

COURT OF APPEALS  
STATE OF WASHINGTON  
2016 FEB 18 PM 2:40

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

State of Washington  
Respondent,  
  
v.  
  
Douglas Ho,  
Appellant.

CASE NO: 72497-5-1  
  
STATEMENT OF ADDITIONAL GROUNDS  
FOR REVIEW

I, Douglas Ho, have recieved and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in the brief. I understand that the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ISSUES PRESENTED FOR REVIEW

- 1 - Did trial Court erroneously impose legal financial obligations?
- 2 - Did the Prosecutor error during closing arguments resulting in prosecutor misconduct?
- 3 - Has the State failed to provide Appellant with all transcripts, depriving him of the ability to properly prepare for this Appeal?
- 4 - Was defense counsel, during trial, ineffective?
- 5 - Was the State relieved of the burden of proving actual possession of firearm?
- 6 - Did the detective falsify evidence pertaining to miranda warnings?
- 7 - Will this honorable Court reverse the restraining order with codefendant?

### ADDITIONAL GROUND 1

During sentencing, trial court failed to consider the defendant's ability to pay the legal financial obligations imposed. RCW 10.01.160(3) provides that "The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take an account of the financial resources of the defendant and the nature of the burden that payment of costs will impose". Further, RCW 9.94A.142(1) provides "The court should take into consideration the total amount of restitution owed, the offender's past, present and future ability to pay, as well as any assets the offender may have".

During trial it was determined that the defendant/appellant is indigent as defined under General Rule 34. His status as indigent under this Washington Court Rule definition has not changed, nor will it change because he is currently serving a 53 year prison sentence. Trial court never held a hearing to make any determinations on the defendant's ability to pay, nor the impact that these financial obligations have had on him and his family. It is causing a manifest hardship on the appellant and his family to have these financial obligations.

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) held that an appellant may raise this issue for the first time on appeal. The Appellant respectfully requests that this honorable Court wholly vacate all Legal Financial Obligations imposed as trial court did not take the appropriate measures in the imposition of the fines. Or, in the alternative, remand appellant to trial court for hearing wherein the appropriate considerations are made before the imposition of these Legal Financial Obligations.

## ADDITIONAL GROUND 2

During closing argument the prosecutor was relieved of the burden of proving the case beyond a reasonable doubt, while making several claims that were err because they served to impassion prejudice toward the defendant. Also, the prosecutor used the closing argument as an opportunity to act as a "witness" and "testify" facts that were not presented during trial.

There were several statements made by the prosecutor, during closing argument, that were clear misconduct. First, is on Pg. 36 of VRP (closing arguments section) where the prosecutor states: "Are you convinced beyond a reasonable doubt? You don't need to be to find the defendants guilty of the crimes charged in this case". This flagrant misconduct by the prosecutor undermines the whole point of having a jury trial, and the due process guarentees ensured by the United States Constitution, which are mirrored by the Washington State Constitution. It is the prosecutors duty to prove every element of the case beyond a reasonable doubt. (emphasis added) For the prosecutor to instruct the jury otherwise is outrageous, and is clear grounds for a mistrial. The fact that the prosecutor used the prestige of their quasi-judicial position to instruct the jury that they do not have to prove guilt beyond a reasonable doubt is reason alone for this honorable Court to vacate these convictions, and remand for a new trial. Although, this was not the sole mistatement of fact made by the prosecutor. They went on to make statements such as:

Pg. 15 "It is clear...they are all guilty."

Pg. 35 "you can be satisfied beyond a reasonable doubt that the defendant's are guilty."

Pg 37 "And there is beyond a reasonable doubt evidence of what their intent was"

Pg. 41 "And all those things...beyond a reasonable doubt."

Here, it is evident that the prosecutor was well aware of the duty to prove

every element of the case beyond a reasonable doubt. Despite this fact, she made the agrievous statement to the jury that the case need not be proven beyond a doubt. This is clear evidence that the defendants may have been convicted by a preponderance of evidence, or maybe even less than that. The prosecutor made the standard to convict less than what the Constitutional protections guarentee the defendants, which is a clear reversable error.

