

**NO. 33027-3-III**

**FILED**  
September 29, 2015  
Court of Appeals  
Division III  
State of Washington

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

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**FRANCISCO GONZALEZ-GONZALEZ**

**Appellant.**

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**APPEAL FROM THE SUPERIOR COURT FOR**  
**FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

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**A. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

**B. RELIEF REQUESTED**

Respondent asserts no error occurred in the trial, conviction, or sentencing of the Appellant.

**C. ISSUES FOR REVIEW**

1. DID THE COURT ABUSE ITS DISCRETION IN PERMITTING TESTIMONY REGARDING THE DEFENDANT'S ALIAS?
2. SHOULD THIS COURT ACCEPT REVIEW OF IMPOSITION OF THE LEGAL FINANCIAL OBLIGATIONS WHERE NO TIMELY OBJECTION WAS MADE? IS THE TRIAL COURT'S FINDING OF ABILITY TO PAY SUPPORTED IN THE RECORD?

**D. CLARIFIED STATEMENT OF FACTS**

On August 26, 2014, C.H. went to the Defendant Francisco Gonzalez-Gonzalez's Pasco apartment to buy marijuana. RP 53. He knew the Defendant by the nickname of "Kiko." RP 53-54. That testimony was not objected to at trial. *Id.* The Defendant pulled C.H. into the apartment by his backpack strap and "swung at" him. RP 55. When C.H. was on the floor, the Defendant kicked him once or twice and took his backpack. RP 55, 57. The backpack

held C.H.'s wallet with \$32 inside, his house key, his phone, his tablet, and his brother's USB disk. RP 57-58. The Defendant accused C.H. of stealing a watch. RP 57. C.H. denied having done so. *Id.*

The Defendant said C.H. could not leave the apartment unless he was going to retrieve the stolen watch. RP 61. The Defendant's brother stood between C.H. and the door and approached him while wielding a knife. RP 60-62. The Defendant told C.H. that if he tried to steal again, he would have his brother kill him. RP 61. C.H. took this threat seriously. RP 61-62. The Defendant allowed C.H. to leave the apartment only after he promised to retrieve the watch. RP 62. C.H. rode his bike to the Oriental Express and called police from the pay phone in the parking lot. *Id.*

Pasco Police Officer Jasen McClintock responded to the Oriental Express. RP 153. He met with C.H. (RP 154) who was upset, frightened, and crying. RP 155. C.H. had a cut lip that the officer photographed. RP 56, 155-156. Officer McClintock then transported C.H. to the area where the incident occurred. RP 62, 157. C.H. pointed out the apartment to the officers. RP 62-63, 157. C.H. also positively identified the Defendant and his brother

as having been involved in this incident. RP 63, 138-139, 159. The Defendant identified himself to officers as “Kiko.” RP 89. That testimony was not objected to at trial. *Id.* Though a search warrant of the apartment yielded no stolen property (RP 159), C.H.’s brother’s disk was found in the Defendant’s pocket. RP 97, 160-161. The Defendant was charged by Information with Robbery in the First Degree, Unlawful Imprisonment, and Felony Harassment. CP 100-101.

At trial, the Defendant denied hitting C.H. and taking his backpack. RP 223, 227. He claimed he found the USB disk lying on the floor in his apartment. RP 225-26. The jury acquitted the Defendant of Counts I and III, but convicted him of Count II: Unlawful Imprisonment. CP 33-35. At sentencing, the court inquired as to the Defendant’s employment. Sent. RP 6. The Defendant informed the court that at the time of the offense, he had been working for a mechanic in Kennewick. *Id.* The court imposed two months with credit for time served, and costs of \$1800. CP 21, 24; Sent. RP 3, 7. The Defendant made no objection to the imposition of costs. Sent. RP 7-8. The court stayed the Defendant’s mandatory requirement to register as a Kidnapping Offender pending this appeal. Sent. RP 9.

## E. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY OF THE DEFENDANT'S ALIAS. NOT ONLY WAS THAT INFORMATION NOT OFFERED TO PROVE THE TRUTH OF THE MATTER ASSERTED, THE DEFENDANT CANNOT SHOW THAT THIS EVIDENCE PREJUDICED HIM AT TRIAL. EVEN IF THE TRIAL COURT IMPROPERLY ALLOWED THE EVIDENCE, IT WAS HARMLESS ERROR.

