No. 30411-6-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

FABIAN ARREDONDO,

Defendant/Appellant.

Appellant's Brief

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3. The trial court erred by barring any inquiry into Maurice Simon's mental state.

4. The evidence was insufficient to support the special verdict that the defendant committed the crime with 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.

5. The trial court erred in finding Mr. Arredondo had the means to pay the costs of incarceration and in ordering him to pay those costs as a condition of his sentence.

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2. Did the trial court abuse its discretion in allowing evidence of other acts contrary to ER 404(b)?

3. Was Mr. Arredondo's Sixth Amendment right of confrontation violated when the trial court barred any inquiry into the mental state of the State's witness, Maurice Simon, during cross-examination?

4. Was Mr. Arredondo's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the special verdict enhancement that he committed the crime with 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?

5. Did the trial court abuse its discretion in finding Mr. Arredondo had the means to pay the costs of incarceration and in ordering him to pay those costs as a condition of his sentence, where there was no evidence to support that finding?

C. STATEMENT OF THE CASE

On 12/5/09, three Sureno gang members went to a party at a house in Toppenish, Washington. Shortly after they arrived, members of the rival Norteno gang showed up at the party. Fighting words were exchanged between several people and a brief fist fight ensued. RP[1] 60-

[1] "RP" refers to the six volumes that include the trail and sentencing. A supplemental transcript that includes jury selection and various motions will be cited as "Supp. RP."

67, 78-79. Fabian Arredondo is a Norteno and was at the party but was not involved in the altercation. RP 65, 80.

Most people left the party after the fight. RP 83. The three Surenos drove off together in a white SUV with a fourth person they picked up walking along the street. RP 68, 179-80. They noticed another car following them and sped up to get away but the other car, a Honda with tinted windows, continued to chase them. Someone saw a gun and yelled to duck. Shots were fired from the Honda and the SUV crashed. RP 70-73, 181-98. The driver had been shot and later died at the hospital. RP 199, 368-73.

During jury selection, the Court mentioned that since the outer doors to the courthouse are locked at 4 p.m., the Court intended to adjourn by 4 p.m. every day of the trial to avoid any potential violations of the right to a public trial. Supp. RP 167-68. Later that same day the Court stated without any preliminary analysis:

> I'll make the finding that the need to conclude the jury selection process this afternoon is an extraordinary circumstance warranting us going past four o'clock and potentially conducting the—some small portion of the jury selection process in an open courtroom in a locked courthouse.

Supp. RP 240.

The jury selection was not completed until 4:17 p.m. Supp. RP 262-63. The Court then read the preliminary instructions to the jury. Supp. RP 263-67. The jury was excused and court was adjourned at 4:24 p.m. Supp. RP 268.

Arredondo moved in limine to prohibit the State under ER 404(b) from introducing evidence of a drive-by shooting that occurred 2/9/09. The Court denied the motion finding the probative value outweighed the prejudicial effect. 10/10/11[2] Supp. RP 22-27.

During opening statements the prosecutor stated that Mr. Arredondo drove a Mercedes-Benz and fired shots during a prior drive-by shooting incident on 2/09/ 09. Supp. RP 273. In the trial Officer Dunn testified that he responded to a report of a drive-by shooting on 2/9/09 in a high gang area. RP 467. The victim said the suspect vehicle "appeared to be like a Mercedes-Benz." RP 468. The officer found a .38 shell casing in the area. RP 468-69.

Corrections Officer Michael Hisey testified he and two police officers attempted to contact Arredondo at an address in Zillah over reports of possible drug trafficking at that residence. RP 478-80. A silver Mercedes-Benz was parked in the area and Arredondo had possession of

[2] The verbatim report of proceedings for 10/10/11 appears in Vol 1 of the 6-volume trial, the 2-volume supplemental, and here in a short 2nd supplemental (9:54 a.m., 35 pages).

the keys to that car. RP 481. Officers searched the car and found a .38 shell casing. RP 482, 486. A forensic examination revealed that the casing found at the scene of the 2/9/09 drive-by shooting and the casing found in the car were fired from the same weapon. RP 523-24.

