

33027-3-III
COURT OF APPEALS
DIVISION III

FILED
May 28, 2015
Court of Appeals
Division III
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FRANCISCO GONZALEZ-GONZALEZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 8754
Spokane, WA 99203
(509) 838-8585

INDEX

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE.....	1
D.	ARGUMENT	4
	1. THE TRIAL COURT’S HEARSAY RULING RESULTED IN THE ADMISSION OF HIGHLY PREJUDICIAL IMPROPER EVIDENCE	4
	2. THE FINDING THAT MR. GONZALEZ- GONZALEZ HAS THE ABILITY TO PAY COURT COSTS IS NOT SUPPORTED BY ANY EVIDENCE.....	8
E.	CONCLUSION.....	11

TABLE OF AUTHORITIES

WASHINGTON CASES

IN RE DEPENDENCY OF K.R., 128 Wn.2d 129,
904 P.2d 1132 (1995)..... 9

IN RE WELFARE OF S.V.B., 75 Wn. App. 762,
880 P.2d 80 (1994)..... 9

SCOTT'S EXCAVATING VANCOUVER, LLC V. WINLOCK
PROPS., LLC, 176 Wn. App. 335,
308 P.3d 791 (2013), *review denied*,
179 Wn.2d 1011 (2014) 8

STATE V. BLAZINA, ___ Wn.2d ___,
344 P.3d 680, 2015 WL 1086552 (Mar. 12, 2015)..... 10

STATE V. HUDLOW, 182 Wn. App. 266,
331 P.3d 90 (2014)..... 5, 6, 7

STATE V. NEAL, 144 Wn.2d 600,
30 P.3d 1255 (2001)..... 4, 6

STATE V. THEROFF, 25 Wn. App. 590,
608 P.2d 1254, *aff'd*,
95 Wn.2d 385, 622 P.2d 1240 (1980)..... 9

STATE V. THOMAS, 150 Wn.2d 821,
83 P.3d 970 (2004)..... 7

STATUTES

RCW 10.01.160 8

COURT RULES

ER 801(c) 5

ER 802 5

A. ASSIGNMENTS OF ERROR

1. The court erred in overruling defendant's objection to hearsay testimony.
2. The court erred in imposing court costs.

B. ISSUES

1. A witness summarized information she had received from non-testifying declarants. Did the court err in overruling defense counsel's hearsay objection?
2. The central issue in the case is the relative credibility of the defendant and the alleged victim. Is it reasonably probable that a police officer's testimony that the defendant was located through police records based on his use of an alias affected the outcome of the prosecution?
3. The record contains no evidence supporting the court's finding as to defendant's ability to pay court costs. Is the imposition of discretionary costs error?

C. STATEMENT OF THE CASE

C.H. went to Francisco Gonzalez-Gonzalez's apartment purportedly to sell him a cell phone. (RP 218) Mr. Gonzalez-Gonzalez

did not know the boy, but had seen him around the apartment complex with a neighbor's son. (RP 223) Mr. Gonzalez-Gonzalez left him alone briefly, and when he returned C.H. said he had to leave and departed quickly. (RP 218-19) After C.H. left, Mr. Gonzalez-Gonzalez discovered his watch was missing. (RP 219) About four months later, the boy returned, and Mr. Gonzalez-Gonzalez immediately confronted him about the missing watch. (RP 220-21) C.H. said he didn't know anything about the watch, made threatening remarks, and left. (RP 223)

Pasco police received a call about an assault involving a knife and possible threats to kill. (RP 85) Officer McClintock was dispatched to the Oriental Express. (RP 153) There he met with the reporting party, C.H. (RP 154) C.H. appeared upset and had a cut on his lower lip. (RP 155) Based on information provided by C.H., Officer McClintock went to a residence. (RP 157) He conducted a show-up in which C.H. identified Mr. Gonzalez-Gonzalez and his brother as having been involved. (RP 158-59) Officer Kari Skinner gave him a disk which C.H. claimed was his. (RP 160-61)

The State charged Mr. Gonzalez-Gonzalez with first degree robbery, unlawful imprisonment, and harassment. (CP 100-191) C.H. told a jury he knew Mr. Gonzalez-Gonzalez by the nickname "Kiko." (RP 54) He said he had gone to Mr. Gonzalez-Gonzalez's house "to get some

weed.” (RP 53) He testified that Mr. Gonzalez-Gonzalez invited him into the house and the he “got pulled in and got swung at.” (RP 55) He said he didn’t really get hit, and his mouth was not injured but his backpack was taken. (RP 55-56) He testified he “got kicked once or twice when [he] was on the floor.” (RP 57) He said Mr. Gonzalez-Gonzalez accused him of stealing a watch, but he denied having done so. (RP 57) He also told the jury Mr. Gonzalez-Gonzalez took his backpack containing his wallet, house key, phone and tablet, and a USB drive that belonged to his brother. (RP 57-58)

