No. 93618-8

COA 32374-9-III

IN THE SUPREME COURT OF THE STATE OF

WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ANDRE JACOB NUNEZ, Petitioner.

ANSWER TO PETITION FOR REVIEW

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The Respondent is the State of Washington.

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C. ISSUES PRESENTED FOR REVIEW

1. Is the Court of Appeals decision consistent with *State v. Deleon*, 185 Wn.2d 487 (2016)?

2. Did the Court of Appeals correctly apply the exception to the spousal privilege?

3. Did the trial court properly limit gang-related testimony?

4. Was the jury properly instructed on the definition of great bodily harm?

5. Has Nunez failed to show prosecutorial misconduct which prejudiced his right to a fair trial?

6. Has Nunez failed to establish that he is entitled to a new trial based on the performance of his trial attorney?

D. STATEMENT OF THE CASE

The Petitioner, Andre Jacob Nunez, was charged with first degree assault and first degree robbery, with aggravating factors alleged on both counts. CP 235-6. The charges stem from the following fact pattern:

Ricardo Ruiz and his younger brother, Ramiro Ruiz, worked at Washington Beef together. RP 647. Andre Nunez also worked there. RP 650. On July 20, 2012, Ramiro accidentally bumped into Nunez at work and then apologized to him. RP 692, 725. Nunez then called him a "scrap," a derogatory word for a Sureño gang member. RP 690, 692. Nunez had previously called Ramiro and Ricardo "scraps" and uttered the word, "Norte," which is used by Norteño gang members. RP 659. Nunez told Ricardo to tell Ramiro to "watch his back" and that he was going to "pull his card." RP 650, 692. Ricardo informed Nunez that Ramiro was his brother and that Ramiro was not into gangs. RP 651. Ricardo also told Nunez that he, himself, was a Sureño and to go through him and not his brother. RP 651, 653, 724.[1] Nunez said he was a "Yakima banger for LR," or "La Raza." RP 654.

Ricardo relayed this to his brother a few minutes later in the break room. RP 654-5, 695, RP 717. When Ramiro went to leave, Nunez followed him and said, "Ramiro, hey come here. Let's go to the restroom." RP 656, 696. Ramiro asked him, "What's your problem?" and said, "I don't wanna do this." RP 656, 657. Ramiro walked away but Nunez continued to follow him and then swung at him. RP 647, 696. Ramiro ducked a couple of times and then turned and started punching

[1] Ricardo had left California to escape the gang lifestyle. He was a Sureño gang member there along with two older brothers. RP 651, 692.

back. RP 656-7, 696, 722. Nunez picked up a chair and put it over his head. RP 696, 271.

At that point, Ricardo ran to the aid of his brother. RP 657. Nunez then showed his red belt (which Ricardo had seen him wear before) and made a reference to "LR" or La Raza. RP 659, 674-5. Ramiro tackled Nunez. RP 658. Nunez's head hit the wall and he got knocked out for a little while. RP 660, 697. Nunez had previously bragged that he was a UFC fighter and had never been dropped by Sureños. RP 661, 667. When Nunez got up, he yelled gang slurs to Ricardo such as, "fucking scraps." RP 697.

A few months later, on August 27, 2012, Nunez and his girlfriend pulled behind Ramiro's car at a rest stop. RP 698-9. Ramiro was in the driver's seat of his car on the phone with his fiancé. Nunez got out of the car and threw a water bottle at the side of Ramiro's head through an open window. RP 700, 730. Nunez said, "well now you fucking scrap. What are you going to do now?" and other cuss words. RP 703. Nunez then jumped in the car through an open back window and stabbed Ramiro with a knife. RP 700-1. The knife was 6 ½ inches long with 3-inch blade. RP 735, 770-1.

