No. 296571

(Consolidated with 296792 and 296911)

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

RICARDO DELEON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in admitting Mr. Ricardo DeLeon's statements to a jail booking officer, as well as a jail booking form, containing admissions as to gang affiliation?

2. Whether the trial court erred in admitting post-arrest statements of two codefendants who did not testify at trial, in violation of the Confrontation Clause?

3. Whether the court erred in imposing an exceptional sentence based on a jury finding that Mr. DeLeon was motivated by an interest in benefiting a criminal street gang?

4. Whether the court abused its discretion in first admitting gang evidence pursuant to ER 404(b), then denying a motion for mistrial based upon the admission of that evidence?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The statements to the jail officer were properly admitted, as they were made after a voluntary waiver of Mr. DeLeon's right to remain silent.

2. The statements of the codefendants were properly admitted. They did not violate the Confrontation Clause as the statements did not incriminate Mr. DeLeon.

3. Sufficient evidence supported imposition of the exceptional sentence, which was based upon a finding that Mr. DeLeon intended to directly or indirectly cause any benefit to a criminal street gang.

4. The court did not err in denying the motion for a mistrial, as it was well within the court's discretion to do so, and the evidence was properly admitted.

II. STATEMENT OF FACTS

The State supplements Mr. DeLeon's Statement of the Case with the following.

The clothing worn by Mr. DeLeon at the time of his arrest, including his shirt and red thongs, while innocuous by themselves, could be indicative of gang membership when combined with other factors. **(RP 1667-68; 1948-49; Ex. 4A-4D)**

The victim, Mr. Cardenas, as well as Miguel Acevedo, are members of the LVL gang in Sunnyside. The gang claims the color blue. (**10/11/10 RP 1358, 1438-39; 10/12/10 RP 1608; 10/15/10 RP 1801**)

At trial, the jury was instructed that they were to consider the respective counts and defendants separately. **(CP 115)**

III. ARGUMENT

1. **Mr. DeLeon's statements were not admitted in violation of the Fifth Amendment, as he waived his right to remain silent, and made voluntary statements to the jail booking officer. The statements were not coerced.**

It is well-established that both the Fifth Amendment and Art. I, s. 9 of the Washington State Constitution protect a suspect from being compelled to give evidence against himself. State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991); Miranda v. Arizona, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602 (1966).

In determining whether custodial statements were voluntarily given, a court engages in an examination of the totality of the circumstances surrounding the giving of the statement. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). Coercive police conduct is a necessary predicate to a finding that a confession is not voluntary. Id., at 100-01, *citing* Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986).

A statement may be found to be involuntary if law enforcement officers exert coercive pressure upon a defendant in order to obtain a

confession. Id., at 101, *citing* Withrow v. Williams, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). Coercion may be by means of an express or implied promises or by the exertion of improper influence. Id., *citing* State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

If a promise has been made by law enforcement, the test is not merely whether that promise had been made, but whether the defendant's will was overborne by the promise, or in other words, whether there is a direct causal relationship between the promise and the confession. Broadaway, 133 Wn.2d at 132; United States v. Walton, 10 F.3d 1024, 1029 (3d Cir. 1993).

A police officer is not precluded from employing psychological ploys or playing on the defendant's sympathies in the interrogation of a suspect, but the officer's statements may not be so "manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986).

Relying upon Fulminate and Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed.2d 975 (1958), DeLeon argues that his statement to the jail booking officer were coerced and involuntary, as he was essentially

offered protection from other gang-affiliated inmates if he provided information as to gang affiliation. His reliance upon those cases is misplaced.

In Fulminate, law enforcement used knowledge that an accused child murderer faced credible threats by other inmates in offering protection in exchange for a confession to the murder. The Supreme Court affirmed the state court in holding that such a promise was coercive, and the confession was involuntary. Fulminate, 299 U.S. at 286.

The Supreme Court likewise held that a confession was coerced when an interrogator told the suspect that "30 or 40 people" would be coming to "get him", and that he would be protected if he would tell the truth. Payne , 356 U.S. at 561, 567.

