FILED
DECEMBER 1, 2016
Court of Appeals
Division III
State of Washington

34361-8-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ISRAEL SANCHEZ-FABIAN,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
SHAWN P. SANT
Prosecuting Attorney

Teresa Chen

by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

Franklin County Prosecuting Attorney's Office
1016 North 4th Avenue
Pasco, WA 99301
(509) 545-3543

TABLE OF CONTENTS

Page No.

I. **IDENTITY OF RESPONDENT** 1

II. **RESPONDENT'S ASSIGNMENT OF ERROR** 1

III. **RELIEF REQUESTED** 1

IV. **ISSUES** 1

V. **STATEMENT OF THE CASE** 2

VI. **ARGUMENT** 5

A. Sufficient Evidence Supports the Conviction 5

B. This Court Should Impose Appellate Costs On The Defendant If The State Substantially Prevails On Appeal 11

VII. **CONCLUSION** 18

TABLE OF AUTHORITIES

State Cases

Page No.

Salas v. Hi-Tech Erectors,
168 Wn.2d 664, 230 P.3d 583 (2010) 13

State v. Ashcraft,
71 Wn.App. 444, 859 P.2d 60 (1993) 7

State v. Blazina,
182 Wn.2d 827, 344 P.3d 680 (2015) 16

State v. Gatlin,
158 Wn. App. 126, 241 P.3d 443 (2010) 10

State v. Hovig,
149 Wn.App. 1, 202 P.3d 318 7

State v. Malone,
193 Wn. App. 762, 376 P.3d 443 (2016) 14

State v. McKague,
159 Wn. App. 489, 246 P.3d 558 (2011) 9

State v. McKague,
172 Wn.2d 802, 262 P.3d 1225 (2011) 6, 10

State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992) 5

State v. Thomas,
150 Wn.2d 821, 83 P.3d 970 (2004) 5

State v. Weber,
137 Wn. App. 852, 155 P.3d 947 (2007) 6, 7, 9, 15

United States Supreme Court Case

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 5

Statutes and Rules

Page No.

RAP 2.4 1
RAP 14.1 15
RAP 14.2 16
RCW 9.94A.507 13
RCW 9.94A.510 13
RCW 9.94A.515 13
RCW 9.94A.525 13
RCW 9.94A.729 13
RCW 9.94A.729 13
RCW 9A.04.110 ..... 6, 7, 9
RCW 9A.36.021 ..... 2, 6
RCW 10.01.160 16
RCW 10.01.160 18
RCW 10.73.160 16
RCW 10.82.090 ..... 14n, 17
RCW 72.09.111 14
RCW 72.11.020 14
WPIC 2.03 6

Secondary Authorities

ABA Standards for Criminal Justice: Prosecution and Defense Function, 3d ed. 2.03 (1993) 16-17

Merriam-Webster Dictionary, www.merriam-webster.com 10n

I. IDENTITY OF RESPONDENT

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

II. RESPONDENT'S ASSIGNMENT OF ERROR

The State respectfully asks the court to consider the following error pursuant to RAP 2.4(a): the sentencing court abused its discretion in finding the Defendant lacked an ability to pay based on the incorrect presumption that he was serving a life sentence.

III. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant. Costs should be imposed against the Appellant should the State substantially prevail on appeal.

IV. ISSUES

1. Whether sufficient evidence supports the conviction?
2. Whether the court should waive all appellate costs without regard for the Defendant's apparent ability to pay upon release from confinement and without regard for the ABA standard concerning improper inducements to appeal?

V. STATEMENT OF THE CASE

The Defendant Israel Sanchez-Fabian has been convicted by jury of assault in the second degree under RCW 9A.36.021(1)(a). CP 8, 23, 34 (substantial bodily harm).

On August 10, 2015, video captured the Defendant's assault of his cellmate Ignacio Cobos at the Coyote Ridge Corrections Center. RP 31, 33-34, 68-69. The video was admitted into evidence and provided to this Court by supplemental designation. RP 51, 66, 73; PE 1. Counselor Douglas LeFebre witnessed the assault. RP 43-44, 57. The Defendant hit Mr. Cobos with closed fist punches, knocking him to the ground and refusing to obey the counselor's orders to desist until the prison staff took the Defendant to the ground. RP 44, 52-56. Mr. Cobos never struck the Defendant. RP 45, 55.