Maurice Simon, a jail snitch with numerous prior convictions, testified he was Arredondo's roommate in jail for 5-8 days. During that time Simon stated Arredondo told him he drove the Honda and Rudy Madrigal fired the shots at the SUV on 12/5/09. RP 570-78. Prior to trial Mr. Arredondo moved to permit cross examination about Simon's mental health condition contemporaneous in time when the alleged jail confession occurred. CP 20-25; RP 565-66. Before making its ruling, the trial court allowed questioning of Simon about his mental condition outside the presence of the jury. During that questioning Simon revealed a number of mental problems including PTSD, problems with comprehension, concentration and anxiety, depression, distrust of other people, hyper vigilancy, and chronic substance abuse from alcohol and methamphetamine. RP 559-64. Following this questioning, the Court barred any inquiry into Simon's mental state now or in the past, finding the probative value was negligible. RP 567.

The jury convicted Mr. Arredondo of second degree murder and three counts of first degree assault. The jury also found by special verdict that he committed the crimes with 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. CP 76-88. The Court imposed an exceptional sentence of an additional 60 months on each count for this aggravating circumstance. The sentences on all counts were run consecutively. CP 90-91.

As part of the sentence, the Court found Mr. Arredondo had the means to pay the costs of incarceration and ordered him to pay those costs. CP 94, ¶ 4.D.4. This appeal followed. CP 98.

D. ARGUMENT

1. The trial court violated appellant's constitutional public trial right by excluding the public from a portion of jury selection.[3]

A person accused of crime is entitled to a public trial. U.S. Const. amend. VI; Wash. Const. art I, § 22; *State v. Bone-Club*, 128 Wn.2d 254, 257, 906 P.2d 325 (1995). This includes the entire jury selection process. *In re Personal Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). The public and press also have a First Amendment right to public

[3] This issue is currently pending before the Washington Supreme Court in *State v. Wise*, No. 82802-4, argued May 3, 2011.

trials. U.S. Const. Amend. I; *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); Wash. Const. art 1, § 10; *State v. Easterling*, 157 Wn.2d 167, 179, 137 P.3d 825 (2006).

The process of jury selection is important to the criminal justice system itself as well as to the parties. *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). Therefore, the court may not close the courtroom "except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. Even where only a part of the jury voir dire is improperly closed, it can violate a defendant's constitutional public trial right. *Orange*, 152 Wn.2d at 812. Violations of this right may be raised for the first time on appeal. *Bone-Club*, 128 Wn.2d at 257; *State v. Brightman*, 155 Wn.2d 506, 517, 122 P.3d 150 (2005).

To overcome the presumption of openness, the trial court must find on the record that closure is the only way to preserve a specific, more important, interest and that the closure is narrowly tailored to serve that interest. The findings must be specific enough to enable this court to determine whether closure was proper. *Orange*, 152 Wn.2d at 806; *Waller*, 467 U.S. at 45. The court must perform five steps:

> 1. The proponent of closure must make some showing of a compelling interest. If that interest is an accused's right to a fair trial, the proponent must show a likelihood of jeopardy.
>
> 2. Anyone present must be given an opportunity to object to the closure.
>
> 3. The protective method must be the least restrictive means available to protect the threatened interest.
>
> 4. The court must weigh the competing interests of the proponent of closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-89; *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 62, 615 P.2d 440 (1980). Failure to follow these steps violates the public trial clause of Wash. Const. art I, § 22. *Orange*, 152 Wn.2d at 812.

In *State v. Strode*, this Court reiterated the same constitutional principles it had previously set forth in *Bone-Club* and its progeny—that a trial judge's decision to allow the questioning of prospective jurors in chambers constitutes a courtroom closure and is a denial of the right to a public trial. *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310, 314 (2009); accord *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); *State v. Paumier*, 155 Wn. App. 673, 678-79, 230 P.3d 212 (2010). A courtroom may be closed to the public only when the criteria

for closure identified in *Bone-Club* are satisfied. *Strode*, 167 Wn.2d 222, 217 P.3d at 312.

Like *Strode*, the trial court herein effectively closed the courtroom on its own motion by conducting part of the jury selection in a locked courthouse. The fact that the courtroom itself was open makes no difference because the locked courthouse effectively barred the public from entering the courtroom. The Court did not consider the *Bone-Club* factors and found only "that the need to conclude the jury selection process this afternoon is an extraordinary circumstance." Supp. RP 240. A *Bone-Club* analysis would have brought other available less restrictive alternatives to light.