According to C.H., the only other person present was Mr. Gonzalez-Gonzalez’s brother. (RP 60) The brother was standing between him and the door, holding a knife. (RP 61) He testified that Mr. Gonzalez-Gonzalez told him he could not leave the apartment unless he was going to go get the watch, and if he ever tried to steal from them again he would have his brother kill him. (RP 61) C.H. agreed to go get the watch, then went to the Oriental Express and called the police. (RP 62)

Mr. Gonzalez-Gonzalez told the jury he had never hit the boy and denied taking his backpack. (RP 223, 227) He identified a small memory card that was found in his pocket following his arrest. (RP 225) He said he owned a number of similar memory cards, and had found this one lying on the floor inside the entrance to his home. (RP 225-26)

The jury returned verdicts of not guilty on the robbery and harassment charges, but found Mr. Gonzalez-Gonzalez guilty of unlawful imprisonment. (CP 33-35)

At sentencing, the judge commented:

I think my view of what happened is Mr. Gonzalez-Gonzalez was upset with this young man when he came to his house and upset with him that the young man had stolen a watch from him on a prior occasion, and that Mr. Gonzalez-Gonzalez just used poor judgment that day to try to pressure the young man into giving him the watch back.

(Sent. RP 8) The court sentenced Mr. Gonzalez-Gonzalez to two months in jail, with credit for three months served before trial, and imposed costs totaling \$1800. (CP 21, 24; RP 3, 7) The court stayed the mandatory reporting requirement required following an unlawful imprisonment conviction involving a juvenile pending this appeal. (Sent. RP 9)

D. ARGUMENT

1. THE TRIAL COURT'S HEARSAY RULING RESULTED IN THE ADMISSION OF HIGHLY PREJUDICIAL IMPROPER EVIDENCE.

“The application of a court rule to the facts in a case is a question of law subject to de novo review on appeal.” *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

The prosecutor elicited hearsay testimony from a police officer informing the jury that Mr. Gonzalez-Gonzalez used an alias and police dispatch was able to locate his residence by using the alias for a record management, implying that Mr. Gonzalez-Gonzalez had a criminal record:

Q. Were you able to locate the residence where this incident occurred?

A. Yes, ma'am, I was.

Q. How so?

A. Originally, the reporting party had indicated a general area to Officer McClintock, and then dispatch had done a records management search on an alias name that had been provided by the name of Kiko.

(RP 86) The court overruled defendant's objection:

MR. LIN: Objection, hearsay. Move to strike.

THE COURT: Any response?

MS. LORINCZ: I'm not -- I'm not necessarily sure what the objection is related to.

THE COURT: I think I heard hearsay.

I'll overrule it. I did not hear where she repeated whatever someone else said.

(RP 86)

“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). “Unless an exception or exclusion applies, hearsay is inadmissible. ER 802.” *State v. Hudlow*, 182 Wn. App. 266, 278, 331 P.3d 90 (2014). “The use of hearsay impinges upon a defendant's constitutional right to confront and cross-examine

witnesses.” *Id.*, citing *State v. Neal*, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001).

When a witness relates information or facts obtained from the statements of another person, the evidence is hearsay regardless of whether the witness expressly repeats the declarant’s actual statements. *State v. Hudlow*, *supra*. In *Hudlow*, a police detective related the substance of a conversation he had overheard in which an informant made arrangements for the purchase of methamphetamine at a specified location at a particular time. 182 Wn. App. at 272. Mr. Hudlow was arrested after he appeared at the location at the appointed time and engaged in an apparent transaction with the informant. *Id.* at 274-75. This court concluded the detective’s testimony was necessarily based on what the informant said and was thus hearsay. *Id.* at 277.

Here, the officer testified as to her understanding that the location of the residence at which C.H. reported having been assaulted was obtained by a dispatcher who relied on information provided by an unidentified source regarding an alias and the dispatcher’s use of that information to search law enforcement records. In short, the officer related the statements of the dispatcher, who in turn related statements made by another person and statements contained in law enforcement records. This was hearsay.

In *Hudlow*, the proponent claimed the apparent hearsay was not offered for the truth of the matter asserted but to show the mental state of the testifying officer. This court rejected this argument, noting the state of mind of the law enforcement officer had “no bearing” on the issue at trial, namely whether the defendant sold drugs to the informant. Here, the methods used by law enforcement to locate an address and in particular the use of an alleged alias in obtaining that information has no bearing on the issue in the present case, namely whether Mr. Gonzalez-Gonzalez robbed, harassed or imprisoned C.H.