Correctional Officer (CO) Kristin King witnessed the Defendant on top of Mr. Cobos, striking him and having to be pulled off him. RP 62-63. She photographed the blood spatter and tuft of hair. RP 65-67. The Defendant was uninjured, however, Mr. Cobos was "very marked up." RP 67.

Nurse Jeffrey Nelson treated Mr. Cobos. RP 70. Mr. Cobos had multiple bruises, swelling, facial lacerations to the forehead and

brow, and a deviated septum. RP 71-72. An X-ray confirmed the nose was broken, the wall between nostrils displaced to one side. RP 71-72, 75. Mr. Cobos' nose was bleeding at the bridge and visibly repositioned or deviated to the right. RP 74. He was confused and in shock. RP 74.

Mr. Cobos was transported from prison to testify and, understandably, unwilling to acknowledge any memory of the event or even the name of his cellmate. RP 76-78. However, he did admit suffering rib pain for several months afterward. RP 77-78. He would hurt when he moved and when he slept. RP 78. He testified that since the incident and still continuing more than seven months later, he was still being in isolation. RP 80-81. He acknowledged there was no other reason for him to be in isolation, other than for his own protection. RP 81.

The Defendant testified, admitting that he had struck Mr. Cobos. RP 91. He did not get along with his cellmate, who demanded that he keep a cleaner cell, and the Defendant wanted to change rooms. RP 94. However, when the Defendant asked to change rooms, he claimed he was advised that the only available room was isolation or "the hole." RP 95, 100, 102-03. "I didn't want

to hit him, but he made me get mad with the things he did to me. I wanted to resolve the things the right way." RP 94.

Investigator Jeff Kinne discredited this claim. Contrary to the Defendant's representation, if an inmate requested to move to another cell, he would not be moved to isolation. RP 110-11. He would fill out a request form and wait for an open bunk to become available. RP 110-11. "[H]e may not have gotten [it] that day," but in a prison the size of Coyote Ridge, those moves do occur every day. RP 111.

Investigator Kinne discredited the Defendant's claim that Mr. Cobos was a member of La FUMAs. RP 91, 105. Ignacio Cobos is affiliated or friends with, but not documented as a member of, the Paisas. RP 105, 108, 114. The investigator testified that based on his training and experience, the Defendant's claim that Mr. Cobos was acting on behalf of La FUMAs was not likely. RP 109. Mr. Cobos is a more mature inmate, in his fifties, known as "the lawyer" and is a peace keeper among the groups. RP 108-09. He is "not a violent individual in prison," not known "to push STG [security threat group aka prison gang] politics or to force anybody to do anything that they wouldn't want to do." RP 106, 109. His skill is in helping other

inmates file appeals. RP 110. He does not have to resort to violence or threats. RP 110.

VI. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION.

The standard of review: "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

The Defendant is convicted under RCW 9A.36.021(1)(a), the prong which defines assault in the second degree as when a person "intentionally assaults another and thereby recklessly inflicts substantial bodily harm." He challenges the sufficiency of the evidence for the element of "substantial bodily injury." Appellant's Brief at 5.

The jury was instructed:

> Substantial bodily harm means bodily harm that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

CP 35 (referencing WPIC 2.03). The jury instruction quotes RCW 9A.04.110(4)(b). "Substantial" means "a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence," harm that is "considerable in amount, value, or worth." *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225, 1227 (2011).

This Court has found that an inmate's attack on his cellie resulting in abrasions, bruising, scratches, and a ***broken nose*** will justify a conviction for assault in the second degree. *State v. Weber*, 137 Wn. App. 852, 855-56, 861-62, 155 P.3d 947 (2007), *review*

denied, 163 Wn.2d 1001, 180 P.3d 783 (2008), *habeas corpus denied*, 2010 WL 1849010 (E.D. Wash. 2010). A fracture of any bodily part, such as a broken nose, "fits squarely within the definition of 'substantial bodily harm'" in RCW 9A.04.110(4)(b). *State v. Weber*, 137 Wn. App. at 861-62.