Ramiro tried to block Nunez and push him away. RP 701. Nunez then opened the front passenger side door and attempted to stab Ramiro

again. RP 701. Ramiro was able to jump out the door at one point. RP 701. Nunez got out and started calling him a "fucking scrap" and said, "It's all about Norte. What the fuck are you going to do you fucking scrap?" RP 702, 739. Nunez then chased Ramiro around the car and demanded his wallet. RP 704. Nunez tried to stab him about five or six times. RP 702-3. At one point, Nunez kicked his driver's side window as well. RP 706. Ramiro felt like Nunez was trying to kill him. RP 705. Ramiro told him to go away and was able to run and tell a truck driver to call 911. RP 706.

Mark Wilcox, a farmer, was exiting I-82 when he saw an individual throw a bottle at the back of another car. RP 486, 489. He slowed down and the individual jumped into a car driven by a female. RP 486. Ramiro flagged down Wilcox and yelled, "call 911. I've been stabbed." RP 487, 490. Wilcox called 911 for help. RP 509-10. Wilcox described Ramiro as being hysterical and breathing hard. RP 487, 510.

Ramiro was taken to the hospital. He had a stab wound on the right side of his chest. RP 456. The wound was about two inches in length and had penetrated through his skin, fatty tissue, and muscle fibers. RP 460, 467. He received six or seven sutures to close the wound. RP 471, 710.

At trial, Nunez did not testify and he did not call any witnesses. He was convicted of first degree assault as well as a deadly weapon enhancement and gang aggravator. CP 282, 284-5. He was sentenced and filed an appeal.

On appeal, the Court of Appeals found that there were no errors warranting reversal and affirmed the conviction. Nunez subsequently filed a petition for review.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals decision does not conflict with *State v. Deleon*, 185 Wn.2d 487 (2016).

In *State v. Deleon*, 185 Wn.2d 487, 374 P.3d 95 (2016), this Court applied the harmless error standard, noting:

> We apply a harmless error standard to constitutional errors such as this. See, e.g., *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). "Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict." *Id.* More specifically, to find such a constitutional error harmless, we must find—beyond a reasonable doubt—that "any reasonable jury would have reached the same result, despite the error." *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995) (emphasis added). The State bears the burden of showing that the constitutional error was harmless. *Monday*, 171 Wn.2d at 680.

DeLeon, 185 Wn.2d at 487-488. The court's ruling in *Deleon* is controlling. However, the amount of untainted evidence is much greater than in *Deleon*. In this case, the evidence is such that the introduction of booking information was harmless beyond a reasonable doubt.

Here, there was an overwhelming amount of untainted evidence of Nunez's gang affiliation admitted throughout the trial, most of which came straight from Nunez's own statements. To begin with, Nunez called both Ramiro and Ricardo Ruiz "scraps," a derogatory word for Sureño gang members, and uttered the word, "Norte," which is used by Norteño gang members.[2] RP 659. Nunez even admitted to Ricardo that he was a "Yakima banger for L.R." or "La Raza." RP 654. He had also bragged that he had never been "dropped" by Sureños. RP 661, 667. After starting a fight with Ramiro at their workplace, Nunez showed his red belt and made another reference to "LR" or "La Raza." RP 659, 674-5. After getting knocked out during the fight, Nunez got up, and yelled gang slurs to Ricardo such as "fucking scraps." RP 667.

On the date of the crime, Nunez continued to show his gang affiliation. When he came upon Ramiro, he said, "well now you fucking scrap. What are you going to do now?" RP 703. As he tried to stab

[2] Nunez points out that Ramiro was not a gang member, however, Ramiro was the brother of Ricardo, a former Sureño gang member, and in Nunez's eyes, the two brothers were lumped together as Sureños.

Ramiro, he continued to call him a "fucking scrap" and said, "It's all about Norte. What the fuck are you going to do you fucking scrap." RP 702, 379.

In addition to all of this testimony at trial, the defendant had numerous gang tattoos that showed his affiliation with Norteños. RP 599, 604-5; State's Exhibits 15-17. As the court of appeals stated, "Mr. Nunez's body was covered with gang-related tattoos, his wife confirmed he was a member of the Norteños, and testimony by the Ruiz brothers indicated Mr. Nunez made repeated gang-related statements and wore gang- related colors. Given these circumstances, the *Miranda* violation does not warrant reversal." Slip Op. at 7-8.

