IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PEDRO S. BELTRAN, Appellant.	No. 38234-2-II UNPUBLISHED OPINION

Bridgewater, J. — Pedro S. Beltran appeals his juvenile conviction for one count of criminal gang intimidation. We hold that the evidence was sufficient to sustain his conviction, but we accept the State's concession that the information was insufficient. Accordingly, we reverse and remand for dismissal of Beltran's conviction without prejudice.

Facts

The State charged Beltran with criminal gang intimidation under RCW 9A.46.120[1] (count I) and fourth degree assault (count II), regarding an incident on July 4, 2008. Count I of the information alleged that Beltran "did threaten another person with bodily injury because the other

[1] RCW 9A.46.120 provides:

> A person commits the offense of criminal gang intimidation if the person threatens another person with bodily injury because the other person refuses to join or has attempted to withdraw from a gang, as defined in RCW 28A.600.455, if the person who threatens the victim or the victim attends or is registered in a public or alternative school.

person refuses to join or has attempted to withdraw from a gang." CP at 14. The charging document did not allege that Beltran attends or is registered in a public or alternative school.

Beltran pleaded guilty to the assault count prior to trial. At his bench trial on the remaining criminal gang intimidation charge, Beltran testified that he had assaulted Jonathan Margart because "[Margart] was talking shit about me and was calling me a bitch," and not for any reason related to gang membership. RP (Aug. 14, 2008) at 62. Prosecution witnesses testified that the assault was aimed at convincing Margart to join the LVL (Little Valley Lokotes).

Retired Centralia School District teacher and administrator Jerry Hensley testified that for the past seven years he had been the lead teacher at Centralia for all the program services and that he was the disciplinarian for the CAPS program (Centralia alternative program). Hensley testified about Beltran's history and student status at CAPS, and the disciplinary actions taken against Beltran for gang-related activities.

Margart testified about the July 4 assault.[2] He also testified about his knowledge of the LVL and their activities. Margart reported to police after the July 4 incident, and acknowledged at trial, that the reason Beltran assaulted him was to get him to join the LVL. Centralia Police Officer Timothy Warren testified regarding the content of Margart's statement to police following the assault. Margart reported to police that as he lay on the ground, Beltran repeatedly kicked him and kept saying "You need to be LVL." RP (Aug. 12, 2008) at 70.

[2] There was no testimony that Margart was a student. He indicated only that he was 18 years old and worked at a local furniture store.

Centralia Police Sergeant Patrick Fitzgerald testified as a gang expert. He described the Centralia LVL and its activities, its place in the local and regional gang culture and hierarchy, its membership, and its involvement in criminal gang activity.

The trial court convicted Beltran of criminal gang intimidation. Beltran appealed.

Discussion

Insufficient Information

Beltran first contends that the information was insufficient because it failed to inform him of an essential element of the charged crime of criminal gang intimidation, namely, that either the defendant or the victim attends or is registered at a public or alternative school. The State concedes that the information is insufficient and asks that Beltran's conviction be dismissed without prejudice. The proper remedy for a conviction based on a defective information is dismissal without prejudice to the State refiling the information. *State v. Franks*, 105 Wn. App. 950, 959-60, 22 P.3d 269 (2001). We accept the State's concession.

Sufficiency of the Evidence

Beltran additionally argues that the State's evidence was insufficient to convict him of the crime of criminal gang intimidation.[3] We disagree.

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

[3] We address this argument because if the evidence is insufficient, the appropriate remedy is reversal and remand for dismissal with prejudice. "A defendant whose conviction has been reversed due to insufficient evidence cannot be retried." *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (citing *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982), *cert. denied*, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982)).

beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When the sufficiency of evidence is challenged in a criminal case, we must draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Credibility determinations are for the trier of fact and are not subject to review. *Thomas*, 150 Wn.2d at 874. We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874-75.

Beltran argues that the evidence fails to establish two elements: that either Beltran or the alleged victim "attends or is registered in a public or alternative school," and that LVL qualifies as a "gang." Br. of Appellant at 7-8; RCW 9A.46.120. He specifically argues that the evidence does not establish that the CAPS program is a public or alternative school or that he attended or was enrolled at a public or alternative school at the time of the offense. But the testimony establishes otherwise. Jerry Hensley testified regarding his role as the main disciplinarian at CAPS, how he applied certain local school district policies generally, and his disciplinary actions against Beltran for gang-related activity prohibited by the school district's student handbook. Hensley testified that when he suspended students from CAPS for gang-related activity, he cleared that action with the Centralia High School administration. A reasonable inference from Hensley's testimony is that CAPS is an alternative program within the Centralia School District.

Moreover, Hensley testified that Beltran was a student at CAPS for "the last two years," and that he was still a student at CAPS and due back when classes resumed in the fall of 2008. RP (Aug. 12, 2008) at 52-53.[4] Beltran argues that he had been suspended on May 21, 2008, and was not attending classes when the July 4 assault occurred. But the fact that he was suspended at the end of the previous school year is irrelevant. The incident in question occurred on a holiday during the summer vacation. No CAPS students were attending classes on that day. As noted, Beltran was due to return in the fall with the other students. We hold that, taken in the light most favorable to the State, the evidence and its inferences establish that Beltran attended a public or alternative school.

Beltran contends that the evidence does not establish that LVL was a gang. Again, we disagree. The criminal gang intimidation statute incorporates RCW 28A.600.455, which provides that "'Gang' means a group which: (a) Consists of three or more persons; (b) has identifiable leadership; and (c) on an ongoing basis, regularly conspires and acts in concert mainly for criminal purposes." RCW 28A.600.455(2). Testimony by Centralia Police Sergeant Fitzgerald, a gang expert, indicated that the Centralia LVL is a subset of the Yakima LVL, and that the LVL are a subpart of a larger umbrella gang organization, the Sorenos, who direct the work of lower members. Fitzgerald testified that the Centralia LVL consisted of some 15 core members and some 40 "wannabes," or associates who do much of the LVL's actual work (recruiting and criminal activity) in order to gain status and become full-fledged members. RP (Aug. 14, 2008) at

[4] The August 2008 trial occurred during the summer vacation period, as did the July 4, 2008, assault in question.

37. Fitzgerald noted the LVL's involvement in local gang crimes, including assaults, and the LVL's conduct of placing gang graffiti on buildings in order to mark territory and intimidate citizens. Margart also testified that he was familiar with the Centralia LVL and its leadership structure, noting that gang members "answer to . . . the top dog." RP (Aug. 12, 2008) at 30. We hold that this evidence, viewed in the light most favorable to the State, establishes that the Centralia LVL is a "gang" under RCW 28A.600.455(2).

In sum, Beltran's assertions of insufficient evidence fail. Accordingly, dismissal *with prejudice* is not required.

Reversed and remanded for dismissal without prejudice.[5]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, J.

Van Deren, C.J.

[5] Beltran additionally asks us to strike several of the trial court's findings of fact, and purportedly erroneous factual findings appearing in the conclusions of law, contending that they are not supported by substantial evidence. Because we reverse his conviction, we need not address these contentions.