

FILED
Court of Appeals
Division I
State of Washington
8/14/2020 3:18 PM

98909-5
No. 81393-5-I

FILED
SUPREME COURT
STATE OF WASHINGTON
8/17/2020
BY SUSAN L. CARLSON
CLERK

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

V.

JOSE AYALA REYES

PETITION FOR REVIEW

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

A. Identity of Petitioner..... 1

B. Court of Appeals Decision..... 1

C. Issues Presented for Review..... 1

 1. During Mr. Ayala’s trial, three jurors repeatedly expressed racial bias and stereotypes during voir dire. Nevertheless, the trial court refused to remove them for cause. Should this Court grant review of an issue of substantial public interest where the trial judge refused to excuse three racially biased jurors for cause?..... 1

 2. Whether the admission of Mr. Ayala’s post-arrest statement was in violation of his Fifth, Sixth, and Fourteen Amendment rights of the United States Constitution?..... 1

D. Statement of the Case..... 1

E. Argument..... 11

 1. The trial court committed reversible error by refusing to excuse three jurors for cause who had expressed actual racial bias, including racist attitudes and stereotypes..... 11

 2. The trial court erroneously admitted Mr. Ayala’s post arrest statement taken in violation of his Fifth, Sixth, and Fourteenth rights..... 19

F. Conclusion..... 20

TABLE OF AUTHORITIES

Cases

<i>Batson v. Kentucky</i> , 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)	13
<i>Michigan v. Mosley</i> , 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).....	19
<i>Miller-El v. Dretke</i> , 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005).....	13
<i>Mincey v. Arizona</i> , 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978)	20
<i>Miranda v. Arizona</i> , 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).....	19
<i>Seattle v. Erickson</i> , 188 Wn.2d 721, 398 P.3d 1124 (2017).....	12
<i>Shane v. Commonwealth of Kentucky</i> , 243 SW.3d 226 (Ky. 2007)	13
<i>State v. Berhe</i> , 193 Wn.2d 647, 444 P.3d 1172 (2018).....	14, 15
<i>State v. E.J.J.</i> , 183 Wn.2d 497, 509, 354 P.3d 815 (2015).....	14
<i>State v. Fire</i> , 145 Wn.2d 152, 34 P.3d 1218 (2001).....	17, 18
<i>State v. Gregory</i> , 192 Wn.2d 1, 5, 427 P.3d 621 (2018).....	14
<i>State v. Gunwall</i> , 106 Wn.2d 54, 720 P.2d 808 (1986)	17
<i>State v. Jefferson</i> , 192 Wn.2d 225, 253-54, 429 P.3d 467 (2018).....	18
<i>State v. Monday</i> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	13, 14
<i>State v. Saintcalle</i> , 178 Wn.2d 34, 42, 309 P.3d 326 (2013)	12, 19
<i>State v. Sassen Van Elsloo</i> , 191 Wn.2d 798, 841, 425 P.3d 807 (2018)...	13
<i>State v. Unga</i> , 165 Wn.2d 95, 196 P.3d 645 (2008)	20
<i>State v. Yates</i> , 161 Wn.2d 714, 774, 168 P.3d 359 (2007)	14
<i>United States v. Lall</i> , 607 F.3d 1277 (11 th Cir. 2010).....	20

A. Identity of Petitioner

Jose Ayala Reyes asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. Court of Appeals Decision

The Court of Appeals issued its decision on July 27, 2020 affirming Mr. Ayala's convictions.

C. Issues Presented for Review

3. During Mr. Ayala's trial, three jurors repeatedly expressed racial bias and stereotypes during voir dire. Nevertheless, the trial court refused to remove them for cause. Should this Court grant review of an issue of substantial public interest where the trial judge refused to excuse three racially biased jurors for cause?
4. Whether the admission of Mr. Ayala's post-arrest statement was in violation of his Fifth, Sixth, and Fourteen Amendment rights of the United States Constitution?

D. Statement of the Case

Jose Jonael Ayala Reyes was born on September 20, 1983 in a poor area of El Salvador. Exhibit 1¹, 2-4. He left school in the Fifth Grade in order to work in the fields. Exhibit 1, 4. He was raised by his

¹ Exhibits 1, 6 & 7 refer to the exhibits admitted at Mr. Ayala's CrR 3.5 hearing. CP, 44. The number after the comma is the page number of the exhibit.

mother and barely knew his father, who abandoned him when he was five years old. Exhibit 1, 3-4. He came to the United States in July of 2014. Exhibit 1, 3. Mr. Ayala's first language is Spanish and he speaks no other languages. Exhibit 6, 13. His English is confined to "Hi" and "My name is Jose." Exhibit 6, 12. He has an IQ of 79 +/- 3 and "functions in the low average range." Exhibit 1, 6. When Mr. Ayala was evaluated for competency by Western State Hospital, he demonstrated no understanding of the American jurisprudence system and had to be educated regarding most court concepts, a process that "became rather time-consuming," although Mr. Ayala was able to understand after "slow and repeated explanations of concepts." Exhibit 1, 7. Mr. Ayala utilized the services of an interpreter throughout the court proceedings, including during the jury trial.

On April 28, 2016 Samuel Vazquez was attacked in his vehicle and stabbed by unknown assailants in Tacoma. As Mr. Vazquez attempted to flee from his assailants, he was run over by a passing car and killed. Over the next two months, law enforcement investigation led them to suspect Mr. Ayala. On July 8, 2016 law enforcement contacted Mr. Ayala and arrested him. On that date, Agent Dan Brewer and Detective Gregory Rock interrogated Mr. Ayala for two-and-a-half to three hours. RP, 79 (3.5 hearing). The interrogation was conducted by Agent Brewer in Spanish,

which Detective Rock does not understand, so he sat “more or less like a bump on a log.” RP 77 (3.5 hearing). A transcript of the interrogation appears in the record at Exhibit 6.

Mr. Ayala’s case proceeded to a jury trial. During voir dire, Mr. Ayala unsuccessfully challenged three jurors, numbers 14, 24 and 39, for racial and actual bias. The Court of Appeals declined to discuss the responses of the jurors during voir dire, saying, “For the sake of argument, we assume, without deciding, that the jurors in question demonstrated racial bias and should have been dismissed on Reyes’s motion.” Opinion, 5, footnote 5. With all due respect to the Court of Appeals, it is simply inadequate to assume without discussion that the trial court erred. This Court cannot appreciate the extent of the error without first reviewing the racist and stereotypical views espoused by the jurors, views that went unchecked by the trial judge. These views were expressed in open court in the presence of Mr. Ayala, his Hispanic co-defendant, and any members of the public present in the courtroom that day. The trial judge’s refusal to remove these three explicitly racist jurors infused an unnecessary and prejudicial implicit racism into the proceedings.