2. The Court of Appeals correctly applied the exception to the spousal privilege.

Washington recognizes two privileges between a husband and wife: a testimonial privilege, which, if invoked, places a party's husband or wife off-limits as a witness against his or her spouse with only a few exceptions, and a communication privilege, which more narrowly protects spousal confidences. RCW 5.60.060(1) provides as follows:

> (1) A spouse...shall not be examined for or against...her spouse...without the consent of the spouse...; nor can either during marriage..., be without the consent of the other, examined as to any communication made by one to the other during the

> marriage...But this exception shall not apply to...a criminal action...against a spouse...if the marriage...occurred subsequent to the filing of formal charges against the defendant...

(Emphasis added). Nunez claims that his wife's testimony violated the spousal privilege. However, they were married in 2013 *after* formal charges were filed against Nunez in 2012. RP 889. Therefore, their marriage occurred subsequent to the filing of formal charges. By the plain language of the statute, this is an exception to both the testimonial and communication privileges. "Testimonial privileges are creatures of statute, and should therefore be strictly construed." *State v. Wood*, 52 Wn. App. 159, 163, 758 P.2d 530 (1988). As such, the Court of Appeals correctly held that the spousal privilege did not apply and the court did not error in allowing Nunez's wife to testify.[3]

3. The trial court properly limited the gang-related testimony.

Evidence of street gang affiliation is admissible in a criminal trial if there is a nexus between the crime and gang membership. *See State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009). Here, the nexus was

[3] Nunez also argued below that the privilege applies to jail phone calls made before Nunez and his wife were married. The phone calls were made on December 6, 2012, and January 18 and 19, 2013. RP 930, 1023, 1024, 1140. Conversations occurring prior to marriage are not subject to suppression on the basis of marital privilege. *See State v. Howard*, 52 Wn. App. 12, 756 P.2d 1324 (1988).

established by the victim's testimony at trial and his brother's testimony. When Ramiro bumped into Nunez, Nunez then called him a "scrap." RP 690, 692. Nunez had previously called Ramiro and Ricardo "scraps" and used the word, "Norte." RP 659. Ricardo told Nunez that he was a Sureño and to go through him and not his brother. RP 651, 653, 724. Nunez bragged he was a La Raza gang member. RP 654. During the attack at Washington Beef, Nunez showed his red belt (which Ricardo had seen him wear before) and made a reference to "LR" or La Raza. RP 659, 674-5. Nunez had previously bragged that he had never been "dropped" by Sureños. RP 661, 667. Furthermore, when Nunez got up, he yelled gang jargon to Ricardo, including the insult, "fucking scraps." RP 697.

Then, on August 27, 2012, after hitting Ramiro with a water bottle, Nunez said, "well now you fucking scrap. What are you going to do now?" RP 703. While they were both outside the car, he called Ramiro a "fucking scrap" and said, "[i]t's all about Norte. What the fuck are you going to do you fucking scrap?" RP 702, 704. Based on the uncontroverted testimony of both Ramiro and his brother, there was undoubtedly a nexus between the crime and gang membership.

At trial, the State called Officer Chris Taylor as a gang expert. He testified as to the characteristics of Sureño and Norteño gang members. RP 579. He testified about some of their symbols, colors, and terminology

such as "scrap" being an insulting name that Norteños call Sureño gang members. He explained that the number 14 was adopted by Norteños. RP 581-2. He also testified about Norteños' use of the phrase "Norte," the Roman Numeral for 14 (XIV), the MOB tattoo, and the northern star. RP 582, 585, 588, 698. Officer Taylor discussed how certain tattoos, such as the number XIV, are earned. RP 599-600, 627-8. Nunez has a large XIV tattooed on his chest, a MOB tattoo, and a northern star tattoo. State's Exhibits 15-17, RP 598-9.

