No. 48857-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ISRAEL TORIBIO-LAUREANO,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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I. ISSUES

A. Did Detective Humphrey's testimony violate Toribio-Laureano's right to confront witnesses?

B. Did the trial court abuse its discretion in denying a missing witness instruction?

C. Did the trial court make an improper judicial comment on the evidence?

D. Did the trial court fail to consider Toribio-Laureano's present or future ability to pay prior to imposing non-mandatory legal financial obligations?

II. STATEMENT OF THE CASE

On March 5, 2013, Detective Humphrey met with Jose Mendez Lopez and Debra Mendez. RP[1] 27-28. He confronted them about recent controlled purchases conducted against them and asked them about working with law enforcement to conduct controlled buys with higher-level dealers. RP 29-30. Mendez Lopez and Mendez agreed to set up a buy-bust operation. RP 30. Mendez Lopez placed a phone call and then worked with the officers to make a plan for the operation. RP 30-31. Officers met with Mendez Lopez and Mendez approximately one mile away from the AM/PM where the deal was supposed to occur. RP 32-33. They discussed the plan and the officers searched Mendez Lopez and Mendez and searched

[1] The State will cite to the transcript of the jury trial, which is in consecutive paginated volumes as RP.

their vehicle. RP 33, 114. Officers provided Mendez Lopez with $1,000 buy money. RP 33. Officers then followed Mendez Lopez and Mendez to the AM/PM. RP 35. Mendez Lopez and Mendez pulled in close to where a dumpster was parked. RP 36.

Officers parked in a lot approximately 100 feet from where Mendez Lopez was located. RP 36. Mendez Lopez got out of the vehicle and walked toward two Hispanic males that got out of a green Honda Civic that was also parked near the dumpster. RP 36, 115. One officer observed what looked like a hand-to-hand exchange between Mendez Lopez and one of the males, later identified as Israel Toribio-Laureano. RP 117-18, 126.

Mendez Lopez walked back to his vehicle. RP 38. Toribio-Laureano entered the driver's side of the green Honda Civic. RP 38-39. Information about Toribio-Laureano's vehicle was conveyed to another officer who was waiting nearby. RP 39. Two of the officers followed Mendez Lopez and Mendez as they left the AM/PM and returned to a pre-arranged location. RP 39-40. Mendez Lopez and Mendez and their car were search again, and officers discovered a baggie containing a white crystal substance. RP 40. Mendez Lopez and Mendez no longer had the buy money in their possession. RP 40.

Meanwhile, another officer followed and then stopped the green Honda Civic and contacted the driver, Toribio-Laureano. RP 105-07. The $1,000 buy money was found in a wallet on Toribio-Laureano's person. RP 41, 106-07. In a later search of the vehicle's center console, officers found another baggie containing a white crystal substance. RP 42-43. Both baggies were later tested and found to contain methamphetamine. RP 166.

Toribio-Laureano was charged with one count of Delivery of a Controlled Substance and one count of Possession of Methamphetamine with Intent to Deliver. CP 1-4. At trial, Detective Humphrey testified that after Mendez Lopez had made a phone call "Mendez agreed to meet with their source that they knew as Primo." RP 31. Toribio-Laureano objected to this testimony on hearsay grounds. RP 31. After the jury was excused, Detective Humphrey was voir dired regarding the plan the officers made with Mendez Lopez and Lopez and how it was informed. RP 31. Detective Humphrey stated that "The plan was made by us. The information that went into the plan was provided to me by the informants." RP 31. Toribio-Laureano renewed his objection and the State did not present an argument in response. RP 31-32. After reviewing the record, the trial court judge stated, "I'm going to overrule the

objection. It's not being offered for the truth of the matter asserted, but that's as far as you should go with that." RP 32.

Mendez Lopez and Mendez did not testify at trial. Toribio-Laureano requested a missing witness instruction. RP 199-200. The trial court declined to give the instruction, finding the witnesses were not peculiarly available to the State. RP 200. The trial court also found there was a satisfactory explanation for the absence of the witnesses based on potential Fifth Amendment issues due to their charges not yet being resolved, which the State then clarified were still actively pending. RP 201. The State elaborated that any testimony provided at Toribio-Laureano's trial would be potential impeachment evidence at the trials for Mendez Lopez and Mendez. RP 201. The jury was provided a packet of jury instructions that contained "State's Proposed Jury Instructions" in the caption. CP 10.