The trial court erred in failing to recognize the hearsay nature of the officer’s testimony and in overruling the defense objection.

A trial court’s evidentiary rulings are harmless unless, within reasonable probabilities, they affected the outcome of the trial. *State v. Thomas*, 150 Wn.2d 821, 870, 83 P.3d 970 (2004). The outcome in the present case hinged on the respective credibility of the defendant and the alleged victim. Apart from the testimony of these two witnesses, the evidence presented to the jury was circumstantial, disputed, ambiguous and trivial. Under these circumstances, evidence that suggested to the jury that Mr. Gonzalez-Gonzalez was known to the police, used an alias, and perhaps had a criminal record, was not harmless.

2. THE FINDING THAT MR. GONZALEZ-GONZALEZ HAS THE ABILITY TO PAY COURT COSTS IS NOT SUPPORTED BY ANY EVIDENCE.

The trial court ordered Mr. Gonzalez-Gonzalez to pay legal costs of \$1800, including discretionary costs of \$700 for appointed counsel.

RCW 10.01.160 authorizes the sentencing court to impose legal financial obligations (LFOs) on a convicted offender, but:

- (3) 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.

The judgment and sentence includes a preprinted finding stating that the court has considered the defendant's ability to pay and finding "the defendant has the ability of future ability to pay" legal financial obligations. (CP 19-20) An appellate court reviews a trial court's findings of fact for substantial evidence to support the findings and then determines whether those findings of fact support its conclusions of law. *Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 341, 308 P.3d 791 (2013), *review denied*, 179 Wn.2d 1011 (2014). Apart from the preprinted finding on the sentencing form, there is nothing in the record to support the court's imposition of costs in this case.

Challenged findings are reviewed to determine whether they are supported by substantial evidence. *In re Welfare of S.V.B.*, 75 Wn. App. 762, 768, 880 P.2d 80 (1994). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Findings of fact will be upheld on appeal where there is "sufficient evidence for a rational trier of fact to find the necessary facts to the required level of certainty." *In re S.V.B.*, 75 Wn. App. at 768.

The party challenging the court's findings must demonstrate the absence of sufficient evidence in the record. *In re Dependency of K.R.*, 128 Wn.2d 129, 141, 904 P.2d 1132 (1995). The record does not show that the trial court took into account Mr. Gonzalez-Gonzalez's financial circumstances before imposing discretionary legal financial obligations. The court made no mention whatsoever of Mr. Gonzalez-Gonzalez's ability to make payments.

Mr. Gonzalez-Gonzalez told the court that he had been working at the time of the alleged offense "helping a mechanic in Kennewick." (Sent. RP 6) During the three months before trial he was in jail on the pending charges. (Sent. RP 3) No evidence was presented as to Mr. Gonzalez-Gonzalez's level of education, job skills or training, or employment

history. The record is insufficient to support the sentencing court's finding and thus the imposition of costs.

In *State v. Blazina*, the Supreme Court reviewed an objection to the imposition of costs raised for the first time on appeal noting “[n]ational and local rules for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case.” ___ Wn.2d ___, 344 P.3d 680, 2015 WL 1086552 (Mar. 12, 2015). To award such costs without determining ability to pay circumvents the individualized judicial discretion that *Blazina* held was essential before including monetary obligations in the judgment and sentence.

The *Blazina* court also suggested, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person’s ability to pay LFOs.” *Blazina*, 344 P.3d at 685.

This court should either reverse the award of discretionary costs or remand for a fair pre-imposition fact-finding hearing at which the defendant can present evidence of his inability to pay. If the State is able to overcome the presumption of continued indigence and support a finding that Mr. Gonzalez-Gonzalez has the ability to pay, the court could then fairly exercise its discretion to impose all or a portion of the State’s requested costs, depending on Mr. Gonzalez-Gonzalez’s actual and documented ability to pay.

E. CONCLUSION

The court should reverse Mr. Gonzalez-Gonzalez's conviction or, in the alternative, reverse the award of discretionary costs imposed.

Dated this 28th day of May, 2015.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 33027-3-III
)	
vs.)	CERTIFICATE
)	OF MAILING
FRANCISCO GONZALEZ-)	
GONZALEZ,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on May 28, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Shawn Sant
ssant@co.franklin.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on May 28, 2015, I mailed a copy of the Appellant's Brief in this matter to:

Francisco Gonzalez-Gonzalez
2037 W Pearl St., Apt A
Pasco, WA 99301

Signed at Spokane, Washington on May 28, 2015.


Janet G. Gemberling
Attorney at Law