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Division III
State of Washington

29657-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICARDO DELEON, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENTS OF ERROR 1

B. ISSUES 1

C. STATEMENT OF THE CASE 3

D. ARGUMENT 13

1. STATEMENTS OFFICER SAENZ ELICITED FROM RICARDO DELEON WERE INVOLUNTARY AND THEIR ADMISSION AT TRIAL VIOLATED THE FIFTH AMENDMENT 13

2. ADMITTING CODEFENDANTS' STATEMENTS VIOLATED ER 802 AND THE CONFRONTATION CLAUSE 19

a. The Statements Were Inadmissible Hearsay 19

b. The Hearsay Evidence Violated The Confrontation Clause 20

c. The Error Was Highly Prejudicial 21

3. NO EVIDENCE SUPPORTED THE AGGRAVATING FACTOR OF GANG BENEFIT 22

4. THE INTRODUCTION OF IRRELEVANT PREJUDICIAL GANG TESTIMONY REQUIRED A MISTRIAL 24

E. CONCLUSION 28

TABLE OF AUTHORITIES

WASHINGTON CASES

STAE V. EASTER, 130 Wn.2d 228,
922 P.2d 1285 (1996).. 17

STATE V. AUMICK, 126 Wn.2d 422,
894 P.2d 1325 (1995).. 17

STATE V. BLUEHORSE, 159 Wn. App. 410,
248 P.3d 537 (2011).. 23

STATE V. CHAMBERS, 134 Wn. App. 853,
142 P.3d 668 (2006).. 20

STATE V. EARLS, 116 Wn.2d 364,
805 P.2d 211 (1991).. 14

STATE V. FISHER, 130 Wn. App. 1,
108 P. 3d 1262, 1268 (2005)... 21

STATE V. FRASQUILLO, 161 Wn. App. 907,
255 P.3d 813 (2011).. 21

STATE V. KIDD, 36 Wn. App. 503,
674 P.2d 674 (1983).. 13

STATE V. KRONICH, 160 Wn.2d 893,
161 P.3d 982 (2007).. 20

STATE V. STEIN, 140 Wn. App. 43,
165 P.3d 16 (2007).. 20

STATE V. THOMAS, 166 Wn.2d 380,
208 P.3d 1107 (2009).. 23

STATE V. UNGA, 165 Wn.2d 95,
196 P.3d 645 (2008).. 14

STATE V. WHELCHEL, 115 Wn.2d 708,
801 P.2d 948 (1990).. 17

STATE V. WHITE EAGLE, 12 Wn. App. 97,
527 P.2d 1390 (1974) 20

STATE V. YARBROUGH, 151 Wn. App. 66,
210 P.3d 1029 (2009) 24

SUPREME COURT CASES

ARIZONA V. FULMINANTE, 499 U.S. 279,
111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) 15

BLACKBURN V. ALABAMA, 361 U.S. 199,
80 S. Ct. 274, 4 L. Ed. 2d 242 (1960) 16

BRUTON V. UNITED STATES, 391 U.S. 123,
88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) 19

COLORADO V. CONNELLY, 479 U.S. 157,
107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) 14

CRAWFORD V. WASHINGTON, 541 U.S. 36,
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) 20

FARE V. MICHAEL C., 442 U.S. 707,
99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979) 14

MIRANDA V. ARIZONA, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 14

PAYNE V. ARKANSAS, 356 U .S. 560,
78 S. Ct. 844, 2 L. Ed. 2d 975 (1958) 15

SCHNECKLOTH V. BUSTAMONTE, 412 U.S. 218,
93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973) 14

FEDERAL CASES

HORTON V. ALLEN, 370 F.3d 75 (1st. Cir. 2004) 21

UNITED STATES V. BRAVE HEART,
397 F.3d 1035 (8th Cir. 2005) 14

CONSTITUTIONAL PROVISIONS

ARTICLE I, § 9 .... 14, 17

FIFTH AMENDMENT 1, 13, 14, 17

FOURTEENTH AMENDMENT 13, 17

U.S. CONST. AMEND. V... 14

U.S. CONST. AMEND. VI 20

STATUTES

RCW 9.94A.030.. 26

RCW 9.94A.535.. 22

RCW 9.94A.535(3)(aa).. 22

COURT RULES

CrR 3.5 .... 7, 13

ER 401 25

ER 404(b)... 3, 24, 25

ER 702 26

ER 801(c) 19

ER 802 .... i, 19

ER 801(d)(2) 19

RAP 2.5(a)(3)... 20

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting into evidence Ricardo DeLeon's statements to the jail booking officer.
2. The court erred in admitting into evidence the statements of Ricardo DeLeon's non-testifying codefendants.
3. The court erred in imposing an exceptional sentence.
4. The court erred in denying defendants' motion for a mistrial.

