

No. 35962-6-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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KOTELSON  
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STATE OF WASHINGTON,

Respondent,

vs.

ADRIAN CONTRERAS REBOLLAR,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 06-1-01643-4  
The Honorable Ronald Culpepper, Judge

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OPENING BRIEF OF APPELLANT

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STEPHANIE C. CUNNINGHAM  
Attorney for Appellant  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

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## **I. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred when it denied Adrian Contreras Rebollar's motion for a mistrial.
2. Adrian Contreras Rebollar was denied his right to a fair trial and effective assistance of counsel when the trial court denied his motion for a mistrial.
3. In convicting Adrian Contreras Rebollar of first degree assault, the State failed to present sufficient evidence to prove beyond a reasonable doubt that he was not acting in self-defense.
4. The trial court erred when it sentenced Adrian Contreras Rebollar based on criminal history and an offender score that was neither agreed upon by Appellant nor proven by the State.

### **B. Issues Pertaining to the Assignments of Error**

1. Where a State's witness told the jury that a defense attorney instructed her to lie on the stand, did the trial court abuse its discretion when it denied Adrian Contreras Rebollar's motion for a mistrial? (Assignments of Error 1 & 2)
2. Was Adrian Contreras Rebollar denied his constitutional

right to a fair trial and effective assistance of counsel when he was forced to choose between calling his attorney as a witness to rebut allegations that the defense was encouraging perjury, and allowing the jury to continue to believe that the defense would ask witnesses to lie in order to win acquittal? (Assignments of Error 1 & 2)

3. Did the State present sufficient evidence to prove that Adrian Contereas Rebollar was unjustified in shooting Nicholas Solis and Ahria Kelley, where Appellant testified that he knew Nicholas Solis was armed, that Nicholas Solis had threatened him earlier in the day with a large gun, and that he believed Nicholas Solis was planning to shoot him? (Assignment of Error 3)

4. Did the trial court err when it sentenced Adrian Contreras Rebollar based on the State's offender score calculation, where the State failed to present evidence at sentencing establishing his criminal history or his community custody status? (Assignment of Error 4)

## II. STATEMENT OF THE CASE

### A. Substantive Facts

The charges in this case stem from a shooting in the early morning hours of April 12, 2006. (RP3 120)<sup>1</sup> Adrian Contreras Rebollar (Contreras) fired a gun into a car driven by his friend Nicholas Solis. (RP7 875) Bullets struck Solis and his passenger, Ahria Kelley. (RP4 371-72, 375-76, 415-16; RP5 503) Contreras asserted that he acted in self-defense because he believed Solis was going to shoot him. (RP7 875-76) Descriptions of the events leading up to the incident differ.

On the afternoon of April 11, 2006, Contreras accompanied Soils to his court appearance in Puyallup, and afterwards they parted company. (RP4 403, 406; RP7 840) Solis testified that he simply said goodbye and went to a friend's home to take drugs. (RP4 407) But State's witness Regina Hernandez testified that Solis and Contreras met several times during that afternoon and evening—they were arguing continuously, each accusing the other of taking items or drugs from the other. (RP4 258, 259-60, 261,

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<sup>1</sup> Citations to the trial transcripts contained in volumes numbered 1 through 8 will be to the volume number followed by the page number (RP# ##). Citations to the remaining volumes will be to the date of the proceeding followed by the page number (DATE RP ##).

262-63, 263-64) According to Hernandez, after one meeting Contreras returned to his car, retrieved a gun, and said "This mother fucker is getting on my nerves; I'm going to do him in." (RP4 261)

Hernandez, however, also testified that she smoked crystal methamphetamine and drank 100-proof Everclear alcohol that day. (RP4 232, 242) She testified that she often hallucinates and hears things that are not real when she is "coming down" from taking drugs. (RP4 241) She testified that she was "really high" and "tripping out" that night. (RP4 303)

Contreras testified that they all went to Hernandez's home after Solis' court appearance, and that Hernandez and Solis took drugs. (RP7 841-42) As they were leaving, Hernandez got into Contreras' car and said that Solis was trying to touch her. (RP7 846) Contreras and Hernandez drove away, but Solis followed. (RP7 846-47) Contreras testified that he tried to get away from Solis, but he kept following them. (RP7 848) Contreras eventually parked, and Solis parked behind him. Solis looked mad, and Contreras thought he was upset about Hernandez leaving with Contreras. (RP7 848-49)

