FILED
Oct 08, 2012
Court of Appeals
Division III
State of Washington

NO. 30340-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JOSE LUIS NIEVES,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

Dennis W. Morgan WSBA #5286
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ARGUMENT

Jose Luis Nieves takes issue with certain aspects of the State's brief.

Initially, the State ignores the prosecuting attorney's failure to elect one of the alternatives set forth in the Instructions relating to intimidating a witness. The State's failure to address this issue constitutes an admission that his argument is correct. *See: State v. Ward*, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005).

The State references WPIC 115.51.01. However, the State ignores the NOTE ON USE. The Note provides, in part:

> …
>
> Use bracketed material as applicable. …
>
> The instruction is drafted under the assumption that only one of the alternatives in element (1) will be used. If, in a given case, more than one alternative needs to be included in element (1), then the instruction should be revised to follow the format for a to-convict instruction involving alternative means. [WPIC 4.23]

Mr. Nieves previously addressed WPIC 4.23 in his original brief and relies upon that argument.

Mr. Nieves next takes issue with the State's analysis concerning introduction of gang evidence at trial.

The State completely ignores the need for a nexus between possession of a firearm and its use in connection with any gang-related activities. *See: State v. Scott,* 151 Wn. App. 520, 527, 213 P.3d 71 (2009).

The State argues that possession of a firearm by Mr. Nieves constitutes a "criminal street gang-related offense." However, the State fails to recognize that the definition of "criminal street gang-related offense" contains the necessary nexus requirement as set forth in the *Scott* opinion.

"Criminal street gang-related offense" is defined in RCW 9.94A.030(14) in part as follows:

> … Any felony … that is committed for the benefit of, at the direction of, or in association with any criminal street gang, or is committed with the intent to promote, further, or assist in any criminal conduct by the gang, or is committed for one or more of the following reasons: (a) - (f).

The State fails to show how Mr. Nieves's possession of a firearm was connected to any gang activity.

The State fails to show how any acts on the part of Mr. Nieves on the evening of October 31, 2010 were gang activities.

Gang membership, as it pertains to unlawful possession of a firearm, is not an element of the offense. It is an enhancement. The State's argument that gang membership is an element of the crimes that were charged is spurious. In particular, the following excerpt from the State's brief, at p. 29, shows the total lack of understanding of the relationship between the crime and "gang membership":

> Because the gang testimony was necessary to prove the gang crimes charged, as well as related to the shooting and witness intimidation, and the jury instructions and evidence relating to them was necessary and proper, the gang evidence was properly admitted.

Finally, Mr. Nieves contends that the State misinterprets the legislative history behind RCW 9A.36.045. The legislative intent behind LAWS OF 1989, CH. 271, § 108 states:

> The legislature finds that increased trafficking in illegal drugs has increased the likelihood of "drive-by shootings." It is the intent of the legislature in sections 102, 109, and 110 of this act to categorize such reckless and criminal activity into a separate crime and to provide for an appropriate punishment.

The State's argument that LAWS OF 1995, CH. 129 somehow changed the nature of the offense is without foundation in fact. § 8 of that Act merely clarifies that a firearm is "as defined in RCW 9.41.010."

Mr. Nieves maintains that the argument contained in his brief correctly interprets legislative intent.

Mr. Nieves otherwise relies upon all portions of his original brief in support of the issues raised.

DATED this __5th___ day of October, 2012.

Respectfully submitted,

_____s/Dennis W. Morgan_____

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	GRANT COUNTY
Plaintiff,	)	NO.10 1 00590 3
Respondent,	)	
	)	**CERTIFICATE OF**
	)	**SERVICE**
v.	)	
	)	
JOSE LUIS NIEVES,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this __5th__ day of October, 2012, I caused a true and correct copy of the *APPELLANT'S REPLY BRIEF* to be served on:

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