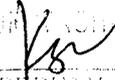


COURT OF APPEALS
DIVISION II

03 APR 23 PM 12:31

STATE OF WASHINGTON
BY  _____
DEPUTY

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

38234-2-II
NO. 38232-2 II

STATE OF WASHINGTON,

Respondent.

vs.

PEDRO S. BELTRAN,
Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

MICHAEL GOLDEN
PROSECUTING ATTORNEY
Law and Justice Center
345 W. Main St. 2nd Floor
Chehalis WA 98532
360-740-1240

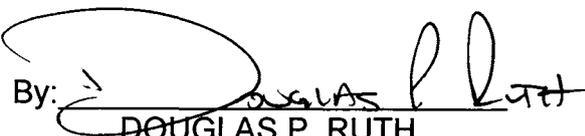
By: 
DOUGLAS P. RUTH
WSBA #25498

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 1

A. THE STATE'S INFORMATION WAS INSUFFICIENT..... 1

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT MR. BELTRAN'S CONVICTION FOR CRIMINAL GANG INTIMIDATION 1

1. Sufficient Evidence Supports the Conclusion That CAPS is a Public Alternative School.....2

2. Sufficient Evidence Supports the Conclusion That Mr. Beltran was registered in School on July 4, 2008.....6

3. Sufficient Evidence Supports the Conclusion That the "Little Valley Lokotes" Gang Meets the Statutory Definition of a "Gang".....12

C. THE COURT'S FINDSING OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.....15

CONCLUSION..... 18

Washington Cases

Armstrong v. State, 91 Wn.App. 530, 958 P.2d 1010 (1998) 8

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850(1990)..... 2

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980) 2

State v. L.B. 132 Wn.App. 948, 135 P.3d 508, 512 (2006) 17

State v. Padilla, 95 Wn.App. 531, 978 P.2d 1113, 1115 (1999)..... 9

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

State v. Walton, 64 Wn.App. 410, 824 P.2d 533 (1992) 2

Statues, Court Rules, Etc.

ER 201(b) 3

RCW 9A.46.120 7

RCW 28A.600.455 17

WAC 392-121-021 8

WAC 392-121-031 16, 17

WAC 392-121-106 8, 9, 17

WAC 392-121-108 8

STATEMENT OF THE CASE

Appellant's version of the statement of the case is adequate for purposes of this response.

ARGUMENT

A. THE STATE'S INFORMATION WAS INSUFFICIENT.

Mr. Beltran's initial argument challenges the sufficiency of the charging document filed by the State in his case. The State recognizes that its information failed to inform Mr. Beltran of an essential element of the crime of Criminal Gang Intimidation. As a result, it is insufficient under this state's and the U.S. constitutions.

While conceding this issue, the state contends that it proved all the elements of the crime by sufficient evidence to meet its burden of proof. Thus, the state seeks that the case be remanded without prejudice so that it may retry Mr. Beltran for the crime.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT MR. BELTRAN'S CONVICTION FOR CRIMINAL GANG INTIMIDATION.

Mr. Beltran claims that the state proffered insufficient evidence to support two elements of the crime. Both claims lack merit. The test for determining the sufficiency of the evidence is

whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. Salinas, 119 Wn.2d at 201, 829 P.2d 1068. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850(1990). The reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial evidence is given equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). As further explained below, sufficient evidence was presented in this case to support the convictions.

1. Sufficient Evidence Supports the Conclusion That CAPS is a Public Alternative School.

Mr. Beltran's first claim asserts that there was insufficient evidence to establish that either he or the victim of the crime was attending or registered in school, as required by RCW 9A.46.120. He presents this argument in two parts. He claims that the state

failed to prove that the CAP program, which Mr. Beltran had attended, is a public or alternative school, and secondly, that he was registered or attending this school at the time of the crime, July 4, 2008. I will consider each part of his argument individually.

Throughout Mr. Beltran's trial, both the State and the defense referred to the acronym CAP, but neither described the program. It is clear from the pre-trial, trial, and post-trial record that this was not due to any oversight of the parties but due to the general familiarity with this program. While the court did not formally take judicial notice that the CAP program is the Centralia Alternative Program of the Centralia School District, it is the type of information that is subject to judicial notice under ER 201. That the CAP program is part of a public school is a fact "generally known within the territorial jurisdiction" of the Lewis County Superior Court. ER 201(b).