According to Contreras, Hernandez got out of his car and

went to talk to Solis. (RP7 850) They argued, and when she returned, Hernandez told Contreras that Solis had tried to hit her with a crowbar. (RP7 850-51)

The three witnesses agree that at some point that night, they all met again in an alley behind a mutual friend's home. (RP4 268, 408; RP7 857) Contreras and Hernandez testified that Solis was angry, and that he pointed a gun at Contreras and threatened him. (RP4 269, 271, 273; RP7 860) Contreras testified that Solis told him "if I ever see you again, I'm going to kill you." (RP7 860) Hernandez testified that Contreras also pulled out a gun and fired at Solis. (RP4 275)

Solis claimed that he does not remember whether he talked to Contreras in the alley, but he does remember that he never pointed a gun at Contreras. (RP4 410, 412) Kelley testified that he did not see a confrontation between Solis and Contreras in the alley. (RP5 492-93)

Contreras and Hernandez left the alley and drove to their friend Yessica Rosas' home. (RP4 276; RP7 865) Rosas let them in and they went to her bedroom to talk. (RP4 279; RP5 558, 565) At some point, Contreras went outside to his car and when he returned he was wearing all black and carrying a gun. (RP5 568,

570-71) He may have also been wearing sun glasses. (RP5 585) Contreras testified that he simply went to his car to get a jacket because he was cold. (RP7 866) He was also still scared because of the incident with Solis in the alley, so he retrieved his gun as well. (RP7 867)

Contreras and Hernandez eventually left Rosas' house and drove away. (RP4 288; RP5 575; RP7 869) At the same time, Solis and Kelley were approaching in Solis' car. (RP4 288, 414) Solis testified that he did not tell Rosas that they were coming. (RP4 415) He testified he was probably going to Rosas' street to park and take drugs. (RP4 415) Sometimes when he parks and takes drugs, he turns off his headlights. (RP4 426) Although Solis testified he does not remember anything that happened, other than seeing sparks from a gun, he was able to remember that he did not turn off his headlights on this occasion. (RP4 415-16, 419)

Hernandez at first testified that Solis' headlights were turned off and only his running lights were turned on, but she later said that she only saw Solis' vehicle after it passed. (RP4 289, 300) Hernandez testified that she heard Contreras say "There those mother fuckers are," then she heard gunshots coming from inside Contreras' car. (RP 289, 290) Hernandez told investigators that

Contreras then said "I just dumped on those fools." (RP4 290)

Kelley testified that he saw Contreras' car parked on the side of the road with its headlights turned off as they approached Rosas' home. (RP5 501, 506) He saw a flash and felt that he had been shot. (RP5 500, 503) He did not see Solis with a gun. (RP5 502) Kelley fled the scene, but eventually went to the hospital for treatment. (RP5 511, 514)

Contreras testified that he saw Solis' car speed up, and saw the headlights turn off. (RP7 871-72) He believed that was a sign that Solis was preparing to commit a drive-by shooting. (RP7 872) He was afraid for his life and the life of Hernandez. (RP7 872) He saw the barrel of Solis' gun rise, and saw a bandana over Solis' face. (RP 875) He believed Solis was going to shoot them. (RP7 873)

Contreras reached for his gun, ducked, and fired towards Solis' car. (RP7 875) He testified he was only trying to protect himself and Hernandez. (RP7 875-76) He did not feel that he had any other alternative because the only way out of the neighborhood was to pass Solis' car. (RP7 879)

When police arrived at the scene, they saw Solis' vehicle stopped in the front yard of a residence near Rosas' home. (RP3

126, 128) The engine was running and the headlights were turned on. (RP3 195, 196) The driver's door window was rolled down. (RP5 665) Solis was still in the vehicle, but was non-responsive. (RP3 188-89, 190) Police found a large rifle tucked under Solis' arm. (RP3 191, 217) The barrel of the rifle pointed forward, towards the dashboard. (RP3 192)

Investigators found broken glass and shell casings in the street nearby, as well as a small bag of suspected methamphetamine. (RP3 130, 131, 140, 207) They found several bullet impacts on the driver's side of the vehicle. (RP5 593, 595, 601) Investigators also noted several bullet strikes on the inside of the front windshield, and bullet fragments on the dashboard below. (RP5 601) The State's forensic specialist opined that the bullets likely traveled from the rear of the vehicle forward. (RP5 601, 625)