In *State v. Duckett*, 141 Wn. App. 797, 173 P.3d 948 (2007), the court of appeals held the trial court must engage in the five-part *Bone-Club* analysis *before* conducting all or a portion of voir dire outside of the public forum of the courtroom. *Duckett*, 141 Wn. App. at 802-03, 173 P.3d 948 (emphasis added). Thus, in the present case the trial court's explanation of "an extraordinary circumstance" cannot substitute for a complete *Bone-Club* analysis done in open court.

The fact that Mr. Arredondo did not object to the closure is of no consequence to the outcome. A defendant cannot waive the public's right

to open proceedings. *Strode*, 167 Wn.2d 222, 217 P.3d at 315. "As we observed in *Bone-Club*, the public also has a right to object to the closure of a courtroom, and the trial court has the independent obligation to perform a *Bone-Club* analysis. The record reveals that the public was not afforded the opportunity to object to the closure, nor was the public's right to an open courtroom given proper consideration." *Id*. (citations omitted).

Finally, the denial of the constitutional right to a public trial is not subject to harmless error analysis. *Strode*, 167 Wn.2d 222, 217 P.3d at 316; *Bone-Club*, 128 Wn.2d at 261-62; *Neder v. United States*, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Since denial of the public trial right is deemed to be a structural error, prejudice is presumed. *Bone-Club*, 128 Wn.2d at 261-62; *Orange*, 152 Wn.2d at 812. The only appropriate remedy is to remand for a new trial. *Brightman*, 155 Wn.2d at 518.

2. <u>The trial court abused its discretion in allowing evidence of other acts contrary to ER 404(b)</u>.

ER 404(b) prohibits evidence of other crimes to show that the defendant acted in conformity with that character--had a propensity to commit this crime. But evidence of prior crimes may be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation,

plan, knowledge, identity, or absence of mistake or accident." ER 404(b). To admit evidence of prior crimes under ER 404(b), the court must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify, as a matter of law, the purpose of the evidence; (3) conclude that the evidence is relevant to prove an element of the crime charged; and, finally, (4) balance the probative value of the evidence against its prejudicial effect. *State v. Williams*, 156 Wn.App. 482, 490, 234 P.3d 1174 (2010) (citing *State v. Vy Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). A trial court's decision to admit evidence of a defendant's prior acts will be reversed showing an abuse of the court's discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Here, there was insufficient proof that Mr. Arredondo committed the prior incident. Despite the prosecutor's assertion to the contrary in his opening statement, there was no evidence presented that Mr. Arredondo was the person who drove the car or fired the weapon in the 2/9/09 drive-by shooting. Nor was he ever prosecuted for this alleged offense. The evidence revealed that the alleged victim said the suspect vehicle "appeared to be like a Mercedes-Benz." RP 468. Mr. Arredondo had access to a silver Mercedes-Benz and police found a .38 shell casing in the car. RP 481-82, 486. The casing found at the scene of the 2/9/09 drive-by

shooting and the casing found in the car were fired from the same weapon. RP 523-24.

But there was no evidence of who drove the car or who fired the shots. There was no evidence that Mr. Arredondo had exclusive access to the Mercedes-Benz. Indeed, someone else or several other persons may have been the perpetrator(s) of this prior incident. Therefore, since there was insufficient evidence that Mr. Arredondo committed the prior misconduct, the Court abused its discretion in allowing that evidence.

A trial court must determine on the record whether the danger of undue prejudice substantially outweighs the probative value of such evidence, in view of the other means of proof and other factors. ER 403; Comment, ER 404(b); *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists. *State v. Rice*, 48 Wn.App. 7, 13, 737 P.2d 726 (1987). " 'In doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.' " *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986)(quoting *State v. Bennett*, 36 Wn.App. 176, 180, 672 P.2d 772 (1983)).

Here, in addition to possibly being untrue and thus irrelevant, the evidence was highly prejudicial because it tended to show Mr. Arredondo was a "criminal type", and thus likely committed the crimes presently charged. Since there was insufficient evidence that Mr. Arredondo committed the prior misconduct, the evidence should have been excluded. The evidence of the other crime only tended to show Mr. Arredondo acted in conformity with the character exhibited in the prior incident and had the propensity to commit the current offenses. This is precisely the type of evidence prohibited by ER 404(b).