B. ISSUES

1. A booking officer in the jail asked the defendant if he would be in danger if housed with certain individuals, then requested gang-related information tending to establish the defendant's membership in a criminal street gang. Were the defendant's statements in response to those questions involuntary and inadmissible under the Fifth Amendment?
2. Under the confrontation clause, did the court err in admitting into evidence hearsay testimony relating non-testifying codefendants' post-arrest statements to the jail booking officer?

3. The State failed to present any evidence that the defendant had made any statements or engaged in any recent activity supporting the inference that his presence at the alleged drive-by shooting was motivated by any interest in benefiting a criminal street gang. Did the court err in imposing an exceptional sentence based on the jury's finding that the defendant was so motivated, presumably based solely on evidence he was associated with a street gang?

4. The State provided the court with minimal, arguably inadmissible evidence that the defendant was associated with a street gang. A gang expert was permitted to present testimony explaining the aspects of gang culture that would support the inference the defendant was associated with a street gang and demonstrate a motive for the defendant to participate in a drive-by shooting. The expert also provided extensive evidence about gang culture unrelated to such motivation, and designed to impress the jury with the prevalence of gangs and their potential threat to the community. Did the court abuse its discretion under

ER 404(b) in ruling the evidence admissible and denying defendants' motion for a mistrial?

C. STATEMENT OF THE CASE

Ignacio Cardenas spent the evening of May 9 at his home at 1111 Tacoma hanging out with his friend Angelo Lopez and his cousin Miguel Acevedos. (RP 1349-50; 1770)[1] They were waiting for a friend, Jose Barajas, who was bringing them invitations to a birthday party. (RP 1772) When he thought he saw Mr. Barajas drive by, Mr. Acevedo made a sign of the "LVL," a local gang. (RP 1773, 1781) The passing car made a U-turn and one of its occupants shouted something. (RP 1774)

The car made another U-turn, and Mr. Acevedo saw shots coming from the passenger. (RP 1776) When the passenger pulled out the gun, Mr. Acevedo hid behind the tire of a nearby car. (RP 1778) When the passing car had gone, Mr. Acevedo found that Mr. Cardenas had been shot. (RP 1779) He told Mr. Cardenas's mother that his cousin had been shot, and they took Mr. Cardenas to the hospital. (RP 1779)

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[1] This brief contains citations to three separate reports of the proceedings. The 16-volume, consecutively paginated transcript, which was prepared by transcriptionist Louie Allred, is cited as RP. The 5-volume report of proceedings prepared by court reporter Joan Anderson is cited as Pretrial RP. A smaller single-volume transcript, prepared by Louie Allred, is cited as Supp. RP.

When Mr. Cardenas arrived at the hospital he appeared to be in critical condition. (RP 1247) He had a gunshot wound to the left side of the abdomen and was suffering significant blood loss. (RP 1251, 1256) Following surgery he was transferred to Harborview Hospital. (RP 1249)

Mr. Barajas was just arriving at Mr. Cardenas's home when the shooting occurred. (RP 1568-70) He followed the car as it left the scene, but he lost sight of it a few moments later. (RP 1572-75) After driving around, he saw what he believed was the same car. (RP 1575-76) He again lost sight of it but followed in the direction it had gone and eventually saw taillights as he approached the road leading to the freeway. (RP 746, 1577-78) He called 911 on his cell phone, and reported that he was following the car that was involved in the shooting and described it as a silver Taurus with a possible license number 439WYM. (RP 746-47, 1580-81)

Based on the information that had been provided to dispatch, Officer Skip Lemmon drove onto the freeway in an attempt to overtake Mr. Barajas or the vehicle he was reportedly pursuing. (RP 717) He overtook and passed Mr. Barajas's truck, then overtook several Grandview patrol cars pursuing a Ford Taurus. (RP 717-18)

Officer Guadalupe Martin became aware of the pursuit when he heard that a witness was following a silver Taurus onto the freeway.