The familiarity of the parties and the court with this information can be seen at several locations in the record. In discussing a preliminary ER 404(b) objection, the prosecuting attorney refers to one of his witnesses, Jerry Hensley, as being a retired teacher from the Centralia Alternative Program. 8/12/08 RP 3. Later, at trial, the prosecuting attorney shortens the reference to

just the acronym, CAP. 8/12/08 RP 53. From then on, the court and the parties use the acronym as a substitute for Centralia Alternative Program. Mr. Beltran's attorney refers to CAPS program and public school interchangeably throughout his examination. When asking Mr. Hensley about gang indicators at school, he exams Mr. Hensley about the cliques within the CAPS program and the attire considered gang related by the "school district." 8/12/008 RP 61, 67. In posing the question, he makes no distinction between these agencies. More specifically, in closing argument the defense attorney refers to the CAPS program as an "alternative school." To argue that Mr. Beltran was not attending or registered in school at the time of the crime the attorney states,

"In this case, if it was any school I admit it would be the alternative school in CAPS. That's probably considered public school, too, but nevertheless, it is not clear whether or not he would be presently considered registered." 8/14/08 RP 104.

The juvenile court itself makes no distinction between the two as well. When giving its ruling, the court finds that "Mr. Beltran is an enrollable student with the Centralia School District... Notwithstanding that he had been suspended from CAPS..." 8/15/08 RP 4.

Clearly, the parties and the court were familiar with the meaning of the acronym and that the program was the alternative division of the Centralia School District. These quotes strongly indicate they used the CAPS acronym much like an individual might refer to the CIA or the AFL-CIO; without any thought that someone might not know what the letters refer to. With this degree of familiarity with the term, the State was not required to directly prove that CAPS stands for Centralia Alternative Program and was part of the public school system.

Further, the evidence at trial established that the CAP program is part of a public school. The record contains frequent references tying the CAP program to the Centralia schools. In addition to the references already cited, Mr. Hensley's testimony establishes that as a teacher for the CAPS program, he was an employee of the Centralia School District. He testified that he was a teacher with the Centralia School District and in that capacity interacted with Mr. Beltran when the defendant was a CAPS student. 8/12/08 RP 52. He also described himself as the "main disciplinarian for the CAPS program." 8/12/08 RP 53. And on direction examination, he made no distinction between rule

violations having occurred at the CAPS program and at "school."

8/12/08 RP 56.

On cross-examination, the former teacher's answers further interconnected the CAPS program with Centralia School District. Mr. Hensley noted that he clears any suspensions of gang activities occurring at the CAPs program with the administration at Centralia High School. 8/12/08 RP 57. And he clarified that as the administrator for the program he would not be concerned by a student wearing a belt loosely from his waist, but that the Centralia School District might have a different policy. 8/12/08 RP 60-61. From this testimony, and considering the juvenile court's clear familiarity with the CAPS program, there was sufficient evidence for the juvenile court to infer that Mr. Beltran was attending or registered at an alternative school.

2. Sufficient Evidence Supports the Conclusion That Mr. Beltran was registered in School on July 4, 2008.

Mr. Beltran next contests the evidence that he was registered or attending any school at the time of the crime. He notes that his suspension from the CAPS program prior to the date of the crime prevented application of the Criminal Gang Intimidation statute. This argument is misplaced.

The state does not disagree with Mr. Beltran's conclusion that he was not attending school at the time of the assault. His suspension clearly resulted in him not being present on the school grounds during the period of his suspension. Moreover, the crime occurred during summer vacation when most students are not attending school. But this does not end the inquiry, since the statute applies both to any juvenile attending school and those who are "*registered*" in school. RCW 9A.46.120 (emphasis added).

While the meaning of "attending... school" is fairly apparent from the face of the statute, the meaning of "registered in school" is not. Because the words are presented in the alternative, we know it means something different than school attendance. In this respect, Mr. Beltran's argument comes up short. While a suspension is mutually exclusive with school attendance, this is not necessarily the case with registration. If we apply the common understanding of student registration, a student may be suspended from school but still remain registered in school.

