

original

FILED
COURT OF APPEALS

08/27/15 11:35

STATE OF WASHINGTON

BY *[Signature]*
COURT CLERK

Nº. 33278-7-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

CARL EDWARD JIVES, JR.,
Appellant.

SUPPLEMENTAL REPLY BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 02-1-01515-0
The Honorable D. Gary Steiner, Presiding Judge

Reed Speir
WSBA No. 36270
Law Offices of Reed Speir
Attorney for Appellant
3800 Bridgeport Way W, Ste. A #23
University Place, Washington 98466
(253) 722-9767

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF	2

I. INTRODUCTION

On March 10, 2006, a hearing was held in Superior Court to enter the Findings of Fact and Conclusions of law in Mr. Jives' case. RP 1-5, 3-10-2006.¹ Counsel for Appellant Jives objected to entry of the Findings of Fact on two grounds: first, a motion was pending before the Supreme Court regarding whether or not the State had failed to follow the proper procedure as set for in the Rules of Appellate Procedures for supplementing the record, and second, that the Findings of Fact proposed by the State had been tailored to meet issues raised in Mr. Jives' appeal. RP 2-5, 3-10-2006. At the hearing the prosecutor demanded that counsel for Mr. Jives "indicate what he is relying on" with regards to the "allegation" that the Findings of Fact had been tailored to address issues raised on appeal." Counsel for Mr. Jives responded,

Let me review the findings briefly, Your Honor. One moment. I actually withdraw the allegation, Your Honor. I was basing that on the presumption that, as with most other appeals I handle, the Findings of Fact entered by the State would indeed have some sort of statements reflecting that certain witnesses were or were not credible. From my brief review of the Findings of Fact, appears they did not include such Findings. Had those been present, they would be tailored since the appeal is largely centered around issues of credibility. With the understanding those are not present in the Findings of Fact, I withdraw the objection that they were tailored.

¹ This portion of the transcript was not numbered consecutive to the rest. Reference will be made by giving the page number followed by the date of the hearing.

RP 4-5, 3-10-06.

II. REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF

In its Supplemental Brief, the State apparently argues that, by counsel's withdrawal of his objection to the trial court entering the Findings on grounds that they were tailored, appellate counsel for Mr. Jives has abandoned the argument raised on appeal that the Findings of Fact entered by the trial court were tailored to address issues raised in Mr. Jives' appeal.

The State also alleges that counsel for Mr. Jives has "not provided this court with any factual basis in support of the claim [that the Findings were tailored] or any basis to establish prejudice to the Appellant, let alone actual prejudice." Supplemental Brief of Respondent, p. 3.

The State also alleges that appellate counsel for Mr. Jives "never took the time to read the State's Proposed Findings until being requested in the presentment hearing to support the claim that the findings and conclusions were tailored to address issues in their opening brief" and "chose to make a blanket assertion not supported in fact." Supplemental Brief of Respondent, p. 2-3.

Appellate counsel submits this Reply.

a. Objections made and withdrawn at trial are separate from argument raised on appeal

The proceedings on March 10, 2003, were technically a part of Mr. Jives' original trial. In granting the State's Motion to Remand to Settle the

Record, the Court of Appeals had remanded Mr. Jives' appeal back to the Superior Court for entry of the Findings of Fact. Any objections made or withdrawn at the Superior Court level are not part of the argument raised by an appellant on review.

b. Counsel for Mr. Jives withdrew his objection to entry of the Findings by the trial court, not his objection that Mr. Jives was prejudiced by the entry of the Findings

Mr. Jives raised the objection that the Findings entered by the trial court would be tailored to meet issues raised on appeal several times in his appeal. *See* Opening Brief of Appellant, p. 28-29, Supplemental Opening Brief of Appellant, p. 5-7. Mr. Jives also raised the argument in the trial court that the trial court should decline to enter the Findings of Fact proposed by the State because the Findings had been tailored to address issues raised in Mr. Jives' appeal. *See* Motion in Opposition to Entry of Findings of Fact and Conclusions of Law, attached to Appellant's Motion to Modify Commissioner's Ruling.

While these arguments appear similar, there are actually two distinct objections. The objection at the trial court level was that the trial court should decline to enter the Findings because they had been tailored. The argument on appeal is that Mr. Jives was prejudiced by the late entry of the Findings because the Findings had been tailored. When counsel for Mr. Jives withdrew his objection in the trial court, he withdrew the objection to the trial court entering the Findings in the record. This had no

effect on the argument on appeal that Mr. Jives was prejudiced by the over two-year late entry of the Findings.

- c. *The State's assertion that counsel for Mr. Jives has "not provided this court with any factual basis in support of the claim that the Findings were tailored or any basis to establish prejudice to the Appellant, let alone actual prejudice is not supported by the record*

One of the main arguments raised by Mr. Jives in his appeal is that there was insufficient evidence to convict him because the only evidence which supports the claim that Mr. Jives shot Mr. Blue is the testimony of one witness, Mr. McGahee, and that Mr. McGahee is not a credible witness since his testimony is contradicted by both the testimony of the State's own witnesses as well as by the physical evidence. Opening Brief of Appellant p. 23-27.

Because Mr. McGahee was the only source of evidence which would establish that Mr. Jives shot Mr. Blue, and because Mr. Jives' appeal is largely based on the assertion that Mr. McGahee is not a credible witness, any Finding of Fact entered by the trial court which agrees with Mr. McGahee's version of the events necessarily is also an implicit finding that Mr. McGahee was a credible witness. By definition, this means that the Findings of Fact entered by the trial court which upheld Mr. McGahee's version of the events are also Findings of Fact which were

tailored to meet issues raised by Mr. Jives on appeal, specifically, the credibility of Mr. McGahee.

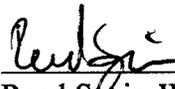
With regards to the prejudice suffered by Mr. Jives, appellate counsel would direct this Court's attention to section 1 of the Supplemental Opening Brief of Appellant.

d. The State's assertion that appellate counsel for Mr. Jives "never took the time to read the State's proposed findings" is not supported by the record

Appellate counsel for Mr. Jives received and reviewed the proposed Findings given to him at the December 9, 2005 hearing. Counsel's request to review the proposed Findings before answering the prosecutor's demand that counsel for Mr. Jives state the basis for his assertion that the findings had been tailored at the March 10, 2006 hearing was due not to appellate counsel's failure to review the proposed findings, but rather appellate counsel's desire to determine whether or not the State had altered the proposed findings between December 9, 2005 and March 10, 2006.

DATED this 14th day of July, 2006.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

FILED
COURT OF APPEALS

05 JUL 14 AM 11:35

STATE OF WASHINGTON

BY CM

CERTIFICATE OF SERVICE

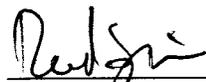
Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14th day of July, 2006, I delivered a true and correct copy of the Supplemental Opening Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Carl Jives, DOC# 948205
Monroe Correctional Complex
P.O. Box 777
Monroe, WA. 98272

And, I mailed a true and correct copy of the Supplemental Opening Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 15th day of May, 2006.



Reed Speir, WSBA #36270