(RP 978-79) He drove onto the freeway and saw three vehicles, one of which appeared to match the description of the vehicle that was being pursued. (RP 985-87) He pulled in behind that vehicle and began to pursue it. (RP 988) He was directly behind the pursued Taurus when police eventually brought it to a halt using road spikes. (RP 727, 864) The license on the pursued Taurus was 438WCY. (RP 861, 990)

The driver of the Taurus was eventually identified as Anthony Deleon. (RP 964) The front passenger was Octavio Robledo. (RP 962) According to Officer Martin, Ricardo Deleon was seated on the left side of the rear seat. (RP 964, 997, 1009)

The State charged Anthony and Ricardo Deleon and Octavio Robledo with three counts of first degree assault, while armed with a firearm and with intent to benefit a criminal street gang. (CP 225-26)[2] Before trial, defense counsel sought an offer of proof and court ruling on expert testimony related to gang membership and gang activities. (Anthony DeLeon CP 250-51)

Trial commenced on September 2, 2010. (Pretrial RP 12-13, 119) The three defendants were tried together.

The court stated that gang membership alone would be sufficient to establish that a crime was committed in order to benefit a gang. (Pretrial

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[2] Citations to CP refer to the clerk's papers for Ricardo DeLeon.

RP 220) But the court made clear that expert testimony should be limited to explaining evidence of gang association provided by lay witnesses. (Pretrial RP 106, 108-09, 193, 207, 226, 236)

> I think the requirement is going to be that the expert testimony to be admissible has to be tightly crafted. It has -- the foundational information or evidence that comes in has to be very specific. There has to be -- you have to know why it's coming in and for what purpose it's coming in. If we allow the gang evidence in, the expert evidence in, and I'll use Ricardo again, and there is no linkage to establish or allow it, that, I think, is reversal. That creates a problem.

(Pretrial RP 256)

The court particularly noted the absence of evidence relating to Ricardo DeLeon's gang involvement. (Pretrial RP 196, 206, 210, 236) The prosecutor acknowledged to the court that the only evidence of Ricardo's gang affiliation was the fact that he was wearing red clothing and a t-shirt that mentioned a recently deceased member of the Norteno gang. (Pretrial RP 194, 210-11) The State also referenced the fact that Ricardo DeLeon was associating with gang members at the time of the shooting. (Pretrial RP 196)

A few days before jury selection began, the State provided the court with copies of documents reflecting statements the defendants had made during the booking process in the jail. (Pretrial RP 309) These documents, entitled Sunnyside Gang Documentation Forms, purported to

show that all three defendants had acknowledged association with a gang. (Pretrial RP 281; Supp RP 41-4) The prosecutor assured the court that the statements were taken after the defendants had been advised of their constitutional rights. (Pretrial RP 318).

The court then held a "CrR 3.5" hearing to determine the admissibility of the statements contained in the Sunnyside Gang Documentation Form (gang form), which had been prepared for each of the defendants. (Pretrial RP 337-356; Supp. RP 1-94).

At the 3.5 hearing, Detective Ortiz explained the function and contents of the gang form. (Pretrial RP 345) He told the court that the gang form was used by jail intake for the "well-being" of the individual as well as the well-being of the individuals already in custody. (Supp. RP 19) He testified that the officer who initially completes the form, in this case Officer Saenz, includes the suspect's response to the question whether he is a gang member. (Pretrial RP 345) There is a separate space at the bottom where a check box is labeled "confirmed gang member" and Detective Ortiz explained that it is his job to conduct further research and then check this box if he is able to confirm the suspect's claimed gang membership and then sign and date this portion of the form. (RP 345-48) This portion of the form thus reflects Detective Ortiz's personal opinion,

based on information he receives from other agencies as well as his own files. (Pretrial RP 357)

Corporal Gabino Saenz testified that he was employed by the Sunnyside City jail. (Supp. RP 26) He had participated in the booking of the three defendants to the extent of completing the gang forms. (Supp. RP 27) He explained that he would ask a detainee "if there are certain individuals or certain groups you can't be housed with." (Supp. RP 44) If the person says yes, then he completes the form. (Supp. RP 45) He said the reason for the form was that if a person is thought to be a gang member, the form is used to ensure that they are not housed with members of a rival gang. (Supp. RP 30) The form prepared based on Ricardo DeLeon's answers to Corporal Saenz's questions indicate he admitted some association with the "North Side Side Varrio." (Supp. RP 69)