In fact, bruising alone has sometimes been found sufficient. A bite-mark bruise to the cheek was found to constitute "substantial disfigurement" in *State v. Hovig,* 149 Wn.App. 1, 5, 12-13, 202 P.3d 318, *review denied,* 166 Wn.2d 1020, 217 P.3d 335 (2009). There the bruising to an infant's cheek was photographed only hours after the bite and a doctor testified it would have lasted from seven to 14 days. *Id.* Three day old bruises consistent with being hit by a shoe with a rigid sole were found to be "temporary but substantial disfigurement" in *State v. Ashcraft,* 71 Wn.App. 444, 449, 455, 859 P.2d 60 (1993).

Here Mr. Cobos' nose was broken and repositioned. This constitutes a fractured body part, a substantial disfigurement. He testified that he suffered months of rib pain such that he hurt whenever he moved and even when he slept. RP 77-78. The duration and intensity of the pain suggests his ribs were also broken.

The months of pain every time he moved or lay down constitutes "substantial loss or impairment of the function of any bodily part."

The Defendant argues that a nurse does not diagnose. Appellant's Brief at 5. Although for purposes of a medical chart, a nurse does not make the *official* diagnosis (RP 75), this does not mean that Nurse Nelson lacks the capacity or knowledge to identify a broken nose. Nor does it mean that he lacks personal knowledge of Doctor Rendleman's diagnosis so as to testify. He did so testify. RP 71. His testimony was before the jury and is part of the record.

The Defendant claims that the evidence is only that "the nurse suspected" a broken nose. Appellant's Brief at 5. This is not the testimony. Nor does the challenge respect the legal standard: drawing all reasonable inferences from the evidence in the State's favor and interpreting those inferences most strongly against the Defendant.

The nurse testified that he treated Mr. Cobos for "multiple bruises, swelling, lacerations, scratches around the face and the appearance of a deviated septum." RP 71, ll. 12-14. Then nurse the "[g]ot an order from Doctor Rendleman to verify that." RP 71, ll. 14-15. This testimony was repeated at the request of the interpreter.

> He had multiple bruises, swelling, scratches, lacerations to his face, forehead, brows. The appearance of a broken nose or deviated septum. ***We got him x-rayed to confirm that***.

RP 71-72 (emphasis added). The jury viewed the video[1] of the medical exam. RP 73. In viewing the video, it is apparent to the naked eye that the nose was actually repositioned to the right. RP 75, ll. 1-4.

The Defendant claims it is unclear whether a broken nose "meets the definition of a fracture." Appellant's Brief at 5. It is not unclear. The medical witness testified the nose was "broken." A fracture is a "break" of hard or soft tissue.[2]

A fracture of any bodily part, such as a broken nose, plainly satisfies RCW 9A.04.110(4)(b). *State v. Weber*, 137 Wn. App. at 861-62 (a fractured nose "fits squarely within the definition of 'substantial bodily harm'").

The courts have upheld a conviction for substantial bodily harm on less evidence than broken or torn tissue.

"Disorientation without loss of consciousness" is sufficient evidence of substantial bodily harm. *State v. McKague*, 159 Wn. App.

---

[1] This video has been provided by the State's supplemental designation.
[2] Merriam-Webster Dictionary, www.merriam-webster.com/dictionary/fracture.

489, 503, 246 P.3d 558 (2011), *aff'd but criticized,* 172 Wn.2d 802, 262 P.3d 1225 (2011) (satisfied with injuries described as an extremely puffy and bruised face, a bump on the back of the head, and the appearance that the victim had been "affected by" the blows).

Like the victim in *McKague*, Mr. Cobos was bruised, bloodied, ***confused***, and ***in shock***. RP 75. Although a broken nose is extremely painful, he made no complaint, apparently in shock. RP 75. This suggests a concussion. The nurse testified that the bleeding at the bridge of his nose indicated interior damage. RP 75, ll. 4-6.