Although the prosecutor used majority of closing argument to present "facts" as if she was a witness, there were a couple times when she added statements that should not have been permitted without her taking the stand, and testifying as a witness. On Pg. 12, she says "They chased them down to finish what they started." On Pg. 32 "Their intent was to hurt or kill these guys." and Pg. 39 "There intent was to seriously injure these three men. If not worse."

All of these flagrant, ill-intentioned remarks made by the prosecutor are statements that should not be allowed without taking the witness stand. And if the prosecutor was a witness to this case, they have no right to prosecute this case. However, the prosecutor was not a witness. Therefore the remarks made where she states as a "fact"; what the "intent" of the defendants was is misconduct.

Finally, the prosecutor suggested that it had special knowledge of evidence not presented to the jury, when she attempted to imply a guarentee of truthfulness in expressing her personal opinion of credibility, when she stated: "We only know for certian two of the individuals that were shooting that night. That was Mr. Contreas and Mr. Ho." When the prosecutor states "we know" she suggests that she, as a member of the jury, has knowledge of facts that had not been proven beyond a reasonable doubt. This further relieved the State of their

burden to prove this case beyond a reasonable doubt. On the whole, when all these flagrant ill-intentioned remarks made by the prosecutor are considered, it is clear that the prosecutor stepped outside her role as a prosecutor, and that these statements are clear misconduct, which resulted in prejudice to the defendants, which was not harmless because no curative instructions were given. Nor can it be said that if they were, the damage had not already been done. The jury did not believe that the prosecutor had to prove the case beyond a reasonable doubt, and these convictions are unconstitutional.

Suggested remedy: reverse convictions and remand to a new trial wherein the jury has the clear understanding that the prosecutor has the duty to prove every element of the case beyond a reasonable doubt before the defendant can be found guilty of any alleged crimes.

### ADDITIONAL GROUND 3

Appellant was not provided with all the transcripts on record for this case. This has forced the appellant to prepare for this appeal without the evidence he needs to study this case and ensure that he was granted a fair trial. Although there is clear evidence that he was not given a fair trial in the Brief of the Appellant and these Additional Grounds, the appellant feels that there is more proof in the transcripts that he was never provided with. He has no record of the jury instructions, either on the Verbatim Transcripts nor actual copies of the instructions given to the jury. The verbatim transcripts are missing sections. He was not provided with any of the pretrial transcripts, or motions filed by counsel.

Suggested remedy: Appellant respectfully requests that this Court Order either Appellate counsel, or the trial Court to provide ALL records, transcripts and evidence; including everything on record pertaining to this case, to be copied and those copies sent to the Appellant.

#### ADDITIONAL GROUND 4

Defense counsel, during trial, was ineffective. He failed to prepare any defense to the allegations made against the defendant. Also, he failed to interview the people who would be taking the witness stand before trial had begun. Instead, he chose to make the cross-examination ~~be~~ the interview and the examination into the merits of their claims. If defense counsel had made the required preparations he may have been able to impeach the witnesses. Especially, the detective who conducted the interviews with the defendants once the charges were made. Had defense counsel been prepared, he could have proven that the detective who held these interviews did not give miranda warnings, and therefore any testimony he made pertaining to those interviews should have been thrown out in limeline.

Also, defense counsel was not prepared to make an effective defense against the gang agrivators attached to the charges. This is significant because the gang aggrivators have the potential to greatly enhance the sentence.

Inthis case, the defense counsel's performance was clearly deficient, and the deficiency prejudice the defendant, meeting the standards required under Strickland v. Washington for ineffective assistance of counsel. This deprived the defendant of his due process right to effective assistance of counsel. The suggested remedy is to wholly vacate convictions, and remand for new trial wherein the defendant is provided with defense counsel who will do his/her due diligence in preparing and exocuting defense expectations guarenteed under the United States Constitution which are mirrored by Washington State Constitution. U.S.C.A Const. amend 5 and Wash. Const. art I § 9.