Detective Jose Ortiz testified that he advised each of the defendants of his constitutional rights, using a standard template form. (Pretrial RP 339) He gave Ricardo DeLeon *Miranda* warnings at 2:30 in the morning, and took a statement from him shortly thereafter. (Pretrial RP 341; Supp. RP 22)

Corporal Saenz testified that he completed the Gang Documentation form with Ricardo Deleon between eight and nine o'clock

in the morning of May 10. (Supp. RP 28-29) He explained that he does not advise detainees of their constitutional rights because that is not required for the booking process. (Supp. RP 65)

At the conclusion of the suppression hearing, the court ruled that the defendants were in custody when the gang documentation forms were completed, that the nature of the questions on the forms necessitated the giving of *Miranda* warnings, and that the defendants' statements had been coerced. (Supp. RP 93) The court concluded that *Miranda* warnings had been given prior to the completion of the forms; that the time that elapsed between the giving of *Miranda* warnings and the completion of the gang forms did not render the warnings stale; and that the statements were admissible. (Supp. RP 92-93) Written findings and conclusions have not been entered.

For the first three days following jury selection, the State presented the testimony of law enforcement personnel to identify the numerous dispatch recordings of information related to, by, and among the officers involved in the pursuit of the Taurus. (RP 711-1118) The recordings were then played and replayed before the jury to assist the officers in their recollection of the events of that evening. (RP 711-1118)

On the third day of testimony Corporal Saenz told the jury about statements he had taken from the three defendants after they had been

booked into jail. (RP 1133-1226) Officer Saenz explained that he conducted the interviews using the Sunnyside Gang Documentation Form. (RP 1139) Officer Saenz testified that the jail deals with different gang members who "are rivals and have to be kept separate." He identified the gangs as typically Nortenos and Surenos, associated with red and blue, respectively. (RP 1140)

According to Corporal Saenz, Ricardo Deleon identified himself as an NSV or North Side Varrio and said his gang color was red and that the number fourteen was associated with his gang. (RP 1142-43) Corporal Saenz went on to explain the significance of the number 14: "The letter 14 in the alphabet is letter N. Its Norteno or also Nuestra Familia. It is a prison gang and all red gangs, so to speak, have their alliance under that one gang, so." (RP 1145) At the conclusion of the interview, Corporal Saenz noted, Ricardo Deleon told him he was not active in the gang. (RP 1146)

Corporal Saenz told the jury that he recorded Mr. Deleon's responses on the Gang Documentation Form, which he then had Mr. Deleon sign. (RP 1146) Officer Saenz went on to describe his interviews with Anthony DeLeon and Octavio Robledo, including extended descriptions of their tattoos, the significance of the tattoos as evidence of gang membership, the significance of the color of clothing as identifying a

particular gang affiliation, and their verbal admission to being gang members. (RP 1149-1159) These forms were also admitted into evidence. (CP 157)

Monica Mendoza and her sister Griselda were in Mr. Barajas's truck when he arrived at the scene of the shooting. (RP 1379) She told the jury they had come to get tickets for the party from Mr. Cardenas's sister Leonore. (RP 1379, 1381) Mr. Barajas's truck was across the street from 1111 Tacoma when it pulled over to let another car go past. (RP 1385) After the car passed it did a U-turn. (RP 1385) Monica Mendoza told the jury that at that point she could see the people in the car. (RP 1385) She said all three were wearing red rags. (RP 1385)

Monica Mendoza testified that the car pulled in front of 1111 Tacoma, so Mr. Barajas also did a U-turn and was behind the car when they heard shots. (RP 1387) Upon learning that someone had been shot, Mr. Barajas began pursuing the departing car in the direction of the freeway entrance. (RP 1388-92) Ms. Mendoza described the route they followed until losing sight of the car going around a corner. (RP 1395-97) She explained that they encountered the car again, apparently emerging from a nearby housing development. (RP 1398-1404) This car was a silver Taurus, but its occupants were not wearing red. (RP 1409)

Ms. Mendoza recognized two of the occupants of the car that emerged from the housing development: Octavio Robledo and Anthony Deleon. (RP 1405-06) She told the jury she saw the driver point a gun at Mr. Barajas's truck. (RP 1404) She said she had hung out with Anthony DeLeon a lot when she was in school. (RP 1408) She also recognized Mr. Robledo from school. (RP 1406)

The State asked Ms. Mendoza about Octavio Robledo and Anthony Deleon's gang affiliations when they were in high school. (RP 1421) She said they associated with XIV, the red kind of gang, the Nortenos. (RP 1421, 1424) She did not testify to any gang association relating to Ricardo DeLeon.

