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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 31298-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIK RAMOS CARRASCO,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The court erred by admitting gang evidence.

B. The court erred by imposing an exceptional sentence based on gang aggravators because the gang evidence was inadmissible.

C. The State's evidence was insufficient to support the conviction for second degree murder.

D. The State's evidence was insufficient to support the convictions for four counts of first degree assault.

Issues Pertaining to Assignments of Error

1. Did the court abuse its discretion by admitting gang evidence when there was no nexus between the crimes and gang activity? (Assignment of Error A).

2. Did the court erred by imposing an exceptional sentence based on gang aggravators because gang evidence was inadmissible and, without it, substantial evidence did not support the aggravating factors? (Assignment of Error B).

3. Was the evidence insufficient to support the second degree murder conviction because the State failed to disprove self-defense beyond a reasonable doubt? (Assignment of Error C).

4. Was the evidence insufficient to support the first degree assault convictions because the State failed to disprove self-defense beyond a reasonable doubt? (Assignment of Error D).

II. STATEMENT OF THE CASE

Mr. Carrasco was charged by amended information with one count of second degree murder, two counts of first degree assault, and one count of second degree unlawful possession of a firearm.

(CP 85). It was also alleged:

Furthermore, you committed **any of the above listed current offenses** with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for criminal street gang as defined RCW 9.94A.030, its reputation, influence, or membership, and the court may impose an exceptional sentence above the standard sentence range for this crime (RCW 9.94A.535(3)(aa.))

Furthermore, you committed **any of the above listed current offenses** to obtain or maintain your membership or to advance your position in the hierarchy of an organization, association, or identifiable group, and the court may impose an exceptional sentence above the standard sentence range for this crime. (RCW 9.94.535(3)(s).) (CP 86-87).

On April 28, 2010, Mr. Carrasco shot his .45 Magnum three times into a green Saturn occupied by Alex Ixta, Romero Camacho, Baldomero Camacho, Macedonio Morales, and Storm Lopez.

(11/6/12 RP 533.). It so happened that all the persons in the

Saturn were Surenos gang members. (10/31/12 RP 112, 116l; 11/1/12 RP 163-64). Mr. Carrasco happened to be a member of a rival gang, the Nortenos, and specifically LaRaza. (11/1/12 RP 183-84, 212; 11/6/12 RP 531). Mr. Ixta died from a gunshot wound to the head and Romero Camacho was shot in the left arm. (10/31/12 RP 113-115; 11/2/12 RP 341, 344-45,392; 11/5/12 RP 511).

The State successfully sought to introduce gang evidence through a gang expert, Detective Drew Shaw. (10/31/12 RP 93, 95-96; CP 14). In its oral ruling, the court stated:

Well, you know, the difficulty here, I guess, from the defense standpoint is that you can't excise the gang evidence and testimony from the circumstances of this particular homicide. It's a red on blue or, I guess, from the defendant's standpoint blue on red, if self-defense is to be credited, and it's motivated by the animosity between the two. . .

So I do have some weighing in regard to the 404(b). The fact of the matter is that the evidence is critical, essential and undeniably probative on the issues of motive and intent.

It has some obviously prejudicial effect. The prejudicial effect, I'm afraid, is because of the strong probative value of the evidence and the fact that it permeates this particular event that the probative value significantly outweighs any prejudicial effect.

This particular trial, the events that occurred or are alleged to have occurred cannot be explained and

understood in any context other than the context of this being a gang-related event regardless of whether Mr. Carrasco was – regardless of his motivation, regardless of whether he acted in self-defense. If he acted in self-defense, it's still self-defense to the gang-motivated aggression of the people who he shot at who were of the rival gang. So it seems to me it's just impossible to excise the gang aspect of this case away from the other aspect.

I also think it's appropriate to provide some expert testimony assuming that your expert can qualify on these issues that are outside the knowledge of lay people and people on the street, people who are not involved or familiar with these particular aspects of culture for this particular group of people.

So I think under these circumstances that some expert testimony to explain some of the otherwise incomprehensible, perhaps ideology, is appropriate. (10/31/12 RP 95-96).

The court's ruling was apparently not reduced to a written order.

Ernesto Cuevas lived at 1004 N. 4th St. in Yakima, Washington. Mr. Carrasco was visiting on April 28, 2010, where the shooting took place. (11/5/12 RP 517). In a May 22, 2010 interview with police, Mr. Cuevas said he saw a can thrown out of the green Saturn and saw what could have been a gun from in back of the driver's side. (*Id.* at 519-20).