Juror 14 expressed strong opinions about MS-13 gangs, writing in his written questionnaire, “I would struggle to be impartial, illegal alien or gang membership. Gang membership is inherently violent and illegal in

nature.” RP, 179, 186-87. Asked to explain this comment, he said, “Everything that I've learned was all either violent, illegal of some nature.” RP, 179. He also expressed fears for the safety of himself and his family, saying, “If there's violence involved, I have to be honest that crept into my mind if there is a guilty verdict and if revenge is a part of that culture.” RP, 189. When asked if his safety fears would have an impact on his decision making ability during the trial, he answered, “I have to honest. I would have to say yes.” RP, 190. Juror 14 also related a recent conversation with his wife about jury service where she expressed the following opinion about all criminal defendants, ““They're guilty. I could not see it any other way, given my experience.” RP, 185.

Juror 24 believes based upon his childhood experiences growing up in Arizona that “Hispanic males like to fight.” He attributes it to a “cultural thing” that “everybody knew.” RP, 220. He repeatedly stated that he would have difficulty applying the presumption of innocence to a Hispanic person accused of being a gang member and stated he would not have the same difficulty with a Caucasian person. RP, 221-23.

Juror 39 works as a surveillance technician at the Capital Campus in Olympia and frequently works with local law enforcement. RP, 258. Based upon his 25 years of experience working “First Amendment rallies,” including rallies protesting immigration policy, he believes

Hispanic protesters and counter-protesters are prone to “a lot of violent type of activity.” RP, 260. What stands out to him the most with MS-13 gang members and other people is the “kind of clothing” they wear. RP, 267. When asked about the presumption of innocence, he said, “It’s really hard for me not to evaluate people what they’re saying and how they’re saying it and putting it into kind of pigeon holes that I have experienced before. It’s kind of a natural thing that I do.” RP, 264.

In addition to refusing to strike three racist jurors for cause, the trial court also permitting the State to introduce Mr. Ayala’s July 8 interrogation. The interrogation begins with Agent Brewer introducing himself and explaining he learned Spanish while living in Honduras and El Salvador. Exhibit 6, 3. He then explains that he works for the Federal Bureau of Investigation, an organization that investigates cases on a federal level. Exhibit 6, 6. He then reads Mr. Ayala his *Miranda* warnings. Exhibit 6, 7. Agent Brewer told Mr. Ayala that the *Miranda* warnings were just a “formality.” Exhibit 6, 5. He then stated, “This is where you sign, and I sign here. . . That is our formality.” Mr. Ayala responded, “Oh well, I don’t know what you are talking about, but yes.” Exhibit 6, 10. Mr. Ayala then printed the word “Joneal” on the form, in a barely legible script, not on the signature line, but underneath it, as shown below. Exhibit 7.

Do you voluntarily wish to answer questions now?	
Firma/Signature <i>JONES</i>	
Firma del Testigo/WITNESS' SIGNATURE <i>C. Rock</i>	
.E	Nombre Completo del Testigo/Titulo/WITNESS' COMPLETE NAME/TITLE

After confirming his first name, Agent Brewer then stated, “Uh the truth is that... uh, in the last months we have heard a lot of things about a friend of yours. And you know who that is, right?” Mr. Ayala responded, “Yes. It was mentioned to me. Samuel.” Agent Brewer then changed the subject, saying, “Samuel. Yes. And, and before speaking about him and that, most of all, I want to find out and I want to know a little about, about you and what you do here... how long you’ve been here in the States.” Exhibit 6, 11. Samuel would not be mentioned again for another 46 pages of transcript. Exhibit 6, 57.

Mr. Ayala related that he came to the United States illegally in 2014 and was caught in Tucson, Arizona where he spent three months in custody. Exhibit 6,16-17. He completed only the fifth grade and then he moved to Honduras to work in the fields. Exhibit 6, 20-21. He stated he does not have the ability to “write very much.” Exhibit 6, 76.

When the discussion returned to Samuel, Mr. Ayala acknowledged knowing him and hearing he had been killed. Exhibit 6, 56-57. Agent

Brewer and Mr. Ayala discussed various things the agent had heard about Samuel. Mr. Ayala said he did not know any details about how he died. Exhibit 6, 68.

Agent Brewer then changed the subject to what “problems” Mr. Ayala has. Exhibit 6, 80. These problems include being here “without being a citizen,” being unable to travel easily, and paying his stepfather \$500 per month on a restaurant income. Exhibit 6, 80-81.

After Mr. Ayala again denied any knowledge of how Samuel died, Agent Brewer confronted him for the first time, saying, “I know, and you know, that the night Samuel died, you were there in the street.” Exhibit 6, 86. Mr. Ayala again denied any involvement, saying he was at home asleep. Exhibit 6, 86.

Agent Brewer said, “The worst thing you can do right now is lie to us.” Exhibit 6, 88. He then said, “The thing is, we already know, and, uh, I am giving you the opportunity, Jonael, to tell the truth and, and... and listen to me clearly. You have arrived in this country, and life is difficult. I know that. You have a, a girl, and you haven’t even seen her. You haven’t seen her.” Exhibit 6, 88. Agent Brewer then mentioned being sent back to El Salvador, “You/they are left out on the street. And you don’t want that. You don’t want to go...go back to where you are from, to El Salvador, because it’s awful there.” Exhibit 6, 89.

Agent Brewer then accused Mr. Ayala of lying to him and confronted him with the phone records. "So, Jonael, when I asked you, I asked you, have you talked to him outside of work? We have... we know that you have spoken to him, that you used to speak to him. A lot. On the phone. And you aren't going to lie to me, because we have the records, we have the... the papers that say your number, his number, your number, his number, besides work. So, you have lied to me one time, and I don't, I don't want you to lie to me anymore. I am going to give you the opportunity... I gave you... but now, you have to tell the truth. And do you know why? Because you are here in the United States... ...and you don't believe that. Here in the United States, we can help people who want help. But if you continue to lie to me and the detective, you are not going to have help. And today you can leave here with this weight off your chest and feel free again. But you have to walk with us like this, explaining what happened. Because I imagine that every time you go by that street... [W]hen you were there that night, you saw what was going on, and unfortunately, here you are trying to tell me no, no, no, no; when the fact is that we know. WE have the record that you spoke with him many times, this same day. You lied to me. What if we start again, and tell me the truth... did you talk outside of work?" Exhibit 6, 89-90.