Ms. Mendoza testified that as the car they were following approached the freeway, she believed they were going to Grandview because she knew that was where Mr. Robledo lived. (RP 1419) The State played several of the dispatch recordings to assist her recollection. (RP 1425-29) Mr. Barajas drove onto the freeway but was unable to overtake the car. (RP 1424-25)

According to Miguel Acevedo, Mr. Cardenas was involved with the LVL gang. (RP 1781-82) Mr. Acevedo told the jury he believed that he, in making the LVL sign, precipitated the shooting. (RP 1785)

Mr. Acevedo described the car as silver in color, but did not know the make or model. (RP 1785-86) He told the jury that as it drove past, someone shouted something; he thought they said something like "we're going to shoot you." (RP 1774) Initially, he testified that he did not see who said they were going to shoot, then stated it was the bald guy in the back seat, then acknowledged that he had probably told Officer Ortiz that it was the passenger in the front seat. (RP 1775, 1796-97)

The jury found all three defendants guilty of assault with a firearm with an intent to benefit a criminal street gang. (RP 2411-16) The court sentenced Ricardo DeLeon to a total of 639 months, imposing an exceptional sentence of 459 months plus deadly weapon enhancements totaling 180 months. (CP 194-95)

D. ARGUMENT

1. STATEMENTS OFFICER SAENZ ELICITED FROM RICARDO DELEON WERE INVOLUNTARY AND THEIR ADMISSION AT TRIAL VIOLATED THE FIFTH AMENDMENT.

The purpose of a CrR 3.5 hearing is to fulfill the Fourteenth Amendment due process requirement of a hearing to ensure a reliable determination of the voluntariness of a defendant's confession. *State v. Kidd,* 36 Wn. App. 503, 509, 674 P.2d 674 (1983).

The Fifth Amendment to the United States Constitution protects a person from being compelled by the state to give evidence against himself. U.S. Const. amend. V; *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008); *citing Colorado v. Connelly,* 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986). Article I, § 9 of the Washington State Constitution affords the same protection. *State v. Earls,* 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

In determining whether a statement made during custodial interrogation is voluntary, the court considers the totality of the circumstances under which the statement was given. *State v. Unga*, 165 Wn.2d at 100; *citing Fare v. Michael C.,* 442 U.S. 707, 724-25, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979); *Schneckloth v. Bustamonte,* 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Miranda v. Arizona,* 384 U.S. 436, 475-77, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Unga*, 165 Wn.2d at 100-101, *quoting Colorado v. Connelly,* 479 U.S. at 167. Accordingly the court should consider both the conduct of law enforcement officers and the suspect's ability to resist the pressure. *United States v. Brave Heart,* 397 F.3d 1035, 1040 (8th Cir. 2005).

A classic example of coercive pressure is a state agent's offer to protect an imprisoned suspect from violence threatened by others in exchange for potentially self-incriminating information. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Payne v. Arkansas,* 356 U .S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958).

In *Payne v. Arkansas*, the defendant was suspected of killing a white man, 356 US 560, 562-64 (1958); The police chief promised to protect him from an angry mob that had gathered outside the jail in exchange for his confession. The court concluded:

> It seems obvious from the totality of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice,' and that its use before the jury, over petitioner's objection, deprived him of 'that fundamental fairness essential to the very concept of justice,' and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.

356 U.S. at 567.

In *Fulminante*, a prison informer offered to protect the defendant from "credible threats of violence" by other inmates who suspected him of killing a young girl, on condition the defendant tell him the truth about the killing. 499 U.S. at 288. Concluding that the resulting confession was not voluntary, the Court said: "a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As

we have said, 'coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.'" *Id*. at 287, *quoting Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L. Ed. 2d 242 (1960).

In both these cases, the threat of violence did not come from law enforcement, but the State used the offer of protection from such violence to coerce the suspects to make self-incriminating statements. That is precisely the situation in this case.

Before completing the gang forms, Corporal Saenz asked the defendants "if there are certain individuals or certain groups you can't be housed with," and on receiving an affirmative response, he began asking questions about their street gang affiliations. (Supp. RP 44) This procedure implicitly reminded the defendants of the danger that would result from their being incarcerated with members of a rival gang, and simultaneously promised to protect them from such violence in exchange for their providing him with information about their gang affiliation.