The Defendant challenges the admission of alleged hearsay evidence. Although the Defendant frames the argument as a violation of his constitutional rights, the framing does not affect the standard of review. *State v. Garcia*, 179 Wn.2d 828, 844-45, 318 P.3d 266 (2014) (reviewing a challenge to admission of hearsay for abuse of discretion). It is not the law that a criminal defendant need merely allege an error which he can frame in constitutional terms and then require the State to prove it harmless beyond a reasonable doubt. *State v. Avila*, 78 Wn.App. 731, 738, 899 P.2d 11 (1995) (constitutional underpinnings do not convert every alleged violation of a rule into an error of constitutional magnitude) (*citing State v. Lynn*, 67 Wn.App. 339, 346, 835 P.2d 251 (1992)).

A trial court's admission of hearsay statements is reviewed for abuse of discretion. *State v. Woods*, 143 Wash.2d 561, 597, 23 P.3d 1046 (2001); *State v. Strauss*, 119 Wash.2d 401, 417, 832

P.2d 78 (1992). The trial court's decision will not be reversed by a reviewing court "unless [it believes] that no reasonable judge would have made the same ruling." *State v. Ohlson*, 162 Wash.2d 1, 8, 168 P.3d 1273 (2007) *quoting State v. Woods*, 143 Wash.2d at 595-96. That is not the case here, especially considering that the facts the Defendant complains of were already elicited through C.H.'s testimony.

The question "Were you able to locate the residence where this incident occurred?" does not call for hearsay, in and of itself. The officer could have simply said yes or could have relayed that after officers brought C.H. to the area, he pointed out the specific apartment where this incident occurred. C.H. was the first witness called by the State. RP 51. At the time Officer Skinner testified, the jury already knew that this incident occurred in an apartment in Pasco (RP 53-54), that C.H. had pointed out the specific apartment to the police (RP 62-63), that C.H. knew the Defendant as "Kiko" (RP 53-54), and that C.H. identified the Defendant and his brother through a show up procedure. RP 63, 138-139, 159.

The Defendant alleges that the records management search linking the alias of "Kiko" to a particular property was hearsay. Hearsay is defined as "a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). The testimony here was not offered to prove the truth of the matter asserted (that someone with the alias of Kiko lived at a certain address), but to demonstrate why law enforcement approached that address. It served to provide notice to law enforcement as to where a criminal incident may have occurred. In short, it informed the starting point for the criminal investigation.

The Defendant’s reliance on *State v. Neal*<sup>1</sup> is misplaced. That case related to a certified copy of a lab report that failed to comply with the CrR 6.13(b) requirement to identify by name the person from whom the evidence was received for testing. Our situation is entirely dissimilar where the character of the evidence in this case did not *in any way* implicate a court rule. Because there is no court rule applicable in the complained-of testimony, this Court’s review is not de novo like in *Neal*.

Even if this Court were to conclude that Officer Skinner’s testimony was impermissible hearsay, it undoubtedly is harmless error. The Defendant is correct that a trial court’s evidentiary rulings are harmless unless, within reasonable probabilities, they

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<sup>1</sup> *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

affected the outcome of the trial. Appellant's Brief at 7; *State v. Thomas*, 150 Wn.2d 821, 870, 83 P.3d 970 (2004). The Defendant argues that the alias of "Kiko" materially prejudiced him because it could have caused the jury to speculate that the Defendant was known to the police and "perhaps had a criminal record." Appellant's Brief at 7. Pure speculation does not equal prejudice, especially where there was *never even so much as an insinuation* that the Defendant had a criminal record.

It is certainly true that this case hinged on credibility. Appellant's Brief at 7. The jury heard that C.H. had been convicted of three separate crimes of dishonesty—Robbery in the Second Degree, Residential Burglary, and Theft in the Third Degree. RP 52, 64. There was *never* any mention of criminal convictions of the Defendant. RP 1-278. There was *never* any mention that he was known to the police. RP 1-278. There was *no evidence* that "Kiko" was a "street name" or a "gang name" as opposed to simply a nickname or alias. RP 1-278. It is pure speculation to insinuate that the jurors in this case took any stock in the nickname "Kiko" being linked to a certain address. The average juror has no background knowledge of dispatch's records systems and no knowledge as to how that information is linked. The Defendant also fails to mention

the fact that he identified himself to officers as “Kiko” when he was first contacted. RP 89.

Officer Skinner’s testimony was not hearsay because it was not offered to prove the truth of the matter asserted. The apartment where this incident occurred (and where the Defendant lived) was already established through C.H.’s testimony and was later corroborated through Officer McClintock’s testimony. The fact that C.H. knew the Defendant as “Kiko” was also already established before Officer Skinner testified. Because there was absolutely no insinuation of the nature of the Defendant’s nickname or whether he had a criminal record, the error was harmless.

