FILED
JANUARY 3, 2017
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34361-8-III

STATE OF WASHINGTON, Respondent,

v.

ISRAEL FABIAN-SANCHEZ, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. The jury did not receive expert testimony from a qualified witness that would establish a bodily fracture.

The State contends that because the fracture of any bodily part constitutes substantial bodily harm, the evidence in this case is sufficient. *Respondent's Brief*, at 9. The problem with the State's argument is that the witness, a registered nurse, did not testify that Cobos had a broken nose. The nurse testified that he presented with the appearance of a broken nose **or** a deviated septum, apparently in the alternative, and that x-rays were ordered for confirmation. RP 71-72. But the nurse also acknowledged frankly that he lacked the qualifications to diagnose the injury. RP 75. No foundation was presented by the State to establish that the nurse had the requisite qualifications from experience or training to offer any opinion beyond what a lay person could infer from the circumstance. *See* ER 702.

Similarly, the State asks the court to speculate that Cobos's ribs might have been broken because they hurt for a long time. *Respondent's Brief*, at 7. The State has proffered no testimony, experience, or other foundation supporting its claim to discriminate between the pain of a

break and the pain of a bruise, and has pointed to no diagnostic criteria that would support its claim.

The State also contends that facial bruising alone may constitute substantial bodily harm, citing *State v. Gatlin*, 158 Wn. App. 126, 132-33, 241 P.3d 443 (2010). *Respondent's Brief*, at 10. *Gatlin* involved a joint attack on a single victim by two perpetrators, in which the defendant was determined to be responsible as an accomplice for the injuries inflicted by the other, including attempted strangulation. *Id.* The facts of *Gatlin* do not support the State's overly broad reading that bruising alone can constitute the kind of increased harm necessary to elevate the assault based upon the seriousness of the injury. *See State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

For these reasons, the State did not meet its burden to establish that the harm suffered by Cobos was sufficient to elevate the assault to a felony. Accordingly, the conviction should be reversed.

B. <u>The State's request for appellate costs is pointless and retaliatory.</u>

On the one hand, the State contends that Fabian-Sanchez's current indigency is irrelevant and that future indigency upon release is the determinative factor in assessing costs. *Respondent's Brief*, at 11. On the other, the State apparently sees no inconsistency in suggesting that a man

who will be released from prison as a convicted child rapist, at the very earliest in his early forties and realistically much older, with no significant education, job training, or employment experience, will be able to pay thousands of dollars in cost assessments. *Respondent's Brief*, at 13-15.

As observed in *State v. Blazina*, 182 Wn.2d 827, 836-37, 344 P.3d 680 (2015), the consequences of Washington's LFO system include increased chances of recidivism due to challenges to reentry, unlikely recoupment, and significant disparities based on improper considerations such as the exercise of the right to trial, race, and gender.[1] The Court of Appeals has recognized that these considerations apply with equal effect in the context of appellate costs, such that it is appropriate for courts to consider them. *State v. Sinclair*, 192 Wn. App. 380, 391, 367 P.3d 612 (2016). Together, *Blazina* and *Sinclair* undermine the rationale behind imposing pointless, uncollectible cost assessments such as this by pointing out that they come at a cost to society as a whole when they prevent impoverished offenders from ever being able to repay their debt to society.

The State suggests that declining to impose costs encourages defendants to pursue frivolous appeals because there is no downside to

[1] Notably, Fabian-Sanchez meets many of the criteria identified in *Blazina* as the source of disparities – he is a Latino male who exercised his right to a jury trial in a rural county.

seeking review. *Respondent's Brief*, at 15. Of course, criminal defendants in Washington have a constitutional right to appeal, just as they have a right to a jury trial. Wash. Const. Art. 1, § 22. Imposing a penalty for the exercise of a constitutional right violates due process. *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995) (*citing Bordenkircher v. Hayes,* 434 U.S. 357, 363–64, 98 S .Ct. 663, 54 L.Ed.2d 604 (1978)). The State's view amounts to a proposal that defendants who pursue unsuccessful appeals should be penalized for doing so, to discourage the exercise of the right to appeal. This position is plainly unconstitutional. *See Bordenkircher* at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional.") (Citations omitted).

Underlying the State's punitive approach is the error of conflating unsuccessful appeals with frivolous ones. Unsuccessful appeals are not necessarily frivolous. *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn. App. 201, 220, 304 P.3d 914 (2013). When a legal position is frivolous, "it cannot be supported by any rational argument based in fact or law." *Id.* at 218. Such filings are penalized by the court pursuant to RAP 18.9(a). Cost assessments, by contrast, are awarded to

any party that substantially prevails on review, unless directed otherwise by the appellate court. RAP 14.2. The State is, accordingly, mistaken that the cost assessment rule, which applies to all unsuccessful appeals, targets or affects frivolous appeals with any particular specificity. If the State is concerned that certain appeals are frivolous, the State is free to pursue the argument through the RAP 18.9 process.

In the present case, the record indicates that Mr. Fabian-Sanchez had a nominal ability to earn income *before* being convicted of two sex offenses against a minor child and a violent assault and sentenced to extended terms in prison. It strains credulity to believe that his prospects for gainful employment upon release, *if* he is released, will not be significantly impaired by his record, and that his re-entry will not be substantially undermined by diverting what minimal funds he may be able to earn towards LFO payments rather than transportation, housing, education and job training. Appellate costs should be denied

II. CONCLUSION

For the foregoing reasons, Fabian-Sanchez respectfully requests that the court REVERSE the conviction for second degree assault, DENY any appellate costs requested, and remand the cause for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of January, 2017.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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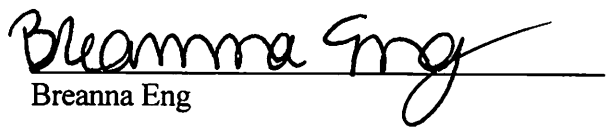
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3rd day of January, 2017 in Walla Walla, Washington.



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