated first degree murder.**

The State contends there was sufficient evidence presented under either a principal or accomplice theory. While the State no doubt establishes Mr. Gomez-Monges knew of the plot to kill Mr. Holbrook and that he was present during the attack, the evidence is sorely lacking establishing either Mr. Gomez-Monges killed Mr. Holbrook or that he assisted or was ready to assist Ms. Mendez.

- a. *The State failed to prove Mr. Gomez-Monges inflicted the fatal injuries.*

The State's primary theory at trial and on appeal is that Mr. Gomez-Monges acted as a principal and killed Mr. Holbrook. Brief of Respondent at 14-23. The brief also reinforces the point that the cause of death was the blunt force trauma to Mr. Holbrook's head. Brief of Respondent at 14, 18. But, contrary to the State's conclusion, and in light of all of the evidence presented at trial, there was insufficient evidence Mr. Gomez-Monges inflicted the fatal blows. The most important fact here is that a weapon, whether brick, large piece of

wood, or other type of evidence that could have been used to inflict the fatal blows was never recovered despite extensive police searches.

The State's brief correctly points out that Ms. Mendez claimed she saw Mr. Gomez-Monges strike Mr. Holbrook in the head with *his fists*. Both pathologists testified the fatal blows could not have been inflicted by human fists. RP 2338, 2358. Both pathologists agreed that if someone used their fists to inflict these injuries it would break the individual's hand(s). RP 2358, 2375.

The State attempts counter this testimony by the pathologists by relying on the testimony of Dr. Pauldine, the anesthesiologist at Harborview Hospital where Mr. Holbrook was transferred after being stabilized in Yakima. Brief of Respondent at 22. Dr. Pauldine testified generally how blunt force injuries such as that Mr. Holbrook suffered could be caused. RP 1457-58. The State then quotes Dr. Pauldine but omits an important qualifier to his statement: "Perhaps a very hard blow with a fist, elbow, knee, *probably not as likely as another object, though*. RP 1458 (emphasis added). In addition, Dr. Pauldine did not have the benefit of close examination of Mr. Holbrook's' injuries, which could only be done post-mortem.

Dr. Reynolds, the State's pathologist, opined that: "So this is more like [Mr. Holbrook] hit the edge of a table or a two-by-four or something with an edge to it, something fairly firm." RP 2335-36. Dr. Wigren, the defense pathologist agreed with this opinion: "Like Dr. Reynolds is saying, it's more consistent with an edge of a piece of wood, a two-by-four or even the edge of a brick, maybe even a rock. I can't think of anything else." RP 2358. Nothing like these items was found by the police at or near the house during their search.

Further, Dr. Wigren testified it was unlikely the fatal blows were inflicted by a shoe via stomping:

If it was stomping it would have to be a really hard-edged sole. It couldn't be like your sneaker, which has kind of a rubberized, a compressible type of sole. It would have to be almost like a boot edge but not rubber. It would have to be like leather or even a metal edge.

The other thing that's missing is a patterned abrasion. Usually when you're stomping on someone, if you look at the sole of your shoes, there's a pattern to it like there is on my shoe. If I were to stomp on someone's head, you're going to see an abrasion typically nearby that has kind of this pattern along with it. That usually -- a surgeon would probably remark on that and a forensic nurse examiner would probably photograph that.

So I don't think it was -- I don't think it was a shoe or a stomping. I have seen stompings, and they usually have some sort of patterned abrasion with them.

RP 2370-71. On the date Mr. Holbrook was assaulted, video surveillance outside the motel where Mr. Gomez-Monges and Ms. Mendez lived showed Mr. Gomez-Monges wearing Nike athletic shoes. RP 2119.

Finally, the State wants to minimize the jury's refusal to find the State had proven beyond a reasonable doubt that Mr. Gomez-Monges used a deadly weapon. Brief of Respondent at 20-21. But if the jury found Mr. Gomez-Monges did not use a deadly weapon, the fatal blows could not have been inflicted by Mr. Gomez-Monges's hands or feet, and no items that could have caused the injuries were found, then the State failed to carry its burden of proving Mr. Gomez-Monges inflicted the fatal injuries.

- b. *The State failed to prove Mr. Gomez-Monges acted as an accomplice to either Ms. Mendez's or Daniel Blizzard's act of inflicting the fatal blows on Mr. Holbrook.*

The State's brief is replete with references to Daniel Blizzard and Adriana Mendez, which indicated how little a role Mr. Gomez-Monges played. The brief also establishes Mr. Gomez-Monges's knowledge of the plan to kill Mr. Holbrook, establishes his apparent assent, and establishes his presence at the house where Mr. Holbrook was assaulted. Brief of Respondent at 16-18, 24-25.

But, it is well-established law that this evidence alone is insufficient to establish accomplice liability. *See State v. Luna*, 71 Wn.App. 755, 759, 862 P.2d 620 (1993) (“Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient; the State must prove that the defendant was *ready to assist* in the crime.”); *State v. Amezola*, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987).

As a consequence, the State failed to establish Mr. Gomez-Monges was criminally liable for Mr. Holbrook’s death. Mr. Gomez-Monges is entitled to reversal of his conviction with instructions to dismiss.

**2. The prosecutor’s letter to Judge Reukauf constituted misconduct and the court erred in failing to dismiss.**

The State spends a significant part of its argument on the motions to dismiss claiming “assuming *arguendo*” there was governmental misconduct . . . Brief of Respondent at 30-32. It is important to remember, the trial court found there was governmental misconduct, the State has not appealed that finding, and Prosecutor Hagerty was sanctioned by the Washington State Bar for sending the letter. Contrary to the State’s attempt to minimize its conduct, there was, in fact, governmental misconduct.