Mr. Carrasco testified in his own defense. He acknowledged socializing at Ernie and Miguel Cuevas's house on 4th St. (11/6/12

RP 532). A green car with a lot of people inside pulled up to the Mercado on 4th St. (*Id.*). Ernie went inside; Nick Castro, Jasmine Johnson and Mr. Carrasco tried to get everybody to leave “in case something [did] occur.” (*Id.*). The car pulled out and went north on 4th St. (*Id.*). On the intersection with J St., the car’s occupants “did some yelling, screaming their hood, their names.” (*Id.* at 533). The names they were screaming out were Surenos and VSL. Mr. Carrasco was affiliated with the Nortenos. (*Id.*). He described what happened next:

The passenger sitting behind the passenger kind of stuck his body out the window, threw a beer can. It hit my head. The passenger at the same time that’s in the passenger behind the driver pulled out to what probably looked to be as a pistol. . . (*Id.*).

He was “scared for my life and the life of my friends that are right there with me.” (*Id.*). He explained:

From various times of having my house shot at and just getting shot at from walking from place to place, I started carrying a gun. So I had a gun with me, pulled out the gun and shot three times at the car. (*Id.*).

Mr. Carrasco ran home. The gun he had was a .45 Magnum. (*Id.*). He got rid of it by throwing it in the river. (*Id.* at 534). He did not come forward initially:

Scared, scared that I wouldn’t be believed. We

got shootings all the time. Most of the time you ain't going to have a police officer believing you did something to protect yourself, protect someone's life just because of who you are and what you represent as, you know, people to depend on to protect you. The police ain't going to take that as self-defense. They're going to think, yes, you want to go for retaliation or to go put in work. But, I mean, they had come to a different neighborhood knowing what they were doing obviously. (*Id.* at 534-35).

He had also written a letter to his then girlfriend expressing remorse:

It states, one day I'll be the reason for the birth of another baby. And when this one is born and he's a boy, he'll be named Alexis for the fact that I was the reason for the death of an Alexis, and now I, too, want to be the reason or the birth of another Alexis. Eva, I'm a fucking dumb ass. Who the fuck confesses to something like that? (11/6/12 RP 535-36).

Mr. Carrasco was just trying to scare them away when he shot. (11/6/12 RP 544). He did not intend to kill anybody. (*Id.*).

No exceptions were taken to the court's instructions. (11/6/12 RP 565). The jury convicted Mr. Carrasco of count 1, second degree murder; counts 2-5; first degree assault; and count 6, second degree unlawful possession of a firearm. (CP 311-321). The jury also returned special verdicts on counts 1-5 for being

armed with a firearm along with both gang aggravators. (CP 322-338).

The court sentenced Mr. Carrasco to consecutive terms of 294 months for second degree murder plus a 60-month firearm enhancement and 20 months for the gang aggravators; 123 months plus a 60-month firearm enhancement and a 20-month exceptional sentence for the gang aggravators on each of counts 2-5; and a concurrent term of 22 months for count 6. (11/16/12 RP 47-53. CP 345-53). The total term of confinement was 1,126 months. (*Id.*). This appeal follows.

III. ARGUMENT

A. The court erred by admitting gang evidence when there was no nexus between the crimes and gang activity.

The court admitted gang evidence and allowed a gang expert to testify. (10/31/12 RP 93, 95-96). The State's case was built on gang culture when the real facts of the matter are that Mr. Carrasco got hit on the head by a beer can, believed he saw a gun, and acted in self-defense. The admission of gang evidence is extremely prejudicial because it invites the jury to make the "forbidden inference" that Mr. Carrasco's gang membership showed his propensity to commit the charged offenses. *State v. Wade*, 98

Wn. App. 328, 336, 989 P.2d 576 (1999). But that is what happened here.

A trial court's decision to admit evidence of other crimes or misconduct is reviewed for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A court abuses its discretion when the decision is manifestly unreasonable or is based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence of other crimes, wrongs, or acts is not admissible to prove character or conformity with it, but may be admissible for other purposes such as motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). But the record shows that gang evidence was not admitted for any purpose other than to prove Mr. Carrasco acted in conformity with that culture where he was protecting his Norteno turf from Surenos, who were simply passing through to get to Baldomero's mom's house at a trailer park. (11/1/12 RP 162). The court's oral ruling underscores the conclusion that the gang evidence was admitted regardless of motive:

This particular trial, the events that occurred or are alleged to have occurred cannot be explained and understood in any context other than the context of

this being a gang-related event regardless of whether Mr. Carrasco was – regardless of his motivation, regardless of whether he acted in self-defense. If he acted in self-defense, it's still self-defense to the gang-motivated aggression of the people who he shot at who were of the rival gang. So it seems to me it's just impossible to excise the gang aspect of this case away from the other aspect. (10/31/12 RP 95-96).