Both Corporal Saenz and Detective Ortiz made it clear to the court that being housed with members of a rival gang carried a high risk of violence for the defendants, that the implied threat was not an idle threat, and that the purpose in preparing the forms was to assure the suspects' personal safety and protection. (RP 355) That protection would only be

available if the defendants provided the booking officer with the requested information.

The court's finding that the defendants had been advised of their constitutional rights, and had failed to assert those rights at any time during questioning, is insufficient to support the conclusion that the statements made to Corporal Saenz were admissible. Admission of Ricardo DeLeon's involuntary statements to Corporal Saenz, both those reported on the gang form and those related to the jury by Corporal Saenz, violated Ricardo DeLeon's rights under the Fifth and Fourteenth amendments and Const. Art. I, § 9.

The error was constitutional and the State bears the burden of showing it was harmless. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Constitutional error is only harmless if a reviewing court is convinced beyond a reasonable doubt that without the error any reasonable jury would still reach the same result, and the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Aumick,* 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); *State v. Whelchel,* 115 Wn.2d 708, 728, 801 P.2d 948 (1990).

The State's theory of the case was that the defendants were motivated to participate in a shooting at the home of Mr. Cardenas because he and they belonged to rival gangs and in the gang culture such

rivalry can provide a motive for such a shooting. Apart from his statements to Corporal Saenz, the only evidence of Ricardo DeLeon's membership in a gang consisted of his presence in a car with his brother Anthony and Octavio Robledo; Sgt. Cunningham's testimony that there was a red bandanna on the back seat of the car after the passengers were removed (RP 1662-63); and Officer Ortiz's testimony that members of the Norteno gangs sometimes wear red items of clothing. Monica Mendoza testified that "the people" in the car before the shooting were wearing red bandanas, but Ms. Mendoza did not identify Ricardo DeLeon as one of "the people" in the car. In short, no evidence showed that Ricardo DeLeon was personally involved in a gang, or had any reason to participate in the alleged assaults in any way.

According to Corporal Saenz's testimony, Ricardo DeLeon indicated that he was familiar with various indicia of gang culture and admitted membership in a gang, the Northside Varrio, although he claimed that he was no longer active. This evidence was essential to the State's case against him; without it he would not have been convicted as an accomplice and the jury would not have found that he intended to cause any benefit or advantage for a gang. The error was overwhelmingly prejudicial.

2. ADMITTING CODEFENDANTS' STATEMENTS VIOLATED ER 802 AND THE CONFRONTATION CLAUSE.

a. The Statements Were Inadmissible Hearsay.

The court ruled the statements recorded on the gang forms were admissible, over defendants' hearsay objections, because they were the defendants' own statements, adopted by them under penalty of perjury. (RP 1126-27) "'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 a rule or statute provides otherwise, hearsay is not admissible. ER 802.

An admission by a party-opponent is not hearsay. ER 801(d)(2) As between the State and the defendants, the statements they made to Corporal Saenz were not hearsay. But at a joint trial, the statements of one non-testifying codefendant are hearsay as to the other defendants. *See Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968).

The sole purpose in offering the statements of Octavio Robledo and Anthony DeLeon admitting their knowledge of, and association with, gangs was to support the State's assertion that the alleged assaults were motivated by gang-related activity, and to corroborate various matters as

to which Officer Ortiz gave expert testimony. The sole purpose of offering these admissions was to prove the truth of the matters asserted.

The court erred in admitting the codefendants' statements.

b. The Hearsay Evidence Violated The Confrontation Clause.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The State can present prior testimonial statements of an absent witness only if the defendant has had a prior opportunity for cross-examination. *Crawford v. Washington,* 541 U.S. 36, 59 (2004). The Court did not set forth a comprehensive definition of what type of statements are "testimonial." *Id*.

A violation of the confrontation clause may be raised for the first time on appeal. *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007); *see also* RAP 2.5(a)(3) A claimed violation of the confrontation clause is reviewed *de novo*. *State v. Stein*, 140 Wn. App. 43, 70, 165 P.3d 16 (2007) *citing State v. Chambers,* 134 Wn. App. 853, 858, 142 P.3d 668 (2006); *see State v. White Eagle*, 12 Wn. App. 97, 102, 527 P.2d 1390 (1974).