**2. THE TRIAL COURT PROPERLY IMPOSED LEGAL FINANCIAL OBLIGATIONS FOR THE DEFENDANT. THIS COURT SHOULD NOT REVERSE THE AWARD OF DISCRETIONARY COSTS BECAUSE THERE IS NO BASIS TO DO SO.**

For the first time on appeal, the Defendant challenges the lower court’s finding of his ability to pay legal financial obligations. The Defendant was 38 at the time of the offense (born December 1, 1975). He was working for a mechanic. Sent. RP 6. The Defendant did not complete the Indigency Screening Form, but was

given a court-appointed attorney.

On December 19, 2014, the Defendant was sentenced to 2 months in custody and given credit for time served. The Honorable Bruce A. Spanner ordered the Defendant to pay \$1800 in legal financial obligations (LFOs) per his judgment and sentence. CP 21. The Defendant received a break when the \$200 filing fee was left out of the calculations; the total amount of his LFOs should have been \$2000. Judge Spanner had an opportunity to observe the Defendant throughout the two day trial and at the sentencing hearing. The Defendant is not disabled, but strong—able to pull a 16 year old boy through a doorway, cutting his lip and forcing him to the ground. RP 55-57. The Court properly found that the Defendant had the present and future ability to pay a monthly fee toward the LFOs that were imposed.

In *State v. Blazina*, this Court held that it is **not error** to decline to reach the merits on a challenge to the imposition of LFOs made for the first time on appeal. *State v. Blazina*, 182 Wash.2d 827, 830, 344 P.3d 680 (2015). “Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny.” *State v. Blazina*, 182 Wash.2d at 833. The decision to review is discretionary on the reviewing court under RAP 2.5. *State v.*

*Blazina*, 344 P.3d at 830.

RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The *Blazina* decision did not overrule *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014). The reasons in *State v. Duncan* appropriately balance the efficient use of judicial resources with fairness.

As the *Duncan* opinion explains, at imposition, the State's burden of proof is so low that it can be met by a single reference in a presentence report in which the defendant described himself as employable. *State v. Duncan*, 180 Wn. App. at 250, (citing *State v. Lundy*, 176 Wn. App. 96, 106, 308 P.3d 755 (2013)). That burden is met here when the Defendant himself told the court that "he had been working at the time of the . . . offense 'helping a mechanic in Kennewick.'" Appellant's Brief at 9.

The Defendant is an English speaker without apparent barriers (other than every offender's barrier, i.e. the criminal conviction) to employment. He had discretionary income for marijuana use. He does not have any dependents. Not only was he employed before this case started, he was able to start working

and earning money again once it ended. Because he was released on December 19, 2014 (with credit for time served), the Defendant was able to immediately seek employment. There was no information provided at sentencing that the Defendant was in any way incapable of working or that he was on a fixed income. Because the State's burden is low, the record is more than sufficient to justify the lower court's finding that he was able to pay a monthly fee toward his LFOs. There is no need to remand this case back to the Superior Court. The finding is supported in the existing record.

The fact that the Defendant was found indigent for purposes of appointing counsel for this Appeal does not necessarily mean that he without the present or future ability to pay a small monthly fee. In fact, the record demonstrates the opposite. Indigency alone is not a prohibition against the imposition of legal financial obligations. *State v. Lundy*, 176 Wn. App. at 99. There is a significant difference between one's ability to pay \$50/mo (which can be earned by mowing one lawn every other week) and being immediately able to come up with the thousands of dollars necessary to retain an attorney and transcribe a record. In any case, indigency is a condition, not an ability. And it is not a static

condition.

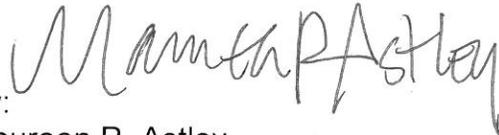
Because the State's burden is low, the record is more than sufficient to justify the lower court's finding that he was able to pay a monthly fee toward his LFOs. There is no need to remand this case back to Superior Court. The finding is supported in the existing record.

**F. CONCLUSION**

Based on the foregoing, the State respectfully requests that this Court affirm the Defendant's conviction and sentence.

Dated this 29th day of September, 2015.

Respectfully submitted,  
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Prosecuting Attorney



By:  
Maureen R. Astley  
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Affidavit of Service	Janet Gemberling PO Box 8754 Spokane WA 99203 <a href="mailto:admin@gemberlaw.com">admin@gemberlaw.com</a> <a href="mailto:jan@gemberlaw.com">jan@gemberlaw.com</a>	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  Dated 29th day of September 2015, Pasco WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 29th day of September, 2015  Notary Public and for the State of Washington residing at Pasco My appointment expires: September 9, 2018		