Police arrested Contreras later that day at a South Tacoma Motel Six. (RP6 690-91, 699, 704) During a search of his hotel room and car, police found a semi-automatic firearm, black clothing, and a blue bandana. (RP6 692, 708-09, 710, 711-12)

As a result of the shooting, Solis's legs are paralyzed and he lives in a full-time care facility. (RP4 392, 393) Kelley was treated at the hospital for about 12 hours then released, and he suffered no

permanent injuries. (RP5 518, 525)

The issue of whether or not Contreras, Hernandez and Kelly were members of or associated with a gang called the Sureños was much discussed at trial. Hernandez testified that Solis was a member, and that he robbed houses, stole cars, and sold drugs. (RP4 244, 245) Solis testified that he is not a member of the Sureños, he just knows gang members and likes to wear their colors. (RP4 394-95, 412, 422-43) Kelley testified that Solis was a member of the Sureños, but he denied being a member himself. (RP5 470-71) Kelley testified that he likes to wear the gang colors because they are intimidating. (RP5 498)

Hernandez also testified that Sureños wear the colors blue and black, and that they tie a bandana over their faces when they are preparing to commit a drive-by shooting or assault. (RP4 249, 251) Hernandez noted that Solis had a blue bandana tied over his face when he pointed the gun at Contreras in the alley. (RP4 270) Kelley testified that he and Solis were wearing blue bandanas that day. (RP5 497) Investigators also found a blue bandana in the pocket of Solis' coat. (RP4 352-53, 356)

Neither Hernandez nor Kelley knew whether Contreras was a Sureños. (RP4 320; RP5 479) Rosas testified that he is not.

(RP5 552) Contreras also testified that he is not a member of a gang. (RP7 835)

**A. Procedural History**

The State charged Contreras by Information with two counts of first degree assault (RCW 9A.36.011(1)(a)), while armed with a firearm (RCW 9.94A.310/.510), and one count of second degree unlawful possession of a firearm (RCW 9.41.040(2)(a)(i)). (CP 1-2)

Contreras agreed to plead guilty to unlawful possession of a firearm, in order to avoid introduction at trial of his prior felony convictions. (01/17/07 RP 42-52; CP 19-22)

The jury convicted Contreras of both counts of first degree assault, and found that he was armed with a firearm during commission of both crimes. (RP8 1046-47; CP 108-13)

At sentencing, the State asserted that Contreras had one prior juvenile felony conviction, two prior adult felony convictions, and that he was on community custody at the time he committed the present crimes. (02/16/07 RP 6-8) Defense counsel did not object, but Contreras refused to stipulate to his criminal history or offender score. (02/16/07 RP 24; CP 115) The trial court used the State's asserted offender score calculation, and sentenced Contreras to a total of 380 months of confinement. (02/16/07 RP

20; CP 119, 121-22) This appeal follows. (CP 129)

### III. ARGUMENT & AUTHORITIES

**A. The trial court abused its discretion, and denied Contreras his constitutional rights to a fair trial and effective assistance of counsel, when it denied Contreras' motion for a mistrial.**

Before trial, attorney Jay Berneburg joined the case as co-counsel. (01/17/07 RP 3; CP 18) As a State's witness, Hernandez testified that she saw Solis' car coming, and saw that his car headlights were turned off and only the running lights were turned on. (RP4 289) In her statement to police the day after the incident, she said that she did not see the car until after it passed, when she looked backwards and saw the break lights illuminated. (RP4 399) When asked why her description of what she observed had changed, she explained that Berneburg had told her that the headlights were turned off. (RP4 300) She said Berneburg told her to testify that Solis' headlights were turned off. (RP4 305, 306)

Contreras subsequently requested that the court disqualify both attorneys, and that it declare a mistrial. (RP RP6 673-681; CP 29-54) Contreras argued that both attorneys needed to testify and contradict Hernandez's allegations. (RP6 673-681; CP 29-54) The trial court denied the motion and excluded Berneburg from the

courtroom, but allowed Berneburg to testify in the defense case.

(RP6 682, 684, 776)

Before Berneburg testified, the trial court read the jury the following limiting instruction:

Before the testimony of Mr. Berneburg is allowed, the Court advises you that you may consider the testimony regarding Mr. Berneburg's contact with Regina Hernandez only for the purpose of assessing her credibility. You must not consider the testimony for any other purpose.

(RP7 812-13) Berneburg then testified as follows:

When I asked her were the lights on or off, and I didn't specify what lights -- I said, Were the lights on or off? And she said, The little yellow lights on the side where the turn signal is were on. And I said, That would be the running lights?

