

No. 30709-3-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

RAMIRO FARIAS-GALLEGOS,

Defendant/Appellant.

FILED
June 24, 2013
Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR FRANKLIN COUNTY
The Honorable Vic L. Vandershoor, Judge

APPELLANT'S REPLY BRIEF

Beth Mary Bollinger, WSBA #26645
Of Counsel
Gasch Law Office
Attorneys for Appellant
P. O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
FAX – None
gaschlaw@msn.com

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....i

A. ARGUMENT.....1

B. CONCLUSION.....5

TABLE OF AUTHORITIES

Washington State Cases

State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986).....4

State v. Calvin, No. 67627-0-I, 2013 WL 2325121 at *11
(Wash.Ct.App. May 28, 2013).....4

State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).....4

State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991).....3

A. ARGUMENT

Mr. Farias-Gallegos, by and through undersigned counsel, hereby submits the following Reply to the State's Respondent's Brief. Primarily Mr. Farias-Gallegos relies upon his Brief of Appellant to address the issues raised by the State. He does, however, state as follows in direct Reply:

--The State asserts that Mrs. Ochoa "admitted that she did not want her child to testify and did not inform him about the subpoena until an hour before they arrived in court." Respondent's Brief at 6. This is incorrect. In fact, Mrs. Ochoa testified only that she did not tell her son ahead of time about the court date because she did not want him to be "nervous." RP Feb. 15, 2012 at 13-14.

--The State asserts that the defense investigator reported that a witness did not want to testify and was concerned for safety. Respondent's Brief at 6. In fact, this was an unsubstantiated proffer by the prosecutor. RP Feb. 16, 2012 at 140-141. To state otherwise is misleading.

--The State asserts that the alleged victim identified the Defendant as wearing a gray shirt. *See* Respondent's Brief at 3. While this information did occur during the victim's testimony, this statement does not acknowledge the victim's initial identification of his assailant as

wearing a blue shirt, to 911 (as we outline in the Brief of Appellant at 5-6, 21-22).

The State does finally appear to concede this point (that the victim initially identified the shirt color as blue) when it asserts that there can be a dispute over color. *See* Respondent’s Brief at 25. However, disputes over color are between individuals – *plural*. A witness who calls about an assailant wearing a blue shirt and then later changes his story to gray in order to identify someone else as the assailant (because this new person is wearing a gray shirt, not blue), and who also changes the label of the color *he himself* is seeing – is a witness who has changed the description of his assailant *in his own eyes* – not the eyes of another who thinks blue looks gray.

--The State asserts that the defense would have been on notice regarding how and whether gang evidence would be used. Respondent’s Brief at 12. However, the State produced Detective Reardon’s “information, numerous reports, his report itself that he is going to testify that this was a gang-related activity.” RP Feb. 16, 2012 at 66. It was the State that invited inquiry into gang-related activity based on its proposed evidence, and it was the State that failed to alert the defense to the trap that it had set. The State made a misleading representation that had adverse consequences for the defense and should be held accountable for its

actions. To the extent that the State's alleged victim used the word "gang" in his testimony and said that Mr. Farias-Gallegos said it does not excuse the State from revealing fully its intention not to use gang evidence and in fact the jury voir dire on gangs actually had the potential of giving credence to an alleged statement of the defendant that otherwise would not have been given credence (coming as it was from an unreliable witness).

--The State attempts to rely on *State v. Johnson*, 61 Wn. App. 539, 811 P.2d 687 (1991), to justify its bootstrapping of hearsay at trial. See Respondent's Brief at 16. But the State errs in its reading of *Johnson*. The accurate reading of that case is found in the Brief of Appellant at pages 20-22. Suffice to say that "fit the description of suspects" is not "on information received" (the only allowable exception found in *Johnson*). In this case, where eye witnesses' descriptions specifically did not match the defendant at the time of trial, and where the State was attempting to impeach its own witnesses via officers testimony that implied on-site identification, the prosecutor's questions resulted in the admission of impermissible hearsay.

--The State does not address the argument outlined in the Brief of Appellant regarding the expansion of charges during jury instructions as being an impermissible variance or constructive amendment. Compare Brief of Appellant at 24-27 with Respondent's Brief at 17-18. This is so

because error did occur, and there is no real response that the State can proffer, given the rulings in *State v. Brown*, 45 Wn. App. 571, 576-77, 726 P.2d 60 (1986) and other cases cited in the Brief of Appellant.

--The State cites no facts in the record to refute appellant's argument that the sentencing court made a factual finding of present ability to pay legal financial obligations without evidence to support the finding. *Cf.* Brief of Appellant at 34–39 with Respondent's Brief at 26–29. References to “Defendant's employment packing apples on Ainsworth”, a possible “financial declaration” and “the booking report” should be stricken where, even if it exists, such evidence is not part of the record. *See* Respondent's Brief at 28. Since the State on appeal has equal ability to obtain supplemental proceedings, the fact it did not order transcription of appellant's first appearance suggests there are no facts there which would support its position here. *See* Respondent's Brief at footnote 1, 26–27.

The State further counters that appellant did not object to the court's finding. Statement of Additional Authorities, filed May 31, 2013 (on file). However, this is an illegal or erroneous sentence that may be challenged for the first time on appeal. *State v. Calvin*, No. 67627–0–I, 2013 WL 2325121 at *11 (Wash.Ct.App. May 28, 2013) (citing *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). Here, the trial court

made the express finding that appellant has the ability to pay legal financial obligations. Since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous.

B. CONCLUSION

For the foregoing reasons, Mr. Farias-Gallegos renews his request to have this Court vacate the conviction of assault in the first degree and the accompanying enhancement on the basis that the evidence was insufficient or, in the alternative, that the Court reverse the convictions based on any one and/or all the errors described in his Brief of Appellant and emphasized above. Also in the alternative, the matter should be remanded to strike the finding of ability to pay legal financial obligations and the offending conditions of community custody from the Judgment and Sentence.

Respectfully submitted this ____ day of June, 2013.

_____/s/ Beth Mary Bollinger
Beth Mary Bollinger, WSBA #26645
Of Counsel

_____/s/ Susan Marie Gasch
Susan Marie Gasch, WSBA #16485
Gasch Law Office
Attorneys for Appellant
P.O. Box 30339
Spokane, WA 99223-3005
(509) 448-1503
FAX - None
gaschlaws@msn.com