At that point, Mr. Ayala attempted to stop the interrogation by saying, "I don't have anything to say." Exhibit 6, 92. Agent Brewer responded, "Nothing?" Mr. Ayala said, "I already told you what it is." Exhibit 6, 92.

Agent Brewer continued to confront Mr. Ayala with the phone records, accusing him of lying, for several pages, when the following occurred:

- You shouldn't start your life like this. What if... if we help you? You are here in the country with laws that are not the same as in your country. Here you have the option of receiving help. Where were you going this night? Because you were not sleeping. Because a person can't sleep and call at the same time.
- Okay. I can't say anything.
- I can't say anything.
- Why?
- Because.
- What happens to you if you, you tell us?
- I can't say anything.
- Hey, we... it's, that is the second time that I tell you... what, what were you doing this night, right?

Exhibit 6, 96.

Agent Brewer continued, "And we know even more... but now I'm going to give you the ch—chance to tell. Here, we leave here. We are not going to tell anyone that, that you know what happened. No one. I know it is hard. You have a, a little baby." Exhibit 6, 97-98. "Here, I'm going to explain to you how it works here in the United States. Would you let—let me? All right? Here in the States... one of the things that is very important

is that you talk to the police, is for the person to show remorse and—and sadness over something that happened. That, that helps. That helps you a lot.” Exhibit 6, 98-99.

Agent Brewer then confronted him again with the phone records, prompting Mr. Ayala to say, “I can’t tell you anything.” Exhibit 6, 100. Agent Brewer again suggested that he needed to answer his questions in order to avoid being deported to El Salvador. “But like from one person, from one human being to another, I’m telling you...it’s important to tell the law here, the truth. It’s different from El Salvador, dude. I know how things work there. Because think it over carefully. If you are involved in some problem there, do you want to go back there?” Mr. Ayala answered, “I don’t want to go back to my homeland.” Exhibit 6, 101

Agent Brewer then tried a different tact, suggesting that only a monster would kill Samuel and he knew Mr. Ayala was not a monster, just someone who made a mistake, because monsters are people who “cut people’s heads off and hurt people’s families.” Exhibit 6, 102-04. Mr. Ayala responded, “I am afraid of... I’m not going to say anything.” Exhibit 6, 104.

Agent Brewer then said, “I’m telling you, you can trust me. About anything, about what you are afraid of, I won’t tell anyone. Today, the truth is, we can explain what happened, what you saw, and then... my

coworker here and I are not going to look to say that ‘Joniel told us.’”

Exhibit 6,104

For the next few pages, Agent Brewer returned to several themes, including that Mr. Ayala is not a monster and he is obviously afraid of something. Agent Brewer then decided to “start again,” saying, “Nothing... I am never going to lie to you. I am never going to lie to you. In your country, that doesn’t happen. The police... I lie to you and take you somewhere and then... it’s horrible. That’s not here. We give you some coffee, calm.” Exhibit 6, 111-12.

At page 123, Mr Ayala made his first incriminating admission, admitting he called Samuel to pick him up for a beer and he got into Samuel’s car with him. Exhibit 6, 123. From there he continued to make admissions. “Well, I was with him, but I don’t know who did that to him. Exhibit 6, 129. He left his shoe behind because it fell off. Exhibit 6, 135.

Mr. Ayala was convicted and sentenced to 608 months in prison for first degree murder and conspiracy to commit first degree murder, a functional life sentence.

E. Argument

1. The trial court committed reversible error by refusing to excuse three jurors for cause who had expressed actual racial bias, including racist attitudes and stereotypes.

This Court should grant review in cases involving issues of substantial public interest and significant issues under the Constitutions of the United States and Washington. RAP 13.4. In this case, three jurors demonstrated actual racial bias and stereotypical views against Hispanics that would have a tangible effect on their ability to be fair and impartial and on their ability to presume innocence. Despite this explicit bias, the trial court refused to remove them from the jury panel, forcing the defense to use half of its preemptory challenges removing them.

Over the past decade, this Court has repeatedly emphasized the need to extricate racial bias and stereotypes in all its forms from the courtroom. Implicit in this Court's recent case law is the principle that racial stereotypes and bias are themselves prejudicial, not just to the defendants, but to the judicial system as a whole and that trial courts have a duty to act affirmatively to eliminate it from the courtroom. Failure to do so should result in reversal.

This Court has been particularly diligent about identifying and eradicating racial stereotypes during the voir dire process. "Racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts." *State v. Saintcalle*, 178 Wn.2d 34, 42, 309 P.3d 326 (2013). In *Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), this Court held that a single use of an alleged racially

motivated preemptory challenge is sufficient to invoke *Batson* protections. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

The failure to excuse a racially biased juror affects the fundamental fairness of the trial and the integrity of the justice system as a whole in the same way that removing a minority juror without cause does, that is, the “very integrity of the courts is jeopardized when a prosecutor’s discrimination invites cynicism respecting the jury’s neutrality, and undermines public confidence in adjudication.” *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 841, 425 P.3d 807 (2018), quoting *Miller-El v. Dretke*, 545 U.S. 231, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005). As one Court put it when analyzing a similar issue, “The issue is actually simple: Can a trial be called fair and the jury impartial if the method of arriving at a qualified jury is not?” *Shane v. Commonwealth of Kentucky*, 243 SW.3d 226, 340 (Ky. 2007).

In *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), this Court reversed a conviction with only minimal evidence of prejudice where the prosecutor appealed to racial bias during the evidentiary portion of the case and again in closing argument. Rather than applying the normal prosecutorial misconduct standard that reversal is required only where “there is a substantial likelihood the misconduct affected the jury’s verdict,” this Court adopted a far more strict standard requiring reversal

where the misconduct invokes race “unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict.” *Compare State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) with *Monday* at 680. *Accord State v. E.J.J.*, 183 Wn.2d 497, 509, 354 P.3d 815 (2015) (Justice Madsen commenting that “our system of justice cannot condone disparate treatment of the people we serve, based on race, through the use of obstruction statutes”); *State v. Gregory*, 192 Wn.2d 1, 5, 427 P.3d 621 (2018) (striking down Washington’s death penalty statute because it was being applied in an “arbitrary and racially biased manner”).

In *State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2018), faced with the prospect of racially motivated juror misconduct, this Court abrogated the normal rule that jury deliberations are secret, holding that an evidentiary hearing is required when the alleged misconduct involves racial bias. This Court noted, “Unlike isolated incidents of juror misbehavior, racial bias is a common and pervasive evil that causes systemic harm to the administration of justice. Also unlike other types of juror misconduct, racial bias is uniquely difficult to identify. Due to social pressures, many who consciously hold racially biased views are unlikely to admit to doing so. Meanwhile, implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness. Given these unique concerns, courts must carefully control the

inquiry when it has been alleged that racial bias was a factor in a jury's verdict." *Berhe* at 657.