Facial bruising alone has been found to be sufficient evidence of substantial bodily harm. *State v. Gatlin*, 158 Wn. App. 126, 132-33, 241 P.3d 443, 447 (2010) *reconsideration denied* (2010), *review denied* 171 Wn.2d 1020, 253 P.3d 393 (2011). Mr. Cobos had facial bruising and bleeding on the bridge of his nose indicating interior damage.

There is no question the conviction is supported by sufficient evidence of substantial bodily injury. The conviction must be affirmed.

B. THIS COURT SHOULD IMPOSE APPELLATE COSTS ON THE DEFENDANT IF THE STATE SUBSTANTIALLY

PREVAILS ON APPEAL.

The State objects to the Defendant's request to waive costs. He asks this Court not to impose costs for the reason that he has neither assets nor income. Of course, he is *currently* indigent. He is incarcerated. Indigency due to his incarceration does not speak to the Defendant's ability to pay ***once he is released from custody***.

The significant (although not determinative) factor is <u>not</u> whether an incarcerated criminal appellant is *currently* indigent, but whether he is *chronically* indigent, and, if so, what causes that condition. Chronic indigency due to disability (whether physical, mental, or developmental) or even addiction is different from chronic indigency due to criminal activity and contumacious refusal to seek employment.

In this case, the Defendant has not been chronically indigent. He is only currently incarcerated, serving sentences in this case as well as for another case resulting in convictions on two counts of Rape of a Child in the First Degree. CP 10.

Both incarceration and legal financial obligations are the lawful penalties for criminal convictions. It makes no sense then to claim costs may not be imposed ***due to incarceration***.

At sentencing, the court's finding of inability to pay is clearly erroneous. It is premised on an incorrect presumption that the Defendant was serving a life sentence.

> THE COURT: All right. How long are you in on your King County matters, the rape of a child in first degree?
> THE DEFENDANT: I still have a lot more to go, and the time you want to give me here will increment the punishment over there, but it doesn't matter.
> THE COURT: I understand that. You probably received life with a mandatory minimum, correct?
> THE DEFENDANT: Yes. It seems like it, but I do not recall.
> THE COURT: You don't recall what the mandatory minimums were?
> THE DEFENDANT: I do not recall.
> THE COURT: All right. Is the State asking for any kind of restitution?
> MR. CHOW: We'll note that up if the Department requests it.
> THE COURT: Okay. All right, I cannot find – in light of a life imprisonment or life sentence that he's facing out of King County I cannot find that he has the present or future ability to pay legal financial obligations.

CP 163-64.

No evidence supports the court's presumption that the Defendant is serving a life sentence. He only told the court that he had more time to serve. The Defendant's only apparent history is a single case (CP 10) for which he would have received an indeterminate sentence, which is not necessarily or even frequently

an effectual life sentence. RCW 9.94A.507. The Defendant's standard range in that case would have been 120-160 months to life. RCW 9.94A.510; RCW 9.94A.515 (seriousness level of XII); RCW 9.94A.525 (17) (offender score of three). If he received 120 months, he could be released on that 2014 sentence after as few as 108 months. RCW 9.94A.729 (3)(c) (earned early release of 10%).

In the instant case, he can be released on this sentence after as few as 13 months. RCW 9.94A.729 (3)(e) (earned early release of 33% on a 20 month sentence).

In other words, the Defendant may be released after 121 months, i.e. **10 years**. He was sentenced on the child rape charges in 2014 when he was 30 years old. That means he could be 40-41 years old upon his release in both cases.

A court abuses its discretion when its decision is manifestly unreasonable when the decision is based on untenable grounds because it applies the wrong legal standard or relies on unsupported facts. *Salas v. Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). The sentencing court made a manifest error here in finding that purely as a result of his sentences he would not have the ability to pay. Neither the factual record nor a legal analysis of the

factual record supports an interpretation of a life sentence.

Moreover, the court's reasoning violated equal protections by treating inmates differently for purposes of DOC deductions based on the length of their sentence. The law requires the Department of Corrections take reasonable deductions from inmate wages. RCW 72.09.111; RCW 72.11.020. If inmates serving life sentences are exempt from such deductions, they are privileged over other inmates, having potentially unlimited access to commissary, placing them in power positions over short timers.

