

COURT OF APPEALS
DIVISION THREE
OF THE STATE OF WASHINGTON

SEP 24 2012

296571
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

CASE # 296792

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 OCTAVIO, ROBIELO)
 (your name))
)
 Appellant.)

No. 091009789

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW


I, OCTAVIO, ROBIELO, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: 9.20.12
Form 23

Signature: 

GROUNDS FOR REVIEW

ONE: The Defendant's had a right to have the "Gang Aggravator" bifurcated. The trial court abused it's discretion not allowing this and all of the gang evidence to come in when it was not the elements of the crimes charged. State v. Monschke, 133 Wn.App. 313, 335, 135 P.3d 966 (2006). The failure to recognize the very prejudicial vs. probative value, made the defendants appear more likely to have commit the crimes charged. State v. Hardy 133 Wn. 2d 701, 706, 946 P.2d 1175 (1997). RP Vol. IV, 9/27/2010, pg.284.

TWO: The Motion for Change of Venue should of been granted. By Denying the Defendants a change of venue, the prejudice was great and could not be overcome. All through the jury Voir Dire, it was as clear as the ringing of the Liberty Bell that the jurors were scared to be on the panel, did not want their names to be mentioned in fear of gang retaliation, and fear was rampant to the point that many refused to serve. The rest were left to serve under a heavy cloud of fear for retaliation. A prospective juror, Mr. Mow, talked about any gang bangers in Yakima having no regard for human life, and a kid was gunned down right in front of him, implying that they are all guilty. The entire process was tainted and the trial was not fair due to the Voir Dire about Yakima's gang epidemic.

THREE: The Motion to Severe should of been granted, as by not severing each of the Defendants, they were denied the right to a fair trial. Use of prejudicial hearsay by non-testifying co-defendants did violate their Sixth Amendment right to effective cross examination. The horrible butcher job the trial Court did in trying to meet Bruton did not meet the standard required. This also violated their right to remain silent under the Fifth Amend. and proper Miranda warnings were not in place for the jail gang booking sheet especially.
RP Vol. I, 9/02/2010, pgs. 85-88; Vol. II, 9/07/2010, pgs. 199-200; Vol. IV, 10/05/2010, pg. 508.

FOUR: Denied effective cross-examination of non-testifying co-defendants statements mentioned in Ground Three.

Five: Denied Exculpatory Evidence under Brady that proves the actual innocence of all three Defendants. The on-record requested exculpatory police reports of the May 2nd shooting at the exact same address as the current crime, that shows the exact same 22 caliber gun that was used by Sureno gang members, not Norteno's the State is accusing the Defendant's of being, was not provided to counsel before trial as required. Most of this existing asked for exculpatory evidence has not been provided the Defense after repeated on record requests. The State admits its existence, not providing it caused the Defense to reserve opening statement and denied a complete trial.
RP Vol. II, 9/07/2010, pgs. 170-175, 205; Vol. IV, 9/27/2010, pgs. 301-302, 305.

SIX: Defendants were denied effective assistance of counsel when counsel failed to present expert testimony. The trial Court put all kinds of conditions and road-blocks up to prevent Dr. Loftus from being called as a defense expert witness, but it did not entirely preclude the testimony if proper foundation was laid and conditions met. Because Dr. Loftus is recognized as the top in his field, he should have been used. The defense attorneys met being below the standard by not insisting a continuence or what ever it took to get his testimony in. The Court was overzealous in forcing trial and not going to grant a delay, the defense was totally lacking for not making the required motion/objection and forcing the trial Court right back to preserve a fair trial. The testimony would of defended against the State's main witness and changed the jury's verdict. RP Vol. I, 9/02/2011, pgs. 25-26, 51-52.

SEVEN: Prosecutor misconduct in illegally obtaining evidence by circumventing the court rules and the province of the trial judge by going behind the trial judge's back to a more prosecutorial friendly judge. Purposely avoiding the trial Court and the very, meant to be protective, Washington State Court Rule, CrR 4.7 (b) (2)(i)(v), in getting a search warrant to gain a photo of "gang" purported tattoo's, was plain deceitful lawyering. All of these ill-gotten photos should of been suppressed as a result of this in-valid gain. RP Vol. IV, 10/05/2010, pg. 637.