The recently passed GR 37 demonstrates that this Court has determined that a trial cannot be called fair if the method of arriving at a qualified jury is tainted by the sanctioning of implicit bias through the use of racial stereotypes and prejudices. While GR 37 is concerned with improper removal of potential jurors based on race, the public policy that prompted this Court to pass GR 37 should apply with just as much force, if not more, to the failure to remove racially biased jurors. GR 37 gives a non-exhaustive list of reasons that have historically been used to perpetuate exclusion of minority jurors: allegations that the prospective juror was sleeping, inattentive, staring or failing to make eye contact, exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers. These stereotypes based on race are no longer allowed as a reason to strike a juror because they unfairly exclude jurors of color. Additionally, the allowance of such stereotypes by the court infects the entire trial process with the appearance that such implicit bias is acceptable in our system of justice.

Many of the stereotypes and attitudes that prompted this Court to adopt GR 37 were expressed by jurors 14, 24, and 39. Juror 14 equated "illegal aliens" with violent gang members and expressed safety concerns

due to a “culture of revenge.” While Juror 14 tried to distance his views from race, he also showed implicit racial bias by referencing violence and revenge in “that culture.” Juror 24’s racist views were the most explicit of the three. He believes “Hispanics males like to fight” and he would apply the presumption of innocence differently for Hispanics than Caucasians. Juror 39 expressed a concern for applying the presumption of innocence to MS-13 members based upon their tendency towards violence, saying he just naturally evaluates people and “pigeon holes” them based upon his experience, including “kinds of clothing” they wear. Referencing the types of clothing worn by a largely Latino gang is a “dog whistle” for racist stereotypes. All three jurors expressed the type of explicit or implied racial views and stereotypes condemned in GR 37.

The recent cases of this Court, as well as the passage of GR 37, viewed collectively, signal a clear trend by this Court to treat racial bias in the courtroom as different from other forms of bias. Trial judges have an affirmative duty to proactively eliminate the “common and pervasive evil of racial bias” and at no time is it more important to the goal of removing this “cause[] of systemic harm to the administration of justice” than ensuring the excusal for cause of jurors who have exhibited racial bias.

The Court of Appeals side-stepped this result by relying on this Court’s 5-4 decision in *State v. Fire*, 145 Wn.2d 152, 34 P.3d 1218

(2001). In *Fire*, this Court affirmed a conviction after a juror who expressed bias against “baby rapists” was not excused by the court but was later excused through the use of a peremptory challenge. The majority summed up the issue by saying, “At issue in this case is whether the trial court abused its discretion in denying a challenge for cause to Juror No. 8 and whether, *without a further showing of prejudice*, reversal is the remedy for a trial court's error in not dismissing a potential juror for cause where the defendant later uses a peremptory challenge to remove that juror and exhausts his remaining challenges before the final selection of the jury.” *Fire*, 145 Wn.2d at 157 (emphasis added). Justice Alexander concurred with majority saying that “*unless a defendant can show prejudice*, the mere fact that one uses his or her peremptory challenge to cure a wrongfully denied for-cause challenge does not establish a constitutional violation.” *Fire*, 145 Wn.2d at 167 (Justice Alexander, concurring) (emphasis added).

As Mr. Ayala argued at length in the Court of Appeals, the failure to excuse a racially biased juror is the type of structural error that requires reversal even absent a showing of prejudice pursuant to article 1, section 21 of the Washington Constitution. *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). This Court should grant review of this case to determine

whether the failure to excuse a racially biased juror constitutes the “further showing of prejudice” referenced in the *Fire* decision.

In bringing this Petition, Mr. Ayala is not blind to the fact that this Court is struggling with the role of preemptory challenges in our state’s jurisprudence. At least two Justices have explicitly said they are ready to get rid of preemptory challenges entirely. *Erickson* at 740 (Justice Yu, joined by Justice Gonzalez, concurring). While a majority of this Court remains unconvinced of the need for the preemptory challenge nuclear option, this Court is unanimous in its desire to eradicate racial bias and stereotypes in the voir dire process. As Justice Yu recently stated, “I nevertheless remain convinced that nothing short of complete abolishment of the peremptory challenge, *coupled with further development of our ‘for cause’ challenge jurisprudence*, will get us on the right path toward finally eradicating racial bias in jury selection.” *State v. Jefferson*, 192 Wn.2d 225, 253-54, 429 P.3d 467 (2018) (Justice Yu, concurring) (emphasis added). It is the responsibility of the trial judges, not attorneys, to ensure that trials are conducted in a manner free from racial bias, not just for the benefit of the defendants but for the spectators and public at large, and this Court should not rely on the judicious use of preemptory challenges to ensure that happens. Mr. Ayala’s case presents an excellent vehicle for this Court to emphasize that point.

This Court has said that the “underlying goal of the jury selection process is to discover bias in prospective jurors and to remove prospective jurors who will not be able to follow instructions on the law, and thus, to ensure an impartial jury, a fair trial, and the appearance of fairness.” *Saintcalle* at 76. There can be no fair trial, let alone the appearance of a fair trial, if the trial judge who presides over the trial allows racial bias to remain unchecked. From the perspective of Mr. Ayala, an uneducated field worker from El Salvador being tried in a system he does not understand using a language that he does not speak, the message sent by the trial judge could not be more plain: race matters and racism is acceptable. This Court should find that such a statement has no place in our system by granting review.

2. The trial court erroneously admitted Mr. Ayala’s post arrest statement taken in violation of his Fifth, Sixth, and Fourteenth rights.

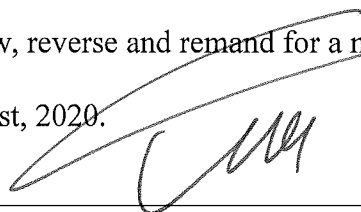
Mr. Ayala’s Fifth, Sixth, and Fourteenth Amendment rights to were violated by his interrogation and his statement was erroneously admitted. *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966). Mr. Ayala’s repeated invocations to remain silent were not scrupulously honored as required by *Michigan v. Mosley*, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). Agent Brewer’s explicit promise of confidentiality in exchange for Mr. Ayala’s statements

rendered his statement involuntary. *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). In the alternative, Mr. Ayala was entitled to specific performance of the promises. *State v. Unga*, 165 Wn.2d 95, 196 P.3d 645 (2008). When a defendant alleges his will was overcome by the interrogation techniques of the officer, including promises, Courts “must then apply the totality of the circumstances test and determine whether the defendant's will was overborne by the promise, i.e., there must be a direct causal relationship between the promise and the confession.” *Unga* at 101-02. Agent Brewer’s statements of confidentiality undercut the *Miranda* warnings previously provided. When an officer attempts to undercut this warning by promising not to use the statements against the defendant, the subsequent statement is involuntary. *United States v. Lall*, 607 F.3d 1277 (11th Cir. 2010). Agent Brewer made explicit threats and promises to Mr. Ayala that overcame his will. Judged by the totality of circumstance, Mr. Ayala’s statement to Agent Brewer was not voluntarily and should have been suppressed.