The *Crawford* decision does not provide a comprehensive definition of testimonial statements. In *State v. Fisher*, Division Two of

this court concluded testimonial statements include those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *State v. Fisher*, 130 Wn. App. 1, 13, 108 P. 3d 1262, 1268 (2005), *quoting Horton v. Allen,* 370 F.3d 75, 84 (1st. Cir. 2004) According to Officer Ortiz, all three defendants had been advised of their constitutional right a few hours before their interviews with Corporal Saenz. That advice included the statement that "anything you say can be used against you in a court of law." (Pretrial RP 56-59) The defendants' statements to police officers were understood to be testimonial by everyone involved. *See* 541 U.S. at 52.

But while each defendant's statements would be admissible at his trial, under *Crawford* the statements of a co-defendant are inadmissible unless the codefendant testifies. *See State v. Frasquillo*, 161 Wn. App. 907, 918, 255 P.3d 813 (2011). Permitting Corporal Saenz to testify to the codefendants' statements violated the confrontation clause.

c. The Error Was Highly Prejudicial.

Evidence that Ricardo DeLeon's companions were gang members tended to support the State's claims that they committed the assaults for reasons related to their gang culture, that persons who wore red were

likely to be affiliated with their gang, and that because Ricardo DeLeon may have been wearing red at the time of the offenses he was likely to have been a participant with them in the crime. Absent any evidence Mr. DeLeon was an active gang member, the evidence was insufficient to support his conviction without the hearsay statements of his codefendants.

3. NO EVIDENCE SUPPORTED THE AGGRAVATING FACTOR OF GANG BENEFIT.

RCW 9.94A.535 provides an exclusive list of aggravating factors that may support a sentence above the standard range. One of those factors is the commission of an offense for the purpose of obtaining or advancing the defendant's membership in an identifiable group. RCW 9.94A.535(3)(aa).

The court instructed the jury:

> INSTRUCTION NO. 29
> If you find the defendant guilty *of* the crime of First Degree Assault in Count t; or of the crime of First Degree Assault in Count 2; or of the crime of First Degree Assault in Count 3, then you must determine if the following aggravated circumstance exists as to that count:
> Whether the defendant committed the crime of First Degree Assault with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang its reputation, influence, or membership. When deliberating on this aggravating circumstance you may consider all the evidence presented during the trial without limitation.

(CP 641)

This question could only be answered "yes" if the State presented evidence that Ricardo DeLeon personally intended to benefit a gang or its membership. *See State v. Bluehorse*, 159 Wn. App. 410, 431, 248 P.3d 537 (2011); *see also State v. Thomas*, 166 Wn.2d 380, 388, 208 P.3d 1107 (2009) (distinguishing cases in which jury instruction permits finding of aggravating factor based on accomplice's act).

The State presented no evidence from which a jury could conclude that, even if guilty as an accomplice to the assaults, Ricardo DeLeon had any intent to benefit any gang. The State presented no evidence as to Ricardo DeLeon's personal involvement in the commission of the assaults, or his mental state at any time prior to his arrest. The State presented no evidence he had ever expressed a desire to benefit any gang, or engaged in recent activity designed to benefit a gang.

"Gang membership alone is not a factor that justifies an exceptional sentence." *Bluehorse*, 159 Wn. App. at 428. The State's argument in support of the gang benefit factor relied exclusively on evidence suggesting all three defendants belonged to a Norteno gang:

> Gang-motivated assaults. You've heard a lot of evidence about who these groups are, who belongs to what group, whether or not the Defendant committed the crime with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage to or for a criminal street gang, its reputation, influence, or membership. And it's abundantly clear that the reason these

> things happen that seem so random, so senseless, is because in their culture you gain respect by doing this kind of thing to a rival gang member. You gain respect. You up their representation as a violent organization that you don't mess with. And if you do, there's consequences. Now, how do we know -- go back. How do we know they're involved? We know because -- and I'm not going to go through it all. You've looked at the clothing. You've looked at the red bandannas in the cars. You've seen their statements when they're booked in, XIV Nortenos. They've all got gang tattoos.

(RP 2335) Here, as in *Bluehorse*, the prosecutor urged the jury to find an aggravating factor based solely on gang membership, without any evidence as to any of the individuals' intent. *See* 159 Wn. App. at 429.

The evidence is not substantial and no reasonable jury could have found that Ricardo DeLeon had intended to benefit or aggrandize any gang. Imposition of an enhanced sentence based on intent to benefit a gang was error.