The jury found Toribio-Laureano guilty of one count of Delivery of Methamphetamine and one count of Possession of Methamphetamine with Intent to Deliver. CP 35-36. Toribio-Laureano was sentenced on June 28, 2013. CP 39-48. The State requested and the trial court imposed discretionary legal financial obligations. CP 44. The court did not conduct any specific inquiry to

find that Toribio-Laureano would be able to make payments. RP 268-71. This appeal follows. CP 49.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE STATEMENTS OF JOSE MENDEZ LOPEZ, REFERENCED IN DETECTIVE HUMPHREY'S TESTIMONY, WERE NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED, AND WERE THEREFORE NOT TESTIMONIAL HEARSAY.

Toribio-Laureano argues Detective Humphrey's testimony, "Mendez agreed to meet with their source that they knew as Primo." was improperly admitted because it was based on testimonial hearsay statements by Mendez Lopez. Brief of Appellant 8-9.[2] Toribio-Laureano asserts that the admission of the statement violated his Sixth Amendment right to confrontation. Brief of Appellant 8-9.

However, Mendez Lopez stating he knew his source as "Primo" was not offered to prove that Toribio-Laureano was known as "Primo" or that Toribio-Laureano was Mendez Lopez's source.

[2] Appellate counsel cites to the record but does not quote the statement he is arguing was not admissible. The State supposes from his argument that the quotation the State has included above is the statement Toribio-Laureano is arguing should have been excluded. The statement can be found on RP 31, as cited by counsel.

Because the statement was not offered to prove the truth of the matter asserted, the statement is not hearsay and there is no confrontation issue.

1. Standard Of Review.

This Court reviews admissibility of evidence determinations by the trial court under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 957 P.2d 967 (1999). This Court reviews alleged violations of the confrontation clause de novo. *State v. Koslowski*, 166 Wn.2d 409, 417, 209 P.3d 479 (2009) (citations omitted).

2. There Is No Violation Of The Confrontation Clause Because The Statement Is Not Hearsay.

A criminal defendant has the right to confront witnesses against him or her. U.S. Const. amend. VI; *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). This does not bar an unavailable witness' out of court statements outright. *Crawford*, 541 U.S. at 42. An out of court statement may be admitted at trial if it has an indicia of reliability, which means it "falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness." *Id.* (internal quotations and citations omitted). The right to confrontation may be asserted for the first time on appeal. *State v. Clark*, 139 Wn.2d 152, 985 P.2d 377 (1999).

However, courts may also find that a defendant has waived or forfeited his right to confrontation if he does not preserve the issue at trial. *State v. O'Cain*, 169 Wn. App. 228, 248, 279 P.3d 926 (2012).

For an out of court statement to be hearsay it must be a statement offered for the truth of the matter asserted. ER 801(c). Statements not offered for the truth of the matter asserted are not testimonial hearsay and do not implicate *Crawford*. *State v. Moses*, 129 Wn. App. 718, 732, 119 P.3d 906 (2005) (statements offered to show why social worker contacted CPS); *State v. Mason*, 127 Wn. App. 554, 566-67, 110 P.3d 245 (2005) (statements offered to show why the police officer later searched and seized items from the defendant's home).

Detective Humphrey testified that after he observed Mendez-Lopez place a phone call, "Mendez agreed to meet with their source that they knew as Primo." RP 30-31. Toribio-Laureano objected, the jury was excused, and Detective Humphrey was voir dired. RP 31. After hearing from both parties, the trial court found the underlying statement was not offered for the truth of the matter asserted but the line of questioning regarding the topic should not continue beyond what was already stated by Detective Humphrey. RP 32. The State

moved on with its direct examination of Detective Humphrey, and the name “Primo” was not referred to again during the trial.

The information underlying Detective Humphrey’s statement was not testimonial hearsay, there was no violation of the confrontation clause, and the trial court’s reason was based upon tenable grounds and therefore was not an abuse of discretion. Toribio-Laureano’s convictions should be affirmed.

B. TORIBIO-LAUREANO WAS NOT ENTITLED TO A MISSING WITNESS JURY INSTRUCTION.

Toribio-Laureano asserts that the trial court erred when it refused to give his proposed missing witness jury instruction. Brief of Appellant 9-12. The trial court did not err because the missing witnesses were not peculiarly available to the State and their absence was explained.