F. Conclusion

This Court should grant review, reverse and remand for a new trial.

DATED this 14th day of August, 2020.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

STATE OF WASHINGTON,) Court of Appeals No.: 81393-5-I
)
Plaintiff/Respondent,) DECLARATION OF SERVICE
)
vs.)
)
JOSE JONAEI AYALA REYES,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On August 14, 2020, I e-filed the Petition for Review in the above-captioned case with the Washington State Court of Appeals, Division One; and designated a copy of said document to be sent through the Court of Appeals transmittal system to: the Pierce County Prosecuting Attorney's Office via email to PCpatcecf@co.pierce.wa.us, to Kristie Barham of the Peirce County Prosecuting Attorney's office via email to kristie.barham@piercecountywa.gov, and to Philip Buri via email to philip@burifunston.com.


On August 14, 2020, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Petition for Review to the defendant:

Jose Jonael Ayala Reyes, DOC #413606
Washington State Penitentiary
1313 N 13 Avenue
Walla Walla, WA 99362

////

1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct.

3 DATED: August 14, 2020, at Bremerton, Washington.

4
5 
6 _____
7 Alisha Freeman
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON

Respondent,

v.

JOSE JONAE AYALA REYES

Appellant.

No. 81393-5-I

DIVISION ONE

UNPUBLISHED OPINION

APPELWICK, J. — Ayala Reyes appeals his convictions for first degree murder and conspiracy to commit first degree murder. He claims that being forced to use his peremptory challenges on jurors who should have been excused for demonstrated racial bias was a structural error that deprived him of his right to a fair trial. He also claims the trial court erred in declining to suppress incriminatory statements he made during an interview with police and that his two crimes should be considered the same criminal conduct. We affirm.

FACTS

Jose Ayala Reyes is a 36 year old immigrant from El Salvador. He speaks Spanish and minimal English. In 2016, he lived in the Tacoma area.

In the spring of that year, Ayala Reyes began communicating with “Sicario.”¹ Sicario is a member of the Mara Salvatrucha (MS-13) street gang.

¹ “Sicario” is a Spanish word meaning “assassin.” It is the street name for an individual named Edenilson Misael Alfaro.

Ayala Reyes sent Sicario money for drugs and to buy weapons for the gang. He also went down to California to meet with Sicario.

After returning from California, Ayala Reyes rented an apartment at the Alladin Camelot complex. A few days later, he and his girlfriend met with Samuel Cruces Vasquez at the apartment to eat food and drink beer. Cruces Vasquez was Ayala Reyes's co-worker at a pizza shop.

After that meeting, Ayala Reyes exchanged text messages with Sicario planning to murder Cruces Vasquez. Ayala Reyes wanted to murder Cruces Vasquez in order to become a member of MS-13. On April 28, 2016, Ayala Reyes, his girlfriend, Sicario, and two other individuals named "Tas"² and "Sombra"³ met at the apartment to plan the murder.

At the meeting, the four discussed details of how they would murder Cruces Vasquez. They decided that Ayala Reyes and Sombra would do the killing, because they were not yet members of MS-13. The four eventually decided they would lure Cruces Vasquez to them by calling him on Ayala Reyes's phone. The four put on dark jackets and passed out gloves for use during the murder.

They then left the apartment with Ayala Reyes's girlfriend, who they dropped off before proceeding to meet Cruces Vasquez. When they arrived, Ayala Reyes and Sombra entered Cruces Vasquez's car and each stabbed him. Cruces

² "Tas" is Cesar Chicas-Carballo's street name. It apparently refers to a tattoo on his body of the Tasmanian Devil (a cartoon character from the television show "Looney Tunes"). Tas is a member of MS-13.

³ "Sombra" is Juan Gaitan Vasquez's street name. It is a Spanish word meaning "shadow." At the time of the meeting, Sombra was not yet a member of MS-13.

Vasquez got out of the car. Ayala Reyes and Sombra followed him out of the car, beat him, and left him lying in the street. Sometime after the assault, an unidentified vehicle ran over Cruces Vasquez. Cruces Vasquez later died of his injuries.

Police questioned Ayala Reyes in connection with the murder. Federal Bureau of Investigation Agent Dan Brewer conducted the interview in Spanish. Brewer is a fluent Spanish speaker. At the outset of the interview, Brewer explained Ayala Reyes's Miranda⁴ rights to him in Spanish. As Brewer explained his Miranda rights, Ayala Reyes responded using phrases like "Uh huh" and "Okay." Brewer then asked Ayala Reyes if he would agree to voluntarily answer questions, to which he responded, "Okay." He also asked the Ayala Reyes to sign a preprinted form indicating he understood and was waiving his rights. The form was written in both English and Spanish. Brewer described the form as a "formality." Ayala Reyes responded, "Oh, well I don't know what you are talking about, but yes." He then signed the form.

Brewer proceeded to interview Ayala Reyes in Spanish for about three hours with several breaks. Ayala Reyes expressed discomfort with proceeding at various points in the interview. His discomfort centered around his fear that MS-13 would retaliate against him if he cooperated with police. At one point, he said, "Do you want me to tell you and then I . . . they'll kill me." At another point, he said, "[I]f I remain quiet, I know that nothing will happen. . . . But if I talk, you know what will happen." He also at times informed Brewer that he would not tell him the things

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

he wanted to know, saying, “I’m not going to say anything,” “I’m not going to talk,” and other statements to that effect. Brewer nevertheless continued the interview.

The State charged Ayala Reyes with first degree murder, conspiracy to commit first degree murder, and murder in the second degree. During jury selection, Ayala Reyes challenged three jurors for cause. The court denied those challenges. Ayala Reyes instead used peremptory challenges to disqualify those jurors. Ayala Reyes accepted the final panel without using his last peremptory challenge.

A jury found Ayala Reyes guilty of first degree murder, conspiracy to commit first degree murder, and second degree murder. It also found that he was armed with a deadly weapon and had committed the crimes for the benefit of a criminal street gang.