Yes.

I said, What about the headlights?

She said they were off.

(RP7 815)

During cross examination, the prosecution attempted to show that Berneburg was lying, and that he did in fact plant the idea that the headlights were turned off:

Q So there's no witness in this case, none, at the time that you go over to that jail the night before you give your opening statement, there is no witness, no piece of evidence in this case that says the headlights were off; is that accurate?

A Nothing in the discovery, correct.

Q Nothing anywhere?

A I'm talking about my client, having conversations with my client, but yeah.

(RP7 825) The trial court then stopped the proceedings out of concern that the prosecutor's questions might have been improper.

(RP7 825-26) The prosecutor explained to the court his purpose in asking such questions:

[W]hat's important is what's in his mind when he goes to the jail. That's all I'm asking. The discovery is provided to him. He reads it. He knows the responding officer and all the witnesses in this case say the lights are on. He's trying to convince the witness to say differently. That's the point.

(RP7 827) Cross examination continued, after which Berneburg was excluded from the courtroom. (RP7 831)

Every criminal defendant is entitled to a fair trial by an impartial jury. U.S. CONST. amends. VI, XIV § 1; WASH. CONST. art. I, §§ 3, 21, 22. A defendant is also guaranteed effective assistance of counsel. U.S. CONST. amd. VI; WASH. CONST. art. I, § 22 (amend. x); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995).

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Thompson*, 90 Wn. App. 41, 45, 950 P.2d 977 (1998) (citing *State v. Lewis*, 130 Wn.2d 700, 707, 927

P.2d 235 (1996)). "Mistrial is appropriate only when the defendant has been so prejudiced that nothing short of a new trial will insure that the defendant will be tried fairly." *Thompson*, 90 Wn. App. at 45; *Lewis*, 130 Wn.2d at 707 (citing *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994)).

Hernandez's testimony that Berneburg told her to lie put the defense attorneys' credibility and ethics at issue. From her testimony, the jury was given the impression that the defense attorneys, and by association Contreras, would lie and encourage perjury in order to win acquittal. By injecting the issue of defense counsel's credibility into the case, Contreras was placed in the untenable position of choosing between allowing this impression to stay in the minds of the jury, or having to call one of his attorneys to testify at trial.

In addition, RPC 3.7(d) provides that an attorney may testify in his client's trial only if the court makes a finding that disqualification would be a hardship and the necessity of the attorney's testimony was not foreseeable before trial. The trial court did not make either of these findings before Berneburg was forced to testify in an effort to clear his name and restore the credibility of Contreras and the entire defense case.

The jury's verdicts in this case rested almost entirely on its determinations of credibility, and on whether they believed Contreras was telling the truth when he testified that he acted in self-defense. Although the trial court gave a limiting instruction, it could not cure the enormous prejudice caused by Hernandez's testimony and the prosecution's attempts to show that the defense did encourage her to commit perjury.

The combined effect of the prejudice to the defense's credibility, and the removal from the proceedings of one of Contreras' attorneys, denied Contreras his right to a fair trial and his right to effective assistance of counsel. The trial court therefore abused its discretion when it denied Contreras' motion for a mistrial, and his convictions should be reversed.

**B. The State failed to disprove Contreras' assertion that his actions were justified because he was acting in self-defense.**

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

The State bears the burden of proving the absence of self-

defense when the defendant introduces evidence corroborating a claim of self-defense. *State v. McCullum*, 98 Wn.2d 484, 496, 656 P.2d 1064 (1983). Self-defense is judged by a subjective standard. *McCullum*, 98 Wn.2d at 488-89. The jury must "view the evidence from the defendant's point of view as conditions appeared to him or her at the time of the act." *McCullum*, 98 Wn.2d at 488-89 (citing *State v. Wanrow*, 88 Wn.2d 221, 234-36, 559 P.2d 548 (1977)). Thus, the jury must view the claim of self-defense "from the defendant's perspective in light of all that [he] knew and experienced with the victim." *State v. Allery*, 101 Wn.2d 591, 594, 682 P.2d 312 (1984) (citing *Wanrow*, 88 Wn.2d at 235-36).