We also know that the meaning of "registered" is not the same as "enrollment." "Enrollment" is well defined and much referenced throughout Title 28A of the Revised Code and Title 392 of the Administrative Code. We can presume that the legislature

was aware of this term and its meaning. If they had wanted to use it, they would have. Because they choose not to, we can presume they intended "registered" to have a different meaning.

According to the Administrative Code, a student's "enrollment" begins on the fourth day of the school year and concludes each year on the last day of that school year. WAC 392-121-106. A school year extends from the first day of September through the last day of August of the next year. WAC 392-121-021. Under some circumstances, an enrollment period ends upon the suspension of a student or after a student is excessively absent. WAC 392-121-108.

The legislature's failure to use this familiar term in the crime of Criminal Gang Intimidation reveals that it intended to have the crime apply to a different category of students than those who are enrolled in school. To discern this separate category of students, we look to the common definition of "registered." *Armstrong v. State*, 91 Wn.App. 530, 538, 958 P.2d 1010 (1998), *review denied*, 137 Wn.2d 1011, 978 P.2d 1099 (1999) ("When words are not defined by statute, the court may refer to dictionary definitions and to common usage in light of the context in which the word is used.")

Webster's Third International Dictionary defines "registered" as "having the owner's name entered in a register." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1912 (1976). Black's Law Dictionary defines the term similarly: "entered or recorded in some official register or record or list." BLACK'S LAW DICTIONARY 1283 (6th Ed. 1990). Applying these definitions to the administration of Washington schools, student registration presumably means entry of the student's name on the "school district's rolls". See WAC 392-121-106. Since such entry is not restricted in time as WAC 392-121-021 restricts the period of student enrollment, the term certainly circumscribes a larger category than that described by "enrollment." A student remains registered as long as the student's name remains on the district's student roll, while under WAC 392-121-108 a student's enrollment is renewed each year. The common definition is also not subject to the exclusions found in WAC 392-121-108 regarding absences and suspensions.

This interpretation of RCW 9A.46.120 is consistent with the overall purpose of the statute. In contrast, reading the statute as limited to the category of enrolled students subverts the statutory purpose. *State v. Padilla* 95 Wn.App. 531, 534, 978 P.2d 1113,

1115 (1999) (faced with an ambiguous statutory term, a court's primary duty is to ascertain and give effect to the intent and purpose of the Legislature). The statute's purpose is set out in detail at the beginning of the 1997 act adopting the crime of Criminal Gang Intimidation. In executing the act, the legislature found that,

"Both students and educators have the need to be safe and secure in the classroom if learning is to occur... The legislature therefore intends to define gang-related activities as criminal behavior disruptive not only to the learning environment but to society as a whole, and to provide educators with the authority to restore order and safety to the student learning environment, eliminate the influence of gang activities, and eradicate drug and substance abuse on school campuses." Laws of 1997 c 266 sec. 1

It is apparent that this purpose would be undermined by the reading Mr. Beltran suggests. Under his reading, the state could only charge suspended students or excessively absent students with Criminal Gang Intimidation if they were threatening an actively attending or registered student. This significantly limits the reach of the law. The very students who are suspended from school for gang activity would escape prosecution if they intimidated a non-student or another suspended student to join a gang, even if the crime occurred on school grounds. These juveniles would escape

punishment although they are eligible to return to school at the end of their suspension. This certainly hampers the legislative goal of "eliminate[ing] the influence of gang activities" on students and educators.

In contrast, reading 9A.46.120 to apply to all juveniles who are named on a district's student registration list preserves school security during both summer school and the regular school year. Read in this way, the crime reaches both those students actively attending class, and those that are temporarily suspended or have excessive absences. This broader reach is more consistent with the remedial purpose of the act -- to address pervasive gang violence and intimidation. It does not create the absurd loophole that allows the very students the law is intended to target to avoid prosecution and penalty.