At sentencing, the State conceded that second degree murder was an alternative theory of the case, and therefore the conviction should be vacated. Ayala Reyes argued that his convictions for murder and conspiracy to commit murder constituted the same criminal conduct and should therefore be sentenced concurrently rather than consecutively. The trial court disagreed and ruled that the sentences be served consecutively.

Ayala Reyes appeals.

DISCUSSION

Ayala Reyes makes three arguments. First, he argues the trial court erred in denying his motion to excuse jurors 14, 24, and 39 for demonstrated racial bias. Second, he claims the trial court erred by not suppressing his July 8, 2018

interrogation. Last, he argues that the trial court erred by not treating first degree murder and conspiracy to commit first degree murder as the same criminal conduct.

I. Racial Bias

Ayala Reyes argues that the trial court erred in denying his motion to excuse jurors 14, 24, and 39 for demonstrated racial bias. He claims that because these jurors should have been dismissed for their racial bias, the trial court's failure to do so constituted a structural error that mandates reversal.⁵

In order to successfully challenge a conviction based on errors in jury selection, Ayala Reyes must show that the trial court erred in denying his challenges for cause and he must make a further showing of prejudice. State v. Fire, 145 Wn.2d 152, 165, 34 P.3d 1218 (2001). If a defendant utilizes peremptory challenges to cure the trial court's error in not excusing a juror for cause, and is subsequently convicted by a jury upon which no biased juror sat, he has not demonstrated prejudice. Id.

The facts here fit squarely within Fire. Id. Ayala Reyes sought to have allegedly biased jurors disqualified for cause. The court denied the motion. Ayala Reyes instead used peremptory challenges to disqualify those jurors. The biased jurors never sat on the jury. Ayala Reyes does not take issue with any of the jurors who actually convicted him, only the jurors who he excused with peremptory challenges. Ayala Reyes therefore has not shown prejudice, and reversal is not

⁵ For the sake of argument, we assume, without deciding, that the jurors in question demonstrated racial bias and should have been dismissed on Reyes's motion.

required. Fire, 145 Wn.2d at 165. We need not address whether the trial court erred in denying his motions because he is unable to show prejudice.

Unable to secure reversal through a traditional challenge to jury selection, Ayala Reyes urges us to adopt a rule requiring reversal whenever the trial court erroneously denies a motion to excuse a juror for demonstrated racial bias. He claims such an error constitutes a structural error under article I, section 21 of the Washington Constitution. He argues that under Gunwall, article I, section 22, should be read to confer greater protection than its federal counterpart, the Sixth Amendment to the United States Constitution. See State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986) (laying out the test for greater protection from the state constitution). The Fire court held that “Washington law does not recognize that article I, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the Constitution.” Fire, 145 Wn.2d at 163. That ruling is binding on this court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (“[O]nce [the Washington Supreme Court] has decided an issue of state law, that interpretation is binding on all lower courts.”).

If we were to consider his argument, Ayala Reyes has not shown structural error. Even assuming that the trial court should have granted Ayala Reyes’s motions, the only consequence of its failure to do so is that Ayala Reyes was deprived of three peremptory challenges. Being deprived of peremptory challenges does not constitute structural error unless an objectionable juror actually sits on the jury. See In re Pers. Restraint of Meredith, 191 Wn.2d 300, 310, 422 P.3d 458 (2018).

Ayala Reyes is unable to show prejudice or structural error because he utilized his peremptory challenges to remove the jurors he believes were biased. Any error the trial court may have committed in denying his motions to excuse the jurors for cause was therefore harmless.

II. Motion to Suppress

Ayala Reyes argues next that the trial court erred in denying his CrR 3.5 motion to suppress statements he made under interrogation to Brewer.

We review the trial court's findings of fact from a CrR 3.5 hearing for substantial evidence. State v. Gasteazoro-Paniagua, 173 Wn. App. 751, 755, 294 P.3d 857 (2013). We review de novo whether the trial court's conclusions of law are properly derived from its findings of fact. Id. The State must prove a defendant intelligently and voluntarily waived his right to remain silent by a preponderance of the evidence. State v. Woods, 34 Wn. App. 750, 759, 665 P.2d 895 (1983). Where the record indicates there is substantial evidence upon which the trial court could find by a preponderance of evidence that a confession was given voluntarily, the trial court's determination of voluntariness will not be disturbed on appeal. Id.

That a suspect is read his Miranda rights and signs a standard waiver of rights form is "usually strong proof of the validity of that waiver." Id. (quoting North Carolina v. Butler, 441 U.S. 369, 373, 99 S. Ct. 1755, 1757, 60 L. Ed. 2d 286 (1979)). A suspect may invoke his right to remain silent at any time even after initially waiving the right. State v. Piatnitsky, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). An invocation of rights must be an unequivocal expression of an objective intent to cease communication with interrogating officers. Id. The invocation must

be sufficiently clear that a reasonable police officer in the circumstances would understand it to be an invocation of Miranda rights. Id. at 413. The right to remain silent cannot be partially invoked and must be exercised in an objectively clear way. Id. at 412.

A. Waiver

Signing a waiver form is considered strong evidence of a waiver of rights. See Woods, 34 Wn. App. at 759. Here, right before Brewer began explaining his rights to him, he told him he was about to question him about what happened to “a friend of yours,” referring to Cruces Vasquez. Then, Brewer explained Ayala Reyes’s Miranda rights to him in Spanish at the outset of the interview. When asked if he would sign the form and voluntarily submit to questioning, he said, “I don’t know what you are talking about, but yes.” At the hearing on his motion to suppress, Ayala Reyes claimed this statement indicated that he did not know what he was signing. But, the record shows that Ayala Reyes had been affirming his understanding of his rights as Brewer explained them to him by saying “[U]h huh” and “Okay” six times. Substantial evidence supports the trial court’s determination that Ayala Reyes’s statement, “I don’t know what you are talking about,” referred to what happened to Cruces Vasquez rather than to Ayala Reyes’s understanding of his Miranda rights.

We affirm the trial court’s finding that Ayala Reyes waived his right to remain silent.

Ayala Reyes nevertheless argues that he reinvoked his right to remain silent at several points during the interview. He identifies five statements he considers to be an invocation of Miranda rights.

First, on page 92 of the first interview transcript, Ayala Reyes and Brewer have the following exchange:

[Brewer:] What if we start again, and tell me the truth . . . did you talk [to Cruces Vasquez] outside of work?

[Ayala Reyes:] I don't have anything to say.

[Brewer:] Nothing?

[Ayala Reyes:] I already told you what it is.

[Brewer:] You told me you didn't talk to him outside of work.

[Ayala Reyes:] Because I didn't.