The facts here are quite different. As DeLeon notes in his opening brief, he was advised of his Miranda rights, and he waived those rights. **(Pretrial RP 339-41; Supp. RP 22; RP 1905)** The form is used to maintain inmate safety in the jail:

> Q. That wouldn't necessarily indicate that he was in a gang at the present time, would it?
> A. It would not, but many of these individuals wear tattoos and, as you know, tattoos are permanent, and if they walk into a cell and they have that one four and they're not active any more, that's not going to matter to the inmate.
> Q. I understand. And in fact, that's why this form was created, right, to protect the inmates?
> A. Yes, Sir.

(RP 1221)

Officer Saenz did not make an offer to protect Mr. DeLeon, provide any consideration that was not afforded to any other inmate, or employ any coercion at all, in order to obtain the answers to the jail booking form. There was no promise made in order to obtain a confession to his involvement in the shooting at issue here. DeLeon was going to be booked into the jail with other inmates regardless of whether he gave responses to the questions on the booking form; it was necessary to determine where and with whom he would be incarcerated with an eye to the safety of the inmates. Fulminate and Payne are not on point.

It should also be noted that while the trial court here did say that the statements of Robledo and the codefendants were "coerced", it is clear from the context of the court's findings that it was not convinced that the statements were involuntary as result of misconduct or coercion on the part of the Sunnyside Police Department, but rather that since the defendants were in custody, and were being questioned, it was necessary for them to be advised of their Miranda rights. **(9-28-10 RP 93-94)** No written findings were filed.

The court did not err in finding that the statements were voluntarily given and thus admissible.

2. The court did not err in admitting the codefendants' statements.

The Sixth Amendment to the United States Constitution grants defendants the right to be "confronted with the witnesses against him." In Crawford v. Washington, 541 U.S. 36, 60-61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that the Confrontation Clause applies to witnesses against the accused, thus the State can present prior testimonial statements of an absent witness only if the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. Id., at 68.

In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Court recognized that admitting a non-testifying codefendant's confession that implicates the defendant may be so damaging that even instructing the jury to use the confession only against the codefendant is insufficient to cure the resulting prejudice. But, admitting a non-testifying codefendant's confession that is redacted to omit all references to the defendant, couple with an instruction that the jury can use the confession against only the codefendant, does not violate the Confrontation Clause. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed.2d 176 (1987). This is true, even where the codefendant's confession, although not facially incriminating, becomes

incriminating when linked with other evidence introduced at trial. Id., at 208-09. Redaction of a codefendant's references to the defendant, coupled with an instruction, creates the same situation with respect to a non-testifying codefendant's confession. Id., at 211.

The Washington Court of Appeals has recently held that while Crawford heightened the standard under which a trial court can admit hearsay statements, it did not overrule Bruton and its progeny. In re Pers. Restraint of Hegney, 138 Wn. App. 511, 546, 158 P.3d 1193 (2007). The court recognized that Bruton answers the threshold question of whether one defendant can be considered a witness against another in a joint trial, but if a statement is properly redacted and the jury is instructed not to use it against the defendant, the declarant is not a "witness against" the defendant, and admitting the codefendant's statement does not implicate the Confrontation Clause. Hegney, 138 Wn. App. at 547.

A case relied upon by DeLeon does not support his argument. In State v. Frasquillo, 161 Wn. App. 907, 918, 255 P.3d 813 (2011), the Court of Appeals did indeed restate the general holding of Crawford, that the testimonial statement of a witness is unavailable unless the defendant had a prior opportunity to cross-examine the witness. The court further found that a statement, made by a codefendant to law enforcement with regard to his knowledge that a shotgun was in the trunk of a car, was

testimonial. The court held, however, that as the statement by the codefendant was not admitted for the truth of the matter asserted, i.e., that the defendant owned the shotgun, but rather to show that the codefendant knew the weapon was in the trunk, the admission of the statement did not violate Crawford. Id.

Here, the jury was properly instructed that they were to consider the counts and defendants separately. The statements were not redacted, but they did not need to be, as each defendant's statement to the jail officer pertained only to that defendant's gang affiliation. No statement by a codefendant constituted testimony against Mr. DeLeon. Crawford is not implicated, and the court did not err in admitting the statements.