1. Standard Of Review

A trial court's refusal to issue a requested instruction, when based on the evidence in the case, is reviewed for abuse of discretion. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only where its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

2. The Trial Court Did Not Abuse Its Discretion By Refusing To Give A Missing Witness Instruction.

A missing witness instruction informs the jury that it may infer an absent witness's testimony would have been unfavorable to the party who would have logically called that witness to testify. *State v. Reed*, 168 Wn. App. 553, 278 P.3d 203 (2012) (*citing State v. Flora*, 160 Wn. App. 549, 556, 249 P.3d 188 (2011)). The instruction is only available when the missing witness is peculiarly available to the party and his or her absence is not satisfactorily explained. *State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008) (*citing State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). A witness's absence is explained, for example, if the witness is not competent or if the testimony would incriminate the witness. *Id.*

Here, the trial court found that Jose Mendez Lopez and Debra Mendez were not peculiarly available to the State. RP 200. Mendez Lopez and Mendez were not unknown to Toribio-Laureano, and if Toribio-Laureano believed that their testimony would have been favorable to him, he had the opportunity to call them as witnesses. RP 200. Additionally, the trial court found Mendez Lopez and Mendez's absences were explained. RP 201. At the time of Toribio-Laureano's trial, Mendez Lopez and Mendez's related cases were

still pending, and their testimony could have been incriminating or used for impeachment purposes. RP 200.

The trial court did not abuse its discretion when it refused to give Toribio-Laureano's proposed instruction. The trial court's decision was not based on manifestly unreasonable or untenable grounds. This Court should affirm the trial court's ruling and Toribio-Laureano's convictions.

C. THE CAPTION ON THE JURY INSTRUCTION PACKET IS NOT AN IMPOROPER COMMENT ON THE EVIDENCE.

Toribio-Laureano claims that the caption on the jury instruction packet, which contains the words "State's Proposed Jury Instructions", constitutes a judicial comment on the evidence. Brief of Appellant 12-13. The packet caption did not imply that the trial court favored the State's position over Toribio-Laureano's, and it was not a judicial comment on the evidence.

1. Standard Of Review.

Constitutional issues are reviewed de novo. *State v. Castro*, 141 Wn. App. 485, 490, 170 P.3d 78 (2007). Challenged jury instructions are reviewed de novo and evaluated in the context of the instructions as a whole. *State v. McCreven*, 170 Wn. App. 444, 461-62, 284 P.3d 793 (2012).

2. The Packet Caption Was Not An Improper Comment On The Evidence.

The Washington State Constitution prohibits judges from charging juries with respect to matters of fact. Const. art. 4, § 16. "The object of this constitutional provision is to prevent the jury from being influenced by knowledge conveyed to it by the court as the court's opinion of the evidence submitted." *Heitfeld v. Benevolent & Protective Order of Keglers*, 36 Wn.2d 685, 699, 220 P.2d 665 (1950). Further, "a court cannot instruct the jury that matters of fact have been established as a matter of law." *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). An instruction which assumes a fact for the jury's determination constitutes a prohibited comment upon the evidence. *Martin v. Kidiviler*, 71 Wn.2d 47, 51, 426 P.2d 489 (1967).

An appellate court will consider an error claimed for the first time on appeal regarding a jury instruction if the claimed erroneous "instruction invades a fundamental right of the accused." *Becker*, 132 Wn.2d at 64. A judicial comment on the evidence is presumed prejudicial. *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006). It is the State's burden to show, absent the record affirmatively showing no prejudice could have resulted, that the defendant was not prejudiced. *Levy*, 156 Wn.2d at 723.

Toribio-Laureano argues the jury instructions packet caption, which contained the words “State’s Proposed Jury Instructions” and was signed by the judge, suggests that the trial court favored the State’s position and was a comment on the evidence. However, the cases Toribio-Laureano cites for this proposition can be distinguished from the present case.

In *State v. Becker*, Becker was charged with delivery of a controlled substance with a school zone enhancement. 132 Wn.2d 54, 56, 935 P.2d 1321 (1997). The special verdict form asked the jury whether it found that the offense was committed "within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School [sic]." *Id*. at 60. The parties disputed whether the youth program, which had never been called a school, was in fact a school under the sentence enhancement statute. *Id*. at 65. The Court held that referring to the youth program as a school in the special verdict form amounted to a judicial comment on the evidence, literally instructed the jury that the program was a school, and removed the disputed issue of fact from the jury’s consideration. *Id*.

In *State v. Levy*, Levy was charged with first degree burglary and first degree robbery. 156 Wn.2d 709, 715, 132 P.3d 1076 (2006).