(Emphasis added) (second alteration in original). Then, on pages 95-104:

[Brewer:] Where were you going this night? Because you were not sleeping. Because a person can't sleep and call at the same time.

[Ayala Reyes:] Okay. I can't say anything.

[Brewer:] Why?

[Ayala Reyes:] Because . . .

[Brewer:] What happens to you if you, you tell us?

[Ayala Reyes:] I can't say anything.

[Brewer:] Hey, we . . . it's, that is the second time that I tell you . . . what, what were you doing that night right? You were there. You told me you were sleeping. But no. You weren't sleeping. You were talking on your phone. And afterwards, you were talking with someone different. And we know that you closed the phone, you turned the phone off, and you hid the

phone or you pu—put the phone in some place, because it isn't turned on this, this night. And this is the time. Jon[a]el [t]his is the time, brother, that you can really explain . . . what happened. Because this night, you already know, and I know that this night you were there, there in your trailer. You weren't sleeping. You were talking on the phone with him. We know that you weren't working. So, yes, it is true that you were talking on the phone outside of work. We know it.

And we know even more . . . but now I'm going to give you the ch—chance to tell. Here, we leave here. We are not going to tell anyone that, that you know what happened. No one. I know it is hard. You have a, a little baby.

[Ayala Reyes:] I know, but what good does it do me? Nothing.

[Brewer:] What do you mean it does you no good?

[Ayala Reyes:] I'm here. You have me, that, where you say that I . . . about what you are saying to me, uh . . . well, I can't say anything.

[Brewer:] Yes. The thing is, I'm giving you the opportunity. And that is difficult, Jon[a]el. I know that. It's difficult. Because what if . . . Here, I'm going to explain to you how it works in the United States. Would you let—let me? All right? Here in the States . . . one of the things that is very important is that you talk to the police, is for a person to show remorse and—and sadness over something that happened. That, that helps. That helps you a lot. But if a person continues without showing remorse, the . . . or, or sadness, uh . . . the others who are going to see the reports say, "Well, this/he is not . . . this/he is not going to help, this person, this man." So, the first step that, that you have to take is to show that something happened, show that there is remorse, there is sadness, and really, that you will never do it again. That won't—that will never happen again. And that is how the law works. That is how the opportunity to receive help works. Because you are young. You are young.

[Ayala Reyes:] I know.

[Brewer:] You have a life. And we want for you to live it . . . well.

[Ayala Reyes:] But, if I'm not doing bad things to anyone, why do you say that to me?

[Brewer:] The thing is . . . I can't believe you if you tell me that. Why did I ask you? I asked you, besides working with him . . . [unintelligible] outside. No, no, no. We didn't/don't talk. You do talk... a lot. With text and with calls. I asked you, "This night, what were you doing?" [Y]ou say to me, you said to me, "Sleeping." You were not sleeping right?

[Ayala Reyes:] I can't tell you anything.

[Brewer:] What is preventing you? What prevents you?

[Ayala Reyes:] [sighs] Nothing.

[Brewer:] Someone? Is someone preventing you? No. Jon[a]el, a person is going to be afraid . . . of being here. I know. I, I know the . . . I know what life is like. It's difficult, I know that. But like from one person, from one human being to another, I'm telling you . . . it's important to tell the law here, the truth. It's different from El Salvador, dude. I know how things work there. Because think it over carefully. If you are involved in some problem there, do you want to go back there?

[Ayala Reyes:] No.

[Brewer:] We are talking about that.

[Ayala Reyes:] I don't want to go back to my homeland.

[Brewer:] I know. I know what happens there. I know how, how life is. No, you have to help . . . to help yourself. I don't think that . . . I don't think you are a bad person.

[Ayala Reyes:] And I'm not.

[Brewer:] No. You . . . you, you are not. And the truth is that . . . we, as human beings, so . . . sometimes we do things that we don't want to do. We make mistakes. I mean, what, what are you? Tell me that. What are you? Are you a . . . a, a bad person, like a monster,

someone who is horrible? Or did you make a mistake?

[Ayala Reyes:] I'm not a [m]onster.

[Brewer:] No. I don't think that. We all make mistakes. This was a mistake. You were involved in something, and you made a mistake. But you're not a monster. Do you know who the monsters are? The ones who, who cut people's heads off and hurt people's families.

[Ayala Reyes:] I know.

[Brewer:] So what are you? Jon[a]el . . . a monster, or did you make a mistake?

[Ayala Reyes:] I am not a monster. I know that I am not a monster.
[pause]

[Brewer:] If you are not a monster . . . what are you?

[Ayala Reyes:] A human being.

[Brewer:] Yes. And as human beings, we make mistakes. This night, you saw something. We only want to know what you saw. I am not blaming anyone. I want to know what you saw.

[Ayala Reyes:] I am afraid of . . . I'm not going to say anything.

(Emphasis added) (some alterations in original).

None of these statements is an unequivocal invocation of Miranda rights. “[An] invocation of the right to remain silent must be clear and unequivocal (whether through silence or articulation) in order to be effectual; if the invocation is not clear and unequivocal, authorities are under no obligation to stop and ask clarifying questions, but may continue with the interview.” State v. Walker, 129 Wn. App. 258, 276, 118 P.3d 935 (2005).

The trial court determined the first claimed invocation was not an invocation at all. Rather, Ayala Reyes was answering the question of whether he spoke to

Cruces Vasquez outside of work by saying he did not because he and Cruces Vasquez had nothing to talk about. We agree. That the statement comes in direct response to Brewer's question, and then Ayala Reyes clarifies again that the two did not speak, making this meaning clear.

The remaining statements are merely expressions of Ayala Reyes's fear of retaliation. In Walker, we observed that a suspect expressing desire not to make incriminating statements was not an unequivocal invocation of Miranda rights: "Garrison did not tell police that he wished to remain silent, but instead said that he did not want to say anything that would make him look guilty or incriminate him. He then continued to speak with police for several hours and signed a highly incriminating statement. At no point in the interview did Garrison stop talking or say that he did not want to talk to police anymore." Id. at 274. Like the defendant in Walker, Ayala Reyes did not say he wished to stop talking to police. To the contrary, he continues talking. And, the more he talks, the more the context makes clear that his hesitance is borne from fear of gang retaliation. At one point in the interview, Ayala Reyes said he "can't talk to you" because of his fear of MS-13. At another point, he said he would have been killed if he had not participated in the murder. When asked who would have killed him, he said, "I am afraid to talk to you about that."

Ayala Reyes's expressed fear of retaliation, coupled with his willingness to continue speaking with police make clear that he, like the defendant in Walker, did not unequivocally invoke his right to remain silent. Brewer was therefore under no obligation to stop the interview, but was free to continue.