3. The court's aggravated sentence was supported by the evidence.

The Appellant argues that, aside from what he believes to be improperly admitted evidence, the record is devoid of any evidence to support the enhanced sentence. He is incorrect, and his reliance upon State v. Bluehorse, 159 Wn. App. 410, 428, 248 P.3d 537 (2011), is misplaced.

As noted previously, the shooting described in this case occurred after Mr. Acevedo flashed an "LVL" sign. There was an abundance of evidence of gang involvement, including the fact that Mr. DeLeon was

wearing red clothing, and, as the passenger in the rear of the vehicle, was observed by the witness Mendoza wearing a red bandana over his mouth immediately prior to the shooting. While he denied current involvement with a gang, he had previously claimed NSV, and was acting in concert with his brother Anthony DeLeon and Octavio Robledo.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must

determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

The gang aggravator at issue in Bluehorse is found at RCW 9.94A.535(3)(s), which is based upon a finding that a defendant commits a crime in order "to obtain or maintain his or her membership or to advance his or her position" in a gang.

Here, the jury answered in the affirmative that Mr. Robledo's behavior, as a principal or accomplice, showed an "intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang . . . its reputation, influence, or membership", pursuant to RCW 9.94A.535(3)(aa).

This aggravator, quite clearly broader in its language than RCW 9.94A.533(3)(s) was added to the list of aggravating factors by the Legislature in 2008.

The final bill report for Wash. *E2SHB* 2712, 60th Leg., 2nd Sess., (June, 12, 2008), explains the legislative intent behind expanding the *exclusive* list of aggravating factors in the Sentencing Reform Act to include a gang aggravating circumstance:

> In 2007 legislation was enacted that required the Washington Association of Sheriffs and Police Chiefs (WASPC) to establish a work group to evaluate the problem of gang-related crime in

> Washington. The work group included members from both the House of Representatives and the Senate as well as representatives from the following groups: the Office of the Attorney General, local law enforcement, prosecutors and municipal attorneys, criminal defense attorneys, court administrators, prison administrators and probation officers, and experts in gang and delinquency prevention.
>
> The work group was charged with evaluating and making recommendations regarding
> additional legislative measures to combat gang-related crime, the creation of a statewide gang information database, possible reforms to the juvenile justice system for gang-related juvenile offenses, best practices for prevention and intervention of youth gang membership, and the adoption of legislation authorizing civil anti-gang injunctions. The WASPC and the work group met monthly during the 2007 interim and on December 11, 2007, provided a report to the Legislature on its findings and recommendations regarding criminal gang activity.

Wash. *E2SHB* 2712, 60th Leg., 2nd Sess., (June, 12, 2008).

As a result of the workgroup's recommendations, the legislature expanded the exclusive list of aggravating factors contained in the Sentencing Reform Act to include any crime that is intentionally committed directly or indirectly for the benefit, aggrandizement, gain, profit, advantage, reputation, membership, or influence of a gang. *2008 Wa. Laws Ch. 276 sec. 303.*

Even before the enactment of the most recent gang aggravator, trial courts in Washington have consistently been upheld for imposing exceptional sentences for gang motivated crimes and random acts of

violence. *See*, State v. Smith, 64 Wn. App. 620, 626, 825 P.2d 741 (1992). Division Two of the Court of Appeals upheld an exceptional sentence imposed for a gang-related shooting which furthered the gang's reputation as a powerful and violent organization); In State v. Smith, 58 Wn. App. 621, 626-27, 794 P.2d 541 (1990), Division One affirmed that an **exceptional sentence** for the defendant because he was shooting at random motorist. The Court held that random violence justified an exceptional sentence because "unpredictable, irrational violence, committed without warning, [is] particularly insidious . . . [and is] especially destructive of society's sense of security); State v. Johnson, 124 Wn.2d 57; 873 P.2d 514 (1994)(Holding that the gang-motivation aggravating sentencing factor was supported by the evidence, and that the sentence was justified by the impact of the crime on the community, State v.Riley, 69 Wn. App. 349; 848 P.2d 1288 (1993) (Gang membership, by itself, may not be a factor which justifies an **exceptional sentence**; however, the evidence of gang motivated crime is a sufficient basis to impose an exceptional sentence).