- a. *There should be no finding that Mr. Gomez-Monges waived the appearance of fairness argument.*

Mr. Gomez-Monges recognizes the holding of this Court in *State v. Blizzard*, that the failure of Mr. Blizzard to move to recuse the trial judge waived the appearance of fairness argument, which the State cites here with approval. 195 Wn.App. 717, 725-27, 381 P.3d 1241 (2016) *review denied*, 187 Wn.2d 1012 (2017). But this holding elevates form or function and should be abandoned or not applied in Mr. Gomez-Monges matter.

Judge Reukauf, while pointing out she could be impartial despite the letter, refused to voluntarily recuse herself. RP 496, 569. Subsequently moving the court to recuse after this statement would be a futile act at best. By finding Mr. Blizzard waived his argument when he failed to move the court to recuse itself this Court elevated form over function, requiring a party to engage in an act which was plainly futile merely to preserve the issue for later appeal. Such a conclusion could not have been what the Court intended.

This Court should find as to Mr. Gomez-Monges that he did not waive the appearance of fairness argument by failing to engage in the futile act of moving to recuse the trial judge.

- b. *This Court should find the governmental misconduct to be structural error and order the matter dismissed.*

Once again, Mr. Gomez-Monges recognizes the holding of *Blizzard*, where this Court ruled structural error did not apply. 195 Wn.App. at 727-28. This Court should reexamine this position.

The State posits that “[i]t is arguable whether structural analysis even applies in the context of prosecutorial misconduct.” Brief of Respondent at 34. But the State apparently ignored the statement of the United States Supreme Court cited in the Brief of Appellant wherein the Court suggested just that:

Our holding does not foreclose the possibility that in an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant the grant of habeas relief, even if it did not substantially influence the jury’s verdict. Cf. *Greer v. Miller*, 483 U.S. 756, 769, 107 S.Ct. 3102, 3110, 97 L.Ed.2d 618 (1987) (Stevens, J., concurring in judgment).

*Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993).

But, as argued in the Brief of Appellant, finding structural error here is the best way to provide a remedy and deter this type of conduct by prosecutors. It is impossible to determine if the trial judge was affected by the letter, and if so, to what extent. In addition, the letter

amounted to an attack on the integrity of the judicial system itself.

There are procedures in place to seek a judge's recusal, but instead, the elected prosecutor decided to deliver an intimidating letter that questioned the neutrality of the trial judge. This Court cannot allow this conduct to go unpunished. Applying structural error to this misconduct will be the only way to deter this conduct in the future.

**3. The trial court failed to make an individualized inquiry into Mr. Gomez-Monges's ability to pay before imposing legal financial obligations.**

The State counters Mr. Gomez-Monges's argument regarding the imposition of the Legal Financial Obligations (LFOs) by claiming that the failure to object at sentencing precludes review on appeal. Brief of Respondent at 37. The Supreme Court has recently held otherwise.

In *State v. Duncan*, the defendant raised the issue concerning LFOs for the first time on appeal. 185 Wn.2d 430, 374 P.3d 83 (2016). The trial court had imposed LFOs without making any inquiry into the defendant's ability to pay. *Id.* The Court of Appeals ruled that the defendant had waived the issue by failing to object at sentencing to the imposition of the LFOs. *State v. Duncan*, 180 Wn.App. 245, 253, 327 P.3d 699 (2014).

The Supreme Court disagreed and remanded for resentencing for consideration of the defendant's ability to pay. *Duncan*, 185 Wn.2d at 437-38.

Subsequently in *State v. Lee*, where the defendant had not objected to the imposition of discretionary legal financial obligations at trial, the Supreme Court again remanded in light of *Duncan* and *Blazina*:

Lee argues the trial court erred when it imposed LFOs without making an individualized determination of his ability to pay. At sentencing, the court imposed \$2,641.69 in LFOs, including \$2,041.69 in discretionary costs. The trial court did not consider Lee's ability to pay, and Lee did not object. Had Lee objected, the trial court would have been obligated to consider his present and future ability to pay before imposing the LFOs sought by the State. *See State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992). Although appellate courts "may refuse to review any claim of error which was not raised in the trial court," they are not required to. RAP 2.5(a). In *Blazina*, 182 Wn.2d at 830, 344 P.3d 680, we exercised our discretion under RAP 2.5(a) to "reach the merits and hold that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs." Consistent with *Blazina* and the other cases decided since, we remand to the trial court for consideration of Lee's ability to pay LFOs. *See, e.g., State v. Duncan*, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016).

188 Wn.2d 473, 501-02, 396 P.3d 316 (2017).

Thus, the Supreme Court has consistently remanded cases to the trial court for consideration of the defendant's ability to pay, where the LFO issue was raised for the first time on appeal and where the trial court failed to inquire into the defendant's ability to pay. This Court should follow the Supreme Court and remand to the trial court for resentencing for the trial court to give "proper consideration" of Mr. Gomez-Monges's ability to pay.

F. CONCLUSION

For the reasons stated, Mr. Gomez-Monges asks this Court to reverse his conviction with instructions to dismiss. Alternatively, this Court should reverse Mr. Gomez-Monges's conviction or remand for resentencing for the trial court to reconsider its decision to impose the discretionary LFOs.

DATED this 9<sup>th</sup> day of March 2018.

Respectfully submitted,

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LUIS GOMEZ-MONGES,	)	
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