Ayala Reyes points to no other statements that could constitute an invocation of Miranda rights. We therefore find that Ayala Reyes explicitly waived his Miranda rights by signing a formal waiver, and did not unequivocally reinvoke those rights at any point in the interview.

B. Voluntariness

Ayala Reyes also argues that his confession was not voluntary and should have been suppressed.

Admission of an involuntary confession violates both the Washington and federal constitutions. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). Whether a confession is voluntary is determined by the totality of the circumstances. Id. at 101. Circumstances potentially relevant to this analysis include the “crucial element” of police coercion, the length of the interrogation, its location, its continuity, the defendant’s maturity, education, physical condition, and mental health, and whether the police advised the defendant of his Miranda rights during the interrogation. Id. A promise made by law enforcement does not render a confession involuntary per se, but is instead only one factor to be considered in deciding whether a confession was voluntary. Id. The question is whether the interrogating officer’s statements were so manipulative or coercive that they deprived the defendant of his ability to make an unconstrained, autonomous decision to confess. Id. at 102.

Here, Ayala Reyes argues first that Brewer’s promise not to “tell anyone” if Ayala Reyes told him who else was involved in the plot is entitled to “specific performance.” He claims that under Unga, Brewer was obligated to keep all

statements made during the interview completely confidential, and presumably therefore excluded from use in court.

In Unga, a police officer interviewed a juvenile suspected of vandalizing a vehicle. Id. at 98. During that interview, the police officer told the juvenile that he wouldn't be charged "with the graffiti" if he told him about another crime that had to do with graffiti. Id. at 98-99. The juvenile confessed. Id. at 99. The officer referred the case to the prosecutor as a motor vehicle case, thereby keeping his promise. Id. at 107. The prosecutor made an independent decision to charge the juvenile with vehicle prowling and taking a vehicle without permission. Id. at 99. The State later conceded that the vehicle prowl charge should be dismissed in order to be in line with the officer's promise to the juvenile. Id. at 107. Our Supreme Court accepted the concession. Id. at 107.

Ayala Reyes now argues that Unga stands for the proposition that an officer's promises to a suspect are entitled to "specific performance," such that a promise of confidentiality would mandate that the statements be suppressed. This is not so. Rather, the Unga court opined that "a promise made by law enforcement does not render a confession involuntary per se, but instead is only one factor to be considered." Id. at 101.

Weighing the promises the officer made along with the other factors, it is clear that Ayala Reyes's confession was voluntary. First, Ayala Reyes was advised of his Miranda rights at the outset of the interview and signed a formal waiver. Ayala Reyes does not claim that he was under any physical or mental impairment. Ayala Reyes dropped out of school in El Salvador in the fifth grade.

But, psychological evaluations indicate the he functions in the “low average range.” The interrogation lasted three hours but was broken up by several breaks. The officer was clearly not making a blanket promise of confidentiality for the entire interview. The promise came after Ayala Reyes expressed fear of retaliation for cooperating with law enforcement. Clearly, the officer was merely promising not to tell the other conspirators that Ayala Reyes is the one who told police of their involvement.

Taking these factors together, it is clear that Ayala Reyes’s will was not overcome such that his confession was involuntary. Rather, Ayala Reyes chose to cooperate with police and balanced his desire to do so with his fear of gang retaliation. Accordingly, the trial court did not err in denying his motion to suppress the statements he made during the interview.

III. Same Criminal Conduct

Ayala Reyes argues last that the trial court erred in not considering his convictions for first degree murder and conspiracy to commit first degree murder to be the same criminal conduct. “Same criminal conduct” means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). A person is guilty of conspiracy when they come to an agreement with others to commit a crime and take a substantial step towards completing the agreement with the intent that the crime occur. RCW 9A.28.040(1). A “substantial step” includes preparatory conduct which furthers the ability of the conspirators to carry out the agreement. State v. Dent, 123 Wn.2d 467, 477, 869 P.2d 392 (1994). A person is guilty of first

degree murder when they cause the death of another person with a premeditated intent to do so. RCW 9A.32.030(1)(a). We review a trial court's determination of same criminal conduct for abuse of discretion or misapplication of the law. State v. Graciano, 176 Wn.2d 531, 535, 295 P.3d 219 (2013).

Here, it is clear the two crimes did not take place in the same time and place. The murder occurred on a Tacoma street. The agreement existed well before the murder, in text messages between Ayala Reyes and Sicario days before the murder itself, and in a meeting of the four conspirators at Ayala Reyes's apartment on the day of the murder. Given the fact that Ayala Reyes brought gloves to the meeting for the group to use during the murder, the meeting that day constituted a substantial step towards completion of the conspiracy.

The crimes did not take place at the same time and place. Thus, the trial court did not abuse its discretion in finding the two crimes were not the same criminal conduct.

We affirm.

Lippelwick, J.

WE CONCUR:

[Signature]

[Signature]

THE LAW OFFICE OF THOMAS E. WEAVER

August 14, 2020 - 3:18 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 81393-5
Appellate Court Case Title: State of Washington, Respondent v. Jose Jonael Ayala Reyes, Appellant
Superior Court Case Number: 16-1-02804-9

The following documents have been uploaded:

- 813935_Affidavit_Declaration_20200814151517D1134571_5813.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Ayala Reyes Service of PRV.pdf
- 813935_Petition_for_Review_20200814151517D1134571_4721.pdf
This File Contains:
Petition for Review
The Original File Name was Ayala Reyes Petition for Review.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov
- pcpatcecf@co.pierce.wa.us
- philip@burifunston.com

Comments:

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email:)

Address:
PO Box 1056
Bremerton, WA, 98337
Phone: (360) 792-9345

Note: The Filing Id is 20200814151517D1134571

THE LAW OFFICE OF THOMAS E. WEAVER

August 14, 2020 - 3:18 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 81393-5
Appellate Court Case Title: State of Washington, Respondent v. Jose Jonael Ayala Reyes, Appellant
Superior Court Case Number: 16-1-02804-9

The following documents have been uploaded:

- 813935_Affidavit_Declaration_20200814151517D1134571_5813.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Ayala Reyes Service of PRV.pdf
- 813935_Petition_for_Review_20200814151517D1134571_4721.pdf
This File Contains:
Petition for Review
The Original File Name was Ayala Reyes Petition for Review.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov
- pcpatcecf@co.pierce.wa.us
- philip@burifunston.com

Comments:

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email:)

Address:
PO Box 1056
Bremerton, WA, 98337
Phone: (360) 792-9345

Note: The Filing Id is 20200814151517D1134571