"Preserving the peace is the first duty of government, and it is for the protection of the community from the predations of the idle, the contentious, and the brutal that government was invented." People ex rel. Gallo v. Acuna, 14 Cal. 4th 1090, 1116; 929 P.2d 596 (1997)(California

Supreme Court decision upholding use of civil gang injuctions). Division Two of the Court of Appeals echoed the above sentiment in Smith:

> . . . we do not agree that the sentencing court may not consider a person's motivation for criminal conduct. Here, Smith was acting to further the criminal enterprise. It is that motivation, to further the illegal activities of the gang, that underlies the increased sentence, not the mere fact of gang membership. Consideration of Smith's motivation by the sentencing court did not impinge on Smith's right of freedom of association.
>
> In reaching the conclusion that we do, we observe that a community faces a greater peril from collective criminal activity than it does from criminal activity by one individual. A criminal enterprise which is composed of a number of persons, whether it is known as a gang, a mob, or a criminal syndicate, poses a great challenge to law enforcement agencies. Furthermore, the specter of such organized wrongdoing tends to make the general public feel that it is held hostage by the criminal enterprise. In cases such as this, where specific criminal activity is motivated by the desire of the criminal to further the illegal objectives of the gang, by projecting its image as a terrorist organization, an appropriate basis for an exceptional sentence is established.
>
> State v. Smith, 64 Wn. App. at 626..

The fact that NSV members would gain some benefit by shooting at LVL members was explained by Detective Ortiz at trial. Sufficient evidence supported the jury's finding, and the court did not err in imposing the aggravated sentence.

4. The court did not abuse its discretion in admitting the gang evidence, or in denying the motion for a mistrial.

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
>
> ER 404(b)

The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. State v. Atsbeha, 142 Wn.2d 904, 913, 16 P.3d 626 (2001); State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

Evidence of gang affiliation is admissible as evidence of other crimes or bad acts under ER 404(b) as proof of premeditation, intent, motive and opportunity. In applying ER 404(b), a trial court is required to engage in a four-step analysis: (1) find by a preponderance of the evidence that the misconduct occurred, 92) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995), *collateral relief granted on other grounds,* Pirtle v. Morgan, 313 F.3d 1160 (9th Cir.

2002), *cited in* State v. Asaeli, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009). *See, also,* State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995); State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990); State v. Yarbrough, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009).

Gang evidence may be properly admitted under ER 404(b) to establish not only motive to commit a crime, but also to show that defendants acted in concert. State v. Scott, 151 Wn. App. 520, 527, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010); State v. Embry, ___ Wn. App. ___, 287 P.3d 648 (2012).

An appellate court will review a trial court's ER 404(b) for abuse of discretion. Id., State v. Walker, 75 Wn. App. 101, 108, 879 P.2d 957 (1994), *review denied*, 125 Wn.2d 1015, 890 P.2d 20 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004), *quoting* State ex rel. Carroll v. Junker, 79 wn.2d 12, 26, 482 P.2d 775 (1971). On appeal, the appellant bears the burden of proving abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Here, the trial court engaged in just the process required by case law and ER 404(b). The court properly weighed the purposes for which

the evidence would be admitted, and further, determined that any prejudicial effect of the evidence was outweighed by its probative value. **(RP 576-82)**

Having admitted the gang evidence, the court properly exercised its discretion in denying the motion for the mistrial. Detective Ortiz, as an expert in the gang culture of Sunnyside, provided testimony which was helpful to the jury in describing the history and associations of the area gangs, as well as the significance of clothing, signs and language employed by them, and more specifically, evidence found with these defendants.

Indeed, in denying the motion, the court observed that the evidence of gang membership "was either created or displayed by the defendants. It's evidence that was out there . . . I think it has been limited. . . " **(RP 1997)** There was no abuse of discretion.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions, as the issues raised on appeal are without merit

Respectfully submitted this 18th day of January, 2013.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 18th day of January, 2013.

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