Not harmless error. The other key incriminating evidence against Mr. Arredondo in these current offenses was the testimony of Maurice Simon. Simon testified that while he was in jail Arredondo told him he drove the Honda and Rudy Madrigal fired the shots at the SUV on 12/5/09. However, as will be shown below, the trial court improperly denied Arredondo the opportunity to adequately impeach the credibility of Simon's testimony on cross examination. If counsel had been allowed to properly cross-examine Simon thus undermining his credibility, the State's case would have become much weaker and elevated the significance of the ER 404 (b) testimony. Under this scenario, the improper admission of the ER 404(b) testimony was not harmless.

3. Arredondo's Sixth Amendment right of confrontation was violated when the trial court barred any inquiry into the mental state of the State's witness, Maurice Simon, during cross-examination.

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' *Davis v. Alaska*, 415 U.S. 308, 315, 317, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). This right is secured for defendants in state as well as federal criminal proceedings under *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. "Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Professor Wigmore stated:

> The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

5 J. Wigmore, Evidence s 1395, p. 123 (3d ed. 1940).

Cross-examination as to a mental state or condition, to impeach a witness, is permissible. *State v. Froehlich*, 96 Wn.2d 301, 306, 635 P.2d

127 (1981) (citing Annot., Cross-Examination of Witness as to His Mental State or Condition, to Impeach Competency or Credibility, 44 A.L.R.3d 1203, 1210 (1972) and cases cited therein). Cross-examination is one of several recognized means of attempting to demonstrate that a witness has erred because of his mental state or condition. *Id*. In addition, in a proper case counsel may produce experimental evidence to indicate a mental infirmity, or he may call an expert witness to testify as to the witness' mental infirmity. Annot., 44 A.L.R.3d at 1208. In each of these methods the purpose is the same, i.e., to impeach the witness and put his credibility in issue by showing his mental condition and how it affects his testimony. *Froehlich,* 96 Wn.2d at 306, 635 P.2d 127 (referencing Juviler, Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach, 48 Calif.L.Rev. 648, 651-52 (1960)).

Applying these principles to the present case, Arredondo was entitled to cross-examine Simon about his mental condition for the same purpose as discussed in *Froehlich,* i.e. to impeach him and put his credibility in issue by showing his mental condition and how it affects his testimony. Since Simon's testimony about Arredondo's jail confession was a key lynchpin for the State's case, the trial court's ruling barring all

cross-examination into Simon's mental state was not immaterial, irrelevant or harmless error.

Before making its ruling the trial court allowed questioning of Simon about his mental condition outside the presence of the jury. During that questioning Simon revealed a number of mental problems including PTSD, problems with comprehension, concentration and anxiety, depression, distrust of other people, hyper vigilancy, and chronic substance abuse from alcohol and methamphetamine. RP 559-64. By not allowing cross-examination into these various conditions, the Court violated Arredondo's Sixth Amendment right of confrontation.

4. Mr. Arredondo's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the special verdict that he committed the crime with 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.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488,

670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id*. "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d

628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Here, there was no evidence that Arredondo committed these crimes with 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. The only evidence

presented was that Arredondo was a Norteno, the victim was a Sureno, and the Nortenos and Surenos are rival gangs. Given these bare facts, it would be mere conjecture to presume these crimes were committed for the reasons stated in the aggravating circumstance. Therefore, the evidence was insufficient to support the special verdict.

5. The trial court abused its discretion in finding Mr. Arredondo had the means to pay the costs of incarceration and in ordering him to pay those costs as a condition of his sentence, where there was no evidence to support that finding.

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Ryan v. State*, 112 Wn.App. 896, 899, 51 P.3d 175 (2002) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Ryan*, 112 Wn.App. at 899-900 (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997))

RCW 9.94A.760(2) authorizes the imposition of the costs of incarceration at $50 per day for a prison sentence if the court determines that the offender, at the time of sentencing, has the means to pay for the cost of incarceration. This statutory language is preprinted in ¶ 4.D.4 of the judgment and sentence, herein, as the court's finding and court-ordered sentencing condition. CP 94. The Court did not make any specific finding that Mr. Arredondo had the means to pay for the cost of incarceration.

A trial court's entry of general rather than specific findings does not automatically require vacation of the trial court's order if evidence in the record supports it. *McCausland v. McCausland*, 129 Wn. App. 390, 406-07, 118 P.3d 944 (2005). However, there was no evidence presented that Mr. Arredondo had the means to pay for the cost of incarceration. Since there was no evidence to support this general boilerplate finding and order in the judgment and sentence, both the finding and the order are based on untenable grounds. Therefore, the Court abused its discretion and the sentencing condition should be stricken.

E