Turning to the case before this Court, Mr. Beltran has not established that his suspension affected in any way his school registration. The state's evidence proved otherwise. Mr. Hensley testified that Mr. Beltran was a student at CAPS during the 2008 school year. 8/12/08 RP 55-56, 64. From this, the juvenile court could infer that he was registered as a student for that year. Mr. Hensley further explained that despite Mr. Beltran's suspension, he

is "a student that's capable of returning back to CAPS September 2nd" upon the end of summer vacation. 8/12/08 RP 53. He affirmed this circumstance during cross-examination when he testified that Mr. Beltran "may reenter [school] on September 2nd of '08." 8/12/08 RP 64. In the light most favorable to the state, this testimony established that Mr. Beltran's suspension did not alter his registration. Mr. Beltran merely needed to re-enter or return to school to continue as a student in the CAP program. Despite his suspension, he remained a registered student and subject to prosecution for Criminal Gang Intimidation.

3. Sufficient Evidence Supports the Conclusion That the "Little Valley Lokotes" Gang Meets the Statutory Definition of a "Gang."

Mr. Beltran's second argument challenging the weight of evidence supporting his conviction regards the gang element of Criminal Gang Intimidation. Under the statute, the state must prove that the defendant's threats were related to the victim's refusal to join or attempt to withdraw from a gang. The gang must be one that meets the definition in RCW 28A.600.455. Mr. Beltran claims that the state failed to adequately prove that the Little Valley

Lokotes, or LVL, gang constituted a gang under the code. He ignores the evidence.

Testimony by the victim and Sergeant Fitzgerald, the gang expert, established sufficient evidence of the leadership prong of the RCW 28A.600.455 definition. The victim, Jonathan Margart, was familiar with the LVL gang in Centralia, although not a member himself. During trial, he clearly confirmed that the LVL has a leadership structure. 8/12/08 RP 26. He described the gang being directed by a ranking of gang members with a "top dog," who the rest of the gang "answers to." 8/12/08 RP 30. Fringe members are recruited by the LVL, and others are accepted into the gang if they have a connection to a current member. 8/12/08 RP 30. These "wannabes" fill the shoes of members who have vacated gang positions. 8/14/08 RP 37.

More generally, Sergeant Fitzgerald testified that the LVL gang in Centralia is an offshoot of the Yakima LVL gang. 8/14/08 RP 27. He verified that the LVL are a "subcategory" or "subpart" of this larger umbrella gang, the Sorenos, who direct the work of the lower members. 8/14/08 RP 27, 30 & 43.

Thus, the evidence both established that the Centralia LVL has an internal structure and hierarchy, and was a subpart of a

larger structure of the LVL organization. These facts qualified the LVL as a gang under the first prong of the RCW 28A definition.

The second definitional requirement is that the gang consists of three or more persons. The state's evidence plainly shows that the LVL gang's size was in excess of this requirement. Sergeant Fitzgerald testified that the core members numbered fifteen and the "wannabes" up to forty. Although the slang title of "wannabe" may indicate otherwise, this secondary group of members are still active constituents of the gang. The sergeant defined wannabes as "guys who are going to go out and do the actual work to gain status to make it into the gang or become a full-fledged member." 8/14/08 RP 38. Mr. Beltran himself acknowledged that he knows ten individuals who are LVL or clam to be LVL. 8/14/08 RP 61. Based upon this testimony, there should be no doubt that the LVL meets the size requirement of RCW 28A.600.455.

Finally, the evidence establishes that the LVL gang collectively acts for criminal purposes. Both Mr. Hensley and Christine Shelton observed that the LVL spread graffiti on Centralia buildings and public property. 8/12/08 RP 56, 81. Ms. Shelton also described an incident when gang members contacted the defendant to perform criminal behavior. 8/14/08 RP 4. Sergeant

Fitzgerald confirmed that graffitiing buildings is a common LVL activity, and noted that LVL gang members had committed several gang related assaults in Centralia. 8/14/08 RP 43. He recounted that he has testified in "three to four cases" in Lewis County regarding gang crimes. 8/14/08 RP 26, 43. In light of this evidence, the state met its burden of proving that Mr. Beltran's threats of violence related to gang intimidation of the victim. The state proved the crime by sufficient evidence.

C. THE COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Mr. Beltran challenges several of the juvenile court's findings of fact and conclusion of law. All meet the requisite sufficiency standard.

Mr. Beltran first challenges the court's second finding of fact, specifically the subsection finding that the Little Valley Lokotes is a street gang. CP1. As revealed above, the testimony of Sergeant Fitzgerald, Mr. Hensley, and Christine Shelton support this finding.