The "to convict" instruction for burglary stated an element of the crime was that the defendant "entered or remained unlawfully in a building, *to-wit: the building of Kenya White, located at 711 W. Casino Rd., Everett, WA." Id. at 716. The "to convict" instructions for both burglary and robbery stated an element of the crime was that the defendant was "*armed with a deadly weapon, *to-wit: a .38 revolver or crowbar." Id.* The Court held that the "to-wit" the references to the building and crowbar were judicial comments on the evidence. *Id*. at 721. The Court found use of the word "building" in the instruction improperly suggested to the jury that the apartment was a building as a matter of law. *Id*. The Court found the reference to the crowbar as a deadly weapon was a judicial comment because the State was required to prove the crowbar was used in a way that met the criteria of a deadly weapon. *Id*. at 722.

In *State v. Jackman*, Jackman was charged with sexual exploitation of a minor, and the "to convict" instructions designated the victims by their initials and included their birth dates. 156 Wn.2d 736, 740-41, 132 P.3d 136 (2006). The Court held the instructions were judicial comments on the evidence because they allowed the jury to infer the victims' birth dates had been proved by the State, and the status of the victims as minors was a fundamental basis for

the offenses. *Id*. at 744. The Court found that had the instructions not removed those facts from the jury's consideration, it was conceivable for the jury to have found the victims were *not* minors, and the record did not affirmatively show no prejudice could have resulted. *Id*. at 745.

In the present case, the packet caption did not remove any of the facts of the case from the jury's consideration, and it did not suggest any of the facts of the case had been proved by the State. The caption did not convey any attitude towards the merits of the case. At most, it suggests the court believed the State provided instructions that were accurate statements of the law, which is not a comment on the evidence or whether the State met its burden of proof.

The trial court instructed the jury that it is improper for the judge to comment on the evidence, that he did not intentionally do so, and that if it appeared he had indicated his personal opinion in giving the jury instructions, that the jury must disregard it entirely. RP 207; CP 12. Juries are presumed to follow the court's instructions. *State v. Warren*, 165 Wn.2d 17, 29, 195 P.3d 940 (2008). The trial court did not make an improper judicial comment, and this Court should affirm Toribio-Laureano's convictions.

D. THE STATE CONCEDES THAT THE TRIAL COURT IMPOSED NON-MANDATORY LEGAL FINANCIAL OBLIGATIONS WITHOUT FIRST INQUIRING ABOUT TORIBIO-LAUREANO'S PRESENT OR FUTURE ABILITY TO PAY.

Toribio-Laureano's argues the trial court imposed discretionary legal financial obligations without considering his financial resources and present or future ability to make payments. Brief of Appellant 13-15.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant's ability to pay. *State v. Blazina,* 182 Wn.2d 827, 834, 344 P.3d 680 (2015).[3] The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

> The court shall not order 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 account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his

[3] Toribio-Laureano was sentenced prior to the Supreme Court's ruling in *Blazina*.

or her individual financial circumstances. *Id*. The trial court must make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id*. In *State v. Duncan*, the Washington State Supreme Court determined that the imposition and collection of legal financial obligations have constitutional implications and may be challenged for the first time on appeal. *State v. Duncan*, 185 Wn.2d 430, 434-38, 374 P.3d 83 (2016).

The State requested and the trial court imposed discretionary legal financial obligations. CP 44. The court did not conduct any specific inquiry to find that Toribio-Laureano would be able to make payments. RP 268-71. Therefore, the State concedes that non-mandatory legal financial obligations were imposed without inquiring about Toribio-Laureano's present or future ability to pay, and this Court should remand the case back to the trial court to make the proper inquiry.

IV. CONCLUSION

The trial court did not err when admitted Detective Humphrey's statement that "Mendez agreed to meet with their source that they knew as Primo." The trial court did not err when it

refused to give Toribio-Laureano's proposed missing witness jury instruction. The trial court did not comment on the evidence by presenting the jury with instructions containing "State's Proposed Jury Instructions" in its caption. However, the State concedes that non-mandatory legal financial obligations were imposed without inquiring about Toribio-Laureano's present or future ability to pay. Therefore, this Court should affirm Toribio-Laureano's convictions but remand the case back to the trial court to make the proper inquiry and impose legal financial obligations accordingly.

RESPECTFULLY submitted this 21ST day of December, 2016.

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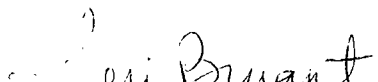
COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. ISRAEL TORIBIO-LAUREANO, Appellant.	No. 48857-4-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for Jessica L. Blye, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On December 21, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jodi R. Backlund, Backlund & Mistry, attorney for appellant, at the following email address: backlundmistry@gmial.com.

DATED this 21st day of December, 2016, at Chehalis, Washington.



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LEWIS COUNTY PROSECUTOR

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