### ADDITIONAL GROUND 5

The State was relieved of the burden of proving that Mr. Ho ever had possession of a firearm. During trial the State's only evidence pertaining to the possibility of Mr. Ho having possession of a firearm was a gun clip that they found in the trunk of a car. They never produced, or tested, a firearm that Mr. Ho was alleged to have possessed. Therefore, none of the firearm protocol taken to prove that there was an actual firearm as defined by the RCW "a device that may fire a projectile, fired by an explosive such as gun powder. Also, the State never proved actual possession, nor was there any nexus between Mr. Ho and the alleged firearm.

In a recent ruling made by this honorable Court, State v. Chouinard, 169 Wn.App. 895, 282 P.3d 117 (2012), it was found that the State has to prove actual possession of the firearm in order to achieve a conviction. The State must also prove that there was a firearm by producing it into evidence and tested to ensure that it is, in fact, a firearm.

State v. David, \_\_\_\_\_ Wn.App.849, 315 P.3d 1105 (2013) held that "To determine whether a defendant had constructive possession of a firearm, courts must examine the totality of the circumstances touching on dominion and control. RCW 9A.41.040(1)(a)-(2)(a) and RCW 9A.56.310(1). In this case the State was relieved of the burden of proving this factor beyond a reasonable doubt. Further, they must have a separate special verdict form finding pertaining to the sentencing enhancement, which should be found by all 12 jurors beyond a reasonable doubt.

In this case, not only was the State's evidence deficient, it was totally relieved of the burden of proving these factors beyond a reasonable doubt because the prosecutor instructed the jurors that they "don't need to be convinced beyond a reasonable doubt to convict the defendants in this case".

Suggested remedy: vacate all convictions pertaining to the firearms, and remand for new trial wherein the State must prove actual possession of the firearm, after the firearm is tested, then admitted into evidence through the appropriate measures required by Washington State Court Rules. Or, in the alternative, remand for an evidentiary hearing where the alleged firearm is tested and admitted into evidence, then the State proves a nexus between Mr. Ho and this alleged firearm.

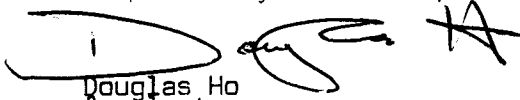
**ADDITIONAL GROUND 6**

The appellant respectfully requests that this Court reverse the restraining order between Mr. Ho and Mr. Contreras. This restraining order no longer has any merit. It was issued as a means to keep them separate before trial. Now that trial is over, there is no need for it. The defendants in this case pose no threat to one another, and would prefer to be allowed to reside at the same prison facilities. This restraining order has barred them from being allowed at the same facilities, and has some prejudicial effect because of the stigma surrounding "keep-seperate" orders within the prison system. Also, as they are co-defendants, being allowed at the same facility may help them in their appeal process as they may be able to study this case in the law library together. This could help in the pursuit of justice.

**CONCLUSION**

It is for the afore stated reasons, but not limited to, that the appellant respectfully requests that this honorable Court grant all of the suggested remedies pertaining to these additional grounds as there have been violations to the appellants Constitutionally guarenteed protections.

Respectfully submitted,



Douglas Ho  
Appellant

01/30/2016



DECLARATION OF SERVICE BY MAIL  
GR 3.1(e)

I, Douglas Ho, declare that, on  
this 10 day of February, 2016. I deposited the forgoing documents:

Statement of Additional Grounds  
RAP 10.10

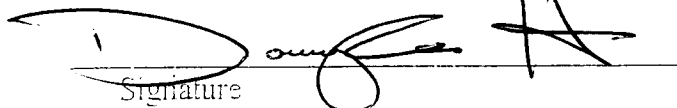
or a copy thereof, in the internal legal mail system of  
Clallam Bay Correctional Center  
1830 Eagle Crest Way  
Clallam Bay, WA. 98326

And made arrangements for postage, addressed to: (name & address of court or other party.)

Washington State Court of Appeals Division I  
One Union Square  
600 University Street  
Seattle, WA. 98101-4170

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

Dated at Clallam Bay, WA. on February 1<sup>st</sup>, 2016  
(City & State) (Date)

  
Signature

Douglas Ho  
Type / Print Name