Nunez claims that the court erred in admitting expert gang testimony under Evidence Rule 404(b). However, the court did an extensive weighing on the record, and found that some of the proffered testimony was admissible to show intent for the assault and robbery. RP 66-9. This decision was not an abuse of discretion. Courts regularly admit gang affiliation evidence where it is relevant to the motive for a crime or to prove a defendant's intent, both of which are permitted purposes for offering evidence under ER 404(b). *See State v Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995). Here, the gang evidence was critical and undeniably probative of motive and intent. As indicated by the Court of Appeals, "Gang evidence was central to the case and was properly admitted." Slip Op. at 12.

In addition, the Court of Appeals noted that the credibility of the Ruiz brothers' statements about gang-related slurs was called into question, therefore allowing the State to introduce corroborating evidence. "This broadened the scope of the permissible gang evidence at trial." Slip Op. at 13.

4. The jury was properly instructed on the definition of great bodily harm.

Nunez argues that the trial court committed reversible error by erroneously instructing the jury on the definition of great bodily harm (WPIC 2.04) and bodily injury (WPIC 2.03). The two pattern instructions were combined into one instruction, number 11, as follows:

> Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. Bodily injury means physical pain or injury, illness, or an impairment of physical condition.

CP 253. First of all, any objection was waived at trial when defense counsel did not object. *See* RAP 2.5(a) (The appellate court may refuse to review any claim of error which was not raised in the trial court). Secondly, the instruction is not "a manifest error affecting a constitutional right." In fact, it was not an error at all. In WPIC 2.03, the "note on use"

states to "Use this definition when an instruction refers to bodily injury, physical injury, or bodily harm." Because WPIC 2.04 (for great bodily harm) includes the phrase "bodily injury," there is no error in defining a term within that instruction. In addition, the instruction defining assault, CP 252, refers to "bodily injury."

The instructions given in this case in no way lowered the State's burden. The jury was instructed that "a person commits the crime of First Degree Assault when, with intent to inflict great bodily harm, he assaults another with any deadly weapon." CP 250 (emphasis added). Instruction number 13 included the elements that the State has to prove. CP 255. Included is the element "[t]hat the defendant acted with intent to inflict great bodily harm." CP 255 (emphasis added). In sum, there was no error and the Court of Appeals correctly held that instruction did not lower the State's burden of proof.

5. Nunez has not shown prosecutorial misconduct which prejudiced his right to a fair trial.

In order to establish that he is entitled to a new trial due to prosecutorial misconduct, Nunez must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Here, Nunez has not met that burden.

Nunez mistakenly claims that the deputy prosecutor likened the defense attorney to Kaiser Soze, a fictional character who was a criminal mastermind. First of all, there was no objection at trial. Secondly, a review of the complete record shows that it is clear from the context that the prosecutor never compared the defense attorney to Kaiser Soze. The point the prosecutor was making was that the defense was describing the *victim* as being some sort of a criminal mastermind like Kaiser Soze. RP 1186-7.

Nunez also challenges parts of the closing argument where the prosecutor uses the terms red herring, rabbit trails, and argument fallacies. However, the defense never objected at trial, and therefore, has waived this issue on appeal. Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). In fact, the absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. McKenzie*, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

During closing arguments in this case, the defense asserted, among other things, that there was no serious wound because the victim could move his right hand when he met with the detective. The State's characterization of this argument as "red herring" was a fair response to the defense argument, suggesting only that insufficient evidence supported the defense position.

Nunez also argues that the prosecutor's use of the phrase "res ipsa loquitur" during closing argument constituted misconduct. "Res Ipsa Loquiter" is Latin for "the thing speaks for itself." However, while the prosecutor used the phrase "res ipsa loquiter," it was not used in a way to change or lessen the State's burden of proof. *See* RP 1137-8. The prosecutor was using the phrase to explain that if someone stabs somebody in the chest, you may infer what their specific intent was. This is an appropriate argument. *See State v. Bea,* 162 Wn. App. 570, 254 P.3d 948 (2011). The prosecutor continued to reiterate that his burden in the case was proof beyond a reasonable doubt. RP 1151.