The court allowed gang evidence because it would explain or make understandable what happened. But the events could be, and were, explained without any reference to gang culture.

Unfortunately, the entire trial was about gangs – not Mr. Carrasco and what he was alleged to have done. The court's admission of the gang evidence was an abuse of discretion because it was contrary to law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The error in admitting gang evidence was not harmless since, within reasonable probability, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Mr. Carrasco was convicted of being a gang member, which is all the State proved. A new trial is required.

B. The court erred by imposing an exceptional sentence based on the gang aggravators because the gang evidence was inadmissible.

RCW 9.94A.535(3)(aa) lists as an aggravating factor that “[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.” RCW 9.94A.535(3)(s) lists as another aggravating factor that “[t]he defendant committed the offense to obtain or maintain [his] membership or to advance [his] position in the hierarchy of an organization, association, or identifiable group.” Although the jury found these factors, there was nothing to support them in the absence of the erroneously admitted gang evidence.

The State proved there were criminal street gangs, as defined in RCW 9.94A.030(12), in the Yakima area. Yet, the State did not prove that Mr. Carrasco acted with the intent to cause any benefit to a criminal street gang or to maintain his membership or advance his position in the Nortenos. RCW 9.94A.535(3)(aa), (s). Certainly, shooting at the Saturn provided no benefit to the Nortenos and did nothing to keep or advance his position with the Nortenos. Mr. Carrasco was acting in self-defense, “regardless of his motivation,” as noted by the trial court.

In the absence of the improperly admitted gang testimony, the record is silent as to any evidence, substantial or otherwise, supporting these aggravating factors. Even when viewed in a light most favorable to the State, the only gang evidence against Mr. Carrasco was that he was in the Norteno gang, LaRaza. But membership alone is insufficient to support an exceptional sentence based on gang aggravators. *State v. Bluehorse*, 159 Wn. App. 410, 428, 248 P.3d 537 (2011). The court erred by imposing an exceptional sentence.

C. The State's evidence was insufficient to support the convictions for second degree murder and first degree assault.

Mr. Carrasco acted in self-defense. The State must prove beyond a reasonable doubt every element of a charged crime. U.S. Const. amends. 5, 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Since a claim of self-defense negates the essential element of intent for second degree murder and assault, the burden is on the State to disprove self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984); *State v. Redwine*, 72 Wn. App. 625, 629, 865 P.2d 552, *review denied*, 124 Wn.2d 1012 (1994). The court so instructed here. (CP 293-295, 297).

For self-defense, the defendant must have subjectively feared that he was in imminent danger of death or great bodily harm; this belief was objectively reasonable; the defendant exercised no greater force than was reasonably necessary; and the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). Evidence of self-defense must be viewed “from the standpoint of the reasonably prudent person, knowing all the defendant knows and seeing all the defendant sees.” *State v. Janes*, 121 Wn.2d 220, 238, 850 P.2d 495 (1993). The jury then is to stand in the shoes of the defendant, consider all the facts and circumstances known to him, and determine what a reasonable person in the same situation would have done. *Id.*

Mr. Carrasco got hit in the head by a beer can, saw what he thought was a pistol, and shot at the car in self-defense. (11/6/12 RP 533). With the nature of the neighborhood and prior shootings in the area, he was scared for his life and the life of the others in the yard with him. (*Id.*). In its cross examination of Mr. Carrasco, the State focused on gangs and the animosity between Nortenos and Surenos, but did nothing to disprove his claim of self-defense beyond a reasonable doubt as to this particular incident. Even viewed in a light most favorable to the State, the evidence

nonetheless fell short of showing by the requisite quantum of proof that Mr. Carrasco did not act in self-defense. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

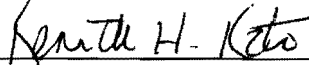
Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The jury necessarily resorted to guess, speculation, or conjecture to fill in the blanks for its guilty verdict and discount Mr. Carrasco's claim of self-defense. The State's evidence was thus insufficient to support beyond a reasonable doubt the findings of guilt as to second degree murder and first degree assault. *Id.*; *Green*, 94 Wn.2d at 220-21. Those conviction must be reversed and the charges dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Carrasco respectfully urges this court to reverse his convictions of second degree murder and first degree assault and dismiss the charges and/or remand for resentencing.

DATED this 28th day of August, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on August 28, 2013, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Eric Carrasco, # 362209, 1313 N. 13th Ave., Walla Walla, WA 99362; and by email, as agreed by counsel, on Kevin G. Eilmes at kevin.eilmes@co.yakima.wa.us.