Because the sentencing court erroneously struck the mandatory criminal filing fee, the only LFO's imposed on this case so far are a mere $600. CP 12; RP 164; *State v. Malone*, 193 Wn. App. 762, 764, 376 P.3d 443, 445 (2016) ($200 criminal filing fee is mandatory). In the Defendant's Report as to Continued Indigency, the total debt he claims in all cases is a bare $1100 in LFO's.[3]

The Defendant's Report indicates he is entirely capable of paying LFO's. He admits he is not chronically indigent. Prior to his

---

[3] Although the Defendant has not raised the specter of interest, it is worthwhile to note that in practice, neither the King County Clerk nor the Franklin County Clerk collect interest on LFO's. Under RCW 10.82.090, at the motion of the clerks, courts regularly waive interest upon collection of the principal and even earlier in order to incentivize payment.

arrest, he says he maintained employment in food preparation at the same place for 42 months. There he was working 70 hours a week at $11.25 an hour. If he was employed year round, and food preparation is not generally seasonal employment, he was making an annual income of approximately $39,000. Based on his employment and history and his youth, the Defendant will be able to pay LFO's upon his release.

The Defendant avers that his appeal "is prosecuted in good faith." Appellant's Brief at 6. In light of the standard of review and this Court's decision in *State v. Weber*, 137 Wn. App. 852, 155 P.3d 947 (2007), this does not seem possible. The Defendant makes this appeal only because he believes he may indulge in expenditure of public resources without risk.

Criminal defendants are and will be motivated to file frivolous appeals at great expense to the public when there is neither cost nor risk of cost to them. Accordingly, the rules of appellate procedure discourage frivolous appeals by presuming costs will be paid to the substantially prevailing party. RAP 14.1(c) ("In all other circumstances, a commissioner or clerk determines and awards costs by ruling as provided in rule 14.6(a)"); RAP 14.2 (court "will" award

costs to substantially prevailing party). RCW 10.73.160 is the relevant statute. Unlike RCW 10.01.160 which was construed in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), RCW 10.73.160 does not require an appellate court to consider financial resources and the nature of the burden before imposing costs.

In this case and in all challenges to costs premised on a criminal defendant's ability to pay, this Court should consider the ABA Criminal Justice Standard 21-2.3.[4] *ABA Standards for Criminal Justice: Prosecution and Defense Function*, 3d ed. (1993). These black letter standards explain that the criminal justice system unacceptably induces an appeal when there is no risk of costs for frivolous appeals.

> **Standard 21-2.3. Unacceptable inducements and deterrents to taking appeals**
>
> (a) Administration of a system of elective appeals presupposes that the parties with the right to appeal will choose to do so only when they, with advice of counsel, have identified grounds on which substantial argument can be made for favorable action by the appellate court. The system should not contain factors that induce or deter appeals for other reasons.
>
> (b) Examples of unacceptable inducements for defendants to appeal are:

[4] Also available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_tocold.html

> (i) absence of any risk that a financial obligation may be imposed on an appellant who pursues a frivolous appeal;
>
> (ii) automatic release from custody, on bail or recognizance, following a sentence to a term of confinement; and
>
> (iii) automatic detention of the appellant who is confined pending appeal in a facility substantially different in quality and regimen from those in which inmates serving sentences are normally held.

In some cases, a nominal imposition of costs may avoid this impropriety. However, in the instant case, if the State substantially prevails, the Court should impose the full appellate costs on the Defendant. Taking into account the Defendant's resources and the nature of the burden of such costs, such imposition is appropriate because:

- upon his release from incarceration, based on his employment history, the Defendant has the ability to earn and to pay;
- the Defendant's only debt is the small debt of $1100 entirely composed of the LFO's in this and one other criminal case;
- the clerks will collect the LFO's under a reasonable and always negotiable payment plan without interest and under RCW 10.82.090; and

- if his circumstances change, the Defendant can always and repeatedly seek remission under RCW 10.01.160(4).

VII. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction and impose costs.

DATED: December 1, 2016.

Respectfully submitted:

SHAWN P. SANT
Prosecuting Attorney

Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

Andrea Burkhart andrea@burkhartandburkhart.com	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 1, 2016, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**