Mr. Beltran next challenges subsection four of Finding of Fact No. 2. The juvenile court found that he "attends an alternative high school, Centralia Alternative Program (CAP) and informed the lead teacher at CAPs, Jerry Hensley, that he was a member of a

gang." CP1. This finding appears to refer to Mr. Beltran's attendance at CAPs prior to his suspension, when he spoke to Mr. Henley about gang affiliation, not at the time of the crime. The evidence is clear that Mr. Beltran attended the school at this time. Mr. Henley testified that Mr. Beltran was a student at CAPS for two years and that it was during this time that he stated he was in a gang. 8/12/08 RP 52-53, 63.

Even if the finding refers to attendance on the day of the crime, testimony in the record supports the court's conclusion that Mr. Beltran was attending school at this time as well. It is uncontested that Mr. Beltran was enrolled in school up until his suspension in May, 2008. He now argues that his suspension ended his attendance in the CAPS school, but this is incorrect. Since a school year extends from September one to August 31st of the following calendar year, Mr. Beltran's enrollment in school did not end at the end of classes or at the time of his suspension. See WAC 392-121-031. His attendance, as with all students, continued throughout the school year. Under the rules governing school administration, Mr. Beltran was enrolled in school at least until August 31, 2008.

Next, Mr. Beltran repeats his argument that the record does not support a finding that the CAPS program is an alternative high school. Again, circumstantial evidence established that the CAPS program was a subpart of the Centralia School District's educational program. Testimony throughout the record links or equates the program to Centralia School District's public instruction.

The juvenile court's fifth finding of fact does not appear to be supported by the evidence in the record. However, the error in the number of members in the LVL gang is harmless and not prejudicial. State v. L.B. 132 Wn.App. 948, 955, 135 P.3d 508, 512 (2006). As previously established above, two witnesses testified that the LVL gang members number ten to fifteen individuals. This number is well above the statutory definition's requirement of three or more members. RCW 28A.600.455.

Mr. Beltran's fourth challenge is to the juvenile court's finding that he was enrolled in school. Again, this finding is established by the testimony that Mr. Beltran was enrolled during the 2008 year. Once enrolled, he remained enrolled until August 31, 2008. WAC 392-121-031; WAC 392-121-106.

Mr. Beltran also repeats his previous arguments to challenge the juvenile court's Conclusions of Law. The record supports the

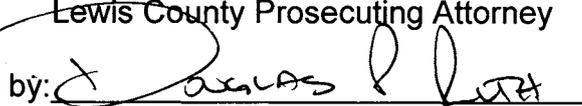
conclusion that Mr. Beltran was both enrolled and, more importantly, registered in school during the summer months of 2008. It also established that the LVL is a gang according to the RCW 28A.600.455 definition. The testimony found that the LVL gang in Centralia had more than three members, had an identifiable leadership, and participated in criminal activity.

CONCLUSION

While the state charged Mr. Beltran by an insufficient information, it proved each of the essential elements of the crime of Criminal Gang Intimidation beyond a reasonable doubt. Thus, the case should not be dismissed with prejudice and should be remand for retrying.

RESPECTFULLY submitted this 22 day of April, 2009.

MICHAEL GOLDEN
Lewis County Prosecuting Attorney

by: 
DOUGLAS P. RUTH, WSBA 25498
Attorney for Plaintiff

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,) NO. 38232-2 II
Respondent,)

vs.)

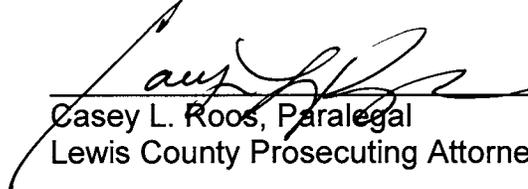
PEDRO S. BELTRAN,) DECLARATION OF
Appellant.) MAILING

00 APR 22 PM 12:11
STATE OF WASHINGTON
BY _____ DEPUTY
Court of Appeals
Division II

Ms. Casey Roos, paralegal for Douglas Ruth, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On April 22, 2009, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund, Esq.
Manek R. Mistry, Esq.
203 Fourth Ave E Suite 404
Olympia WA 98501

DATED this 22nd day of April 2009, at Chehalis, Washington.


Casey L. Roos, Paralegal
Lewis County Prosecuting Attorney Office