Eight: Denying the Defense Motion in Limine to limit/supress the "gang" evidence denied the right to a fair trial. There was no linkage established to find the nexus to the charges. What began as a partial use of the colors red and blue, quickly turned into a carte blanche prosecutorial feeding frenzy of blatant no holds barred prejudicial hatchet-job of overwhelming gang evidence that had nothing to do with the case, but everything to do with the jury returning a verdict of guilty based on gang evidence alone. RP Vol. II, 9/07/2010, pgs. 157-158, 163, 170, 197, 256; Vol. IV, 10/05/2010, pg. 576, 580.

NINE: The Defendant's were repeatedly ambushed with late allowed evidence during trial that forced them into a Hobson's Choice and violated their right to a fair trial. Last minute 911 tapes did force the opening statement to be reserved. The new evidence not disclosed most crucial to the State's case was the eyewitness testimony of police observing something thrown out Defendant Ricardo Deleon's car into the Yakima river that was implied as a gun. Forcing all of the Defendant's to waive their speedy trial right to have adequate investigation violated due process. RP Vol. III, 9/27/2010, pgs. 277, 292-293, 300; Vol. IV, 10/05/2010, 602, 616, 622, 624, 628, 665, 678.

TEN: Having Detective Ortiz sit at the Prosecutor's table as the lead trial aid and investigator, and be allowed to testify as the the State's "gang" expert, denied the Defendat's a fair trial. Detective Ortiz was a State aide/investigator, a fact witness, an expert witness, all in one that lent way to much credibility. RP Vol. I, 9/02/2010, pgs. 112, 130, 154, 217; Vol. IV, 10/05/2010, pgs. 576, 578.

ELEVEN: Denied any cross-examination of State's main eye witness. All Defendants were denied the right to confront their accuser. Defense attorney Lee Edmonds said that he wanted to extensively cross-examine Jose Barajas and was not allowed. **RP Vol. 9, 10/12/2010, pgs. 1563-1607.**

TWELVE: Prosecutor misconduct by enlisting prejudicial evidence beyond the scope. Detective Ortiz testified as an expert that whomever has a bird tattoo is a killer who killed someone to get it. **RP Vol. 9, 10/12/2010, pg. 1955.**

THIRTEEN: Ineffective assistance for not timely challenging venue of elude. The act occurred in Benton county, not Yakima county where this is being prosecuted. Anthony Deleon's lawyer, Mr. Edmonds purposely put on record, "the decision not to raise it was not tactical, it was entirely incompetence on my part." **RP Vol. 9, 10/12/2010, pgs. 1979-1980, Vol.12, pgs. 1850-1859.**

FOURTEEN: Ineffective assistance, conflict of interest, Defense counsel worked simultaneously as a prosecutor. Defense counsel Lee Edmonds repeatedly had to chastise co-counsel Doug Garrison to quit acting as a prosecutor. Defense counsel Garrison admitted in open court that, "two days a month I prosecute." **RP Vol. 15, pg. 2338.**

FIFTEEN: Prosecutor misconduct, introducing facts not part of trial to prejudice Defendants. Prosecutor Troy Clements got in the extent of injuries to Ignacio Cardenas that had been kept out by stating, "spending over a month in Harborview, coming back being immobile wise to where you're having to be bathed by someone else, these are serious injuries. He lost a kidney." **RP Vol. 15, 10/22/2010, pg. 2330.**

SIXTEEN: Denied right to be present at all critical stages of trial. The jury sent out a jury question regarding the 911 tape. The Defendants were not present during this four minute decision making process. **RP Vol. 15, pg. 2390.** This was compounded by the fact that the bailiff played the 911 call without lawyer approved content and told the jurors the wrong time that the call occurred. **RP Vol. 16, 11/23/2010, pg. 2397.** This made a difference in their fact finding process to the truthfulness of where the call was made in time relation to the shooting.

SEVENTEEN: Juror misconduct, conducting outside contact about the trial in violation of Court's admonishing instruction. The juror "Tweeted" the verdict being 3 to 9, and other information. **RP Vol. 16, 10/25/2010, pg. 2409.** This was not inquired into, nor investigated. The juror also posted something during deliberations on "Facebook". **RP Vol. 16, 10/25/2010, pg. 2409.**

EIGHTEEN: Court improperly denied Motion to Reconsider as untimely. All during trial the Court allowed the three co-defendants to join each others motions. When Defense attorney Edmonds Motioned to join the Motion for New Trial, in absentee, the Court did not deny Edmonds motion. When Edmonds tried to file a Motion to Reconsider under the Bluehorse case, the Court wrongly ruled the Motion untimely, and did not afford fair consideration. **RP Vol. 16, 01/04/2011, pgs. 2436-2437.**