Nunez also claimed that references to a "kill shot" were unsupported by the record. However, the argument was supported by the record, which includes testimony that Nunez repeatedly tried to stab the victim and that the victim felt Nunez was trying to kill him. RP 700-5. In addition, Nunez claimed there was misconduct when the prosecutor stated,

"Thank God it was not a serious wound. Thank God this is not a murder trial." RP 1189. The defense did not object. This was consistent with the doctor's testimony that if the knife had penetrated the heart or a major blood vessel or artery, the wound could be fatal. RP 959-60. Finally, Nunez, for the first time on appeal, raised the issue of the prosecutor implying that Nunez was bragging about the stabbing shortly after the crime. *See* RP 1150. However, the argument was entirely reasonable given the evidence at trial.

Assuming, for sake of argument, that there was prosecutorial error, Nunez's claims fail because he has not met the high burden set forth in *Russell* as to the resulting prejudice. Nunez makes no argument as to why an objection and instruction would not have cured any prejudice in this case. And, in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury, Nunez has not shown that the prosecutor's remarks were "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *See Russell*, 125 Wn.2d at 86.

6. Nunez failed to establish that he is entitled to a new trial based on the performance of his trial attorney.

The defense must show deficient performance of the part of his trial attorney and that but for the deficient performance, the outcome of the trial would have been different. The analysis begins with a "strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Id.* at 863. To rebut the presumption of reasonable performance, a defendant bears the burden of proving that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington*, 406 U.S. 688, 689 (1984). That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis. *See Strickland*, 466 U.S. at 689; *cf. State v. Hoffman*, 116 Wn.2d 51, 112, 804 P.2d 577 (1991) ("The defendants cannot have it both ways;

having decided to follow one course at trial, they cannot on appeal now change their course and complain that their gamble did not pay off.").

To satisfy the prejudice prong of the *Strickland* test, the defendant must establish that "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In assessing prejudice, "a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law" and must "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification' and the like." *Strickland*, 466 U.S. at 694-95.

Nunez claims that his attorney was ineffective when he elicited improper opinion testimony from Officer Taylor. The defense attorney's questioning was regarding what are indicia of gang membership and what is enough to be considered a "gang member." RP 624-625. If you read the entire cross-examination, the attorney was clearly trying to get the officer to say that Nunez had not done any work for the gang, one indicia of gang membership. This would have been a reasonable strategy on the part of the attorney because he wanted to get the officer to say that his client's actions could be purely retaliatory for a prior incident. He was not

successful, however. As indicated previously, the fact that his strategy ultimately proved unsuccessful is immaterial to ineffective assistance analysis. *See Strickland*, 466 U.S. at 689. It was a reasonable strategy and Nunez has not shown the absence of any conceivable legitimate tactic explaining his attorney's performance.

Defendant also alleges that his attorney was ineffective in failing to object at times during the prosecutor's closing argument. The decision of when or whether to object is a classic example of trial strategy. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Defense counsel *did* object four times during the prosecutor's closing. RP 1127-1151. As to the times when he chose not to object, there was no deficient performance. The arguments made by the prosecutor were supported by the evidence. Any objection, request, or motion would have been denied. That is most likely why defense counsel did not object. It may also have been a tactical decision intended to avoid drawing further notice to the prosecutor's statements.

F. CONCLUSION

This case does not meet any of the criteria in RAP 13.4(b). First of all, the decision is not in conflict with a decision of the Supreme Court or another decision of the Court of Appeals. Second, a significant question of law under the Constitution of the State of Washington or of the United

States is not involved. Lastly, the petition does not involve an issue of substantial public interest that should be determined by the Supreme Court. As such, the petition for review should be denied.

Respectfully submitted this 28th day of November, 2016,

s/Tamara A. Hanlon
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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on November 28, 2016, by agreement of the parties, I emailed a copy of STATE'S ANSWER TO PETITION FOR REVIEW to Mr. Eric W. Lindell at ericlindell@icloud.com. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of November, 2016 at Yakima, Washington.

s/Tamara A. Hanlon_____
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