Hernandez testified that Solis pointed a "humongous" gun at Contreras in the alley. (RP4 268) After the incident, police found a large rifle tucked under Solis' arm. (RP3 163-64, 191) Contreras and Solis had several confrontations throughout the day, and both Contreras and Hernandez testified that Solis threatened Contreras with that "humongous" gun. (RP4 269, 271, 273; RP7 860; RP4 269, 271, 273; RP7 846-47, 860) Several witnesses testified that Solis was a member of a gang, and he was seen wearing his gang colors the night of the incident. (RP4 244, 245, 270; RP5 470-71, 497)

There was no evidence that Contreras knew that Solis was coming to Rosas' home that night. Contreras was already there when he saw Solis approach in his car. Contreras testified he was afraid that Solis was going to open fire, that he had nowhere to drive to get away from Solis, and that he acted out of fear for his life. (RP7 872, 873, 875-76, 879)

The State simply did not present sufficient evidence to refute Contreras' testimony that he was afraid of Solis, and acted because he believed Solis was planning to shoot him and Hernandez. Accordingly, Contreras' convictions for first degree assault should be reversed and dismissed.

**C. The trial court erred when it sentenced Contreras based on criminal history and an offender score that was neither agreed upon by Contreras nor proven by the State.**

At sentencing, the State asserted that Contreras had two prior adult felony convictions and one prior juvenile felony conviction. (02/16/07 RP 6-7; CP 114-15) The State also asserted for the first time that Contreras was on community custody, so an additional point should be added to his offender score calculation. (02/16/07 RP 6-7) The State provided no evidence to support its assertions, and the trial court failed to require any.

Under the SRA, a defendant's offender score is based on his or her criminal history. RCW 9.94A.030(14). In establishing criminal history, the State bears the primary burden of proving the existence of prior convictions by a preponderance of the evidence. RCW 9.94A.500(1); *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). However, the State may be relieved of its evidentiary obligations under certain circumstances. A stipulation or an acknowledgment may be properly relied upon by the court to support a sentencing determination. *State v. Hickman*, 112 Wn. App. 187, 191, 48 P.3d 383 (2002); *Ford*, 137 Wn.2d at 483.

Absent an acknowledgement by a defendant, the State must introduce evidence to support a defendant's alleged criminal history. *Ford*, 137 Wn.2d at 480. A defendant does not "acknowledge" the State's position by merely failing to object. See *Ford*, 137 Wn.2d at 483. Moreover, the trial court also bears some responsibility to insure that the criminal history and offender score are properly established. RCW 9.94A.500(1).<sup>2</sup> In addition, basic

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<sup>2</sup> RCW 9.94A.500, provides in relevant part:

(1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing . . .

If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record.

principles of due process require "that in imposing sentence, the facts relied upon by the trial court must have some basis in the record." *Ford*, 137 Wn.2d at 482 (quoting *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)).

Here, Contreras did not specifically object, but he did not acknowledge the criminal history or offender score. And Contreras did refuse to sign the stipulation, thereby putting the State and the court on notice that he was not acknowledging his criminal history or offender score. (02/16/07 RP 24) Nevertheless, in the absence of an acknowledgement, the State was required to provide some evidence to support its assertions regarding criminal history and community custody. The trial court failed to require such information, and sentenced Contreras without any evidence establishing that the State's assertions were correct.

Contreras' sentence should be reversed, and his case remanded for a hearing to compel the State to introduce evidence to support its assertions of criminal history and offender score. *Ford*, 137 Wn.2d at 485-86; *State v. McCorkle*, 88 Wn. App. 485, 500, 945 P.2d 736 (1997).

#### IV. CONCLUSION

Contreras was denied his right to a fair trial and his right to

effective assistance of counsel when he was forced to call his attorney to the stand to defend the credibility and ethics of the defense team. The trial court abused its discretion when it denied Contreras' motion for mistrial because nothing short of a new trial could have cured the prejudice resulting from the irregularity. Moreover, the State failed to disprove beyond a reasonable doubt that Contreras' actions were justified as self-defense. For these reasons, Contreras' first degree assault convictions should be reversed. In addition, the State must be required to prove its assertions regarding Contreras' criminal history and offender score.

DATED: February 28, 2008



STEPHANIE C. CUNNINGHAM

WSBA No. 26436

Attorney for Adrian Contreras Rebollar

**CERTIFICATE OF MAILING**

I certify that on 02/28/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

Kathleen Proctor, DPA  
Prosecuting Attorney's Office  
930 Tacoma Ave. S., Rm. 946  
Tacoma, WA 98402

Adrian Contreras Rebollar #819639  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326



STEPHANIE C. CUNNINGHAM  
WSBA No. 26436

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