4. THE INTRODUCTION OF IRRELEVANT PREJUDICIAL GANG TESTIMONY REQUIRED A MISTRIAL.

Evidence relating to gang activities and gang culture may be admissible to prove motive or intent so long as its probative value outweighs its prejudicial effect. ER 404(b); *State v. Yarbrough*, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009).

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

> conformity therewith. ER 404(b). Gang evidence falls within the scope of ER 404(b). It may be admissible for other purposes, such as proof of motive, intent, or identity, but before a trial court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect.

Id., citations omitted.

Although the court did not formally consider and weigh these factors on the record, its comments were clearly intended to ensure the State provided sufficient evidentiary basis to support admissibility of expert testimony relating to gangs under these criteria. In order to establish the relevance of expert testimony regarding gang culture, the State produced the Sunnyside Gang Documentation forms. The court apparently viewed this as sufficient to justify the admission of wide ranging evidence relating to gang culture.

The third requirement in the test for admissibility of ER 404(b) evidence is the relevance of the proffered evidence. Relevant evidence is evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Expert

testimony is relevant and admissible to "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702.

Detective Ortiz testified as an expert on gang culture. He told the jury that his definition of a street gang is based on the definition provided in RCW 9.94A.030, which defines terms used in sentencing proceedings. (RP 1918) Similarly, he told the jury that a street gang member is a person "who actively participates in any criminal street gang and who intentionally promotes, furthers or assists in any criminal act by the criminal street gang." (RP 1919) This definition, too, is based on the sentencing statutes.

He went on to provide an extended explanation of the terms "putting in work" and "courtship," although these terms were never used in any other testimony and did not need to be defined. (RP 1922-24, 1926) He told the jury that there is an inmate at the State Penitentiary who is "calling the shots" in a gang, and went on to elaborate the relationship between people who are in prison and people who are on the outside. (RP 1927-30) Nothing in the record would render this information relevant or helpful to the jury.

Officer Ortiz discussed at length the number, variety and names of local gangs, although no evidence tied most of those gangs to this incident. (RP 1937-38; 1947-48) He also testified about the use of the internet by

gangs for intimidation and recruiting. (RP 1939-40) No one presented any evidence that the internet was in any way involved in the events of May 9, 2009.

Detective Ortiz testified to numerous aspects of gang culture that were not related to any facts in evidence. This testimony was irrelevant. References to orders issuing from prison inmates, and use of the internet to coordinate gang activities, could only serve to inflame the jury, as would his emphasis on the widespread presence of numerous gangs in the community. To the extent any of his evidence was relevant, its relevance was vastly outweighed by its prejudicial effect.

Defense counsel moved for a mistrial based on the extraordinary amount of irrelevant and inflammatory gang-related testimony the State had presented despite the court's earlier admonishments that gang-related testimony should be limited and confined to relevant matters. (RP 1943, 1978, 1991-94) The motion was denied. (RP 1997-98)

The motion for a mistrial should have been granted. The only evidence that rendered expert gang testimony relevant to Ricardo DeLeon's culpability was the fact that he was wearing red clothing at the time of his arrest and the inadmissible evidence contained in the gang documentation form. Detective Ortiz's testimony merely served to cast Ricardo DeLeon as an active gang member engaged in criminal activities

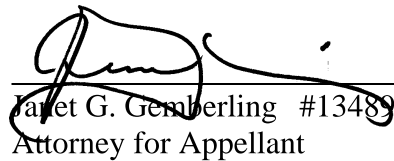
despite the absence of credible evidence that he had participated in any gang related activities or indicated any interest in confronting any members of the Sureno gang or, more specifically, Mr. Cardenas.

E. CONCLUSION

Ricardo DeLeon's conviction was predicated on improper, irrelevant, and inadmissible evidence and should be reversed.

Dated this 7th day of June, 2012.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29657-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
RICARDO DELEON,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on June 7, 2012, 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:

Kevin Eilmes
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I certify under penalty of perjury under the laws of the State of Washington that on June 7, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Walla Walla, WA 99326

Signed at Spokane, Washington on June 7, 2012.

Janet G. Gemberling
Attorney at Law

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 296571
	)	
v.	)	
	)	AFFIDAVIT
RICARDO J. DELEON,	)	OF SERVICE
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on this day I served copies of the Appellant's opening brief in this matter by email on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Signed at Mumbai, India on June 7, 2012.

Janet Gemberling, P.S.

Robert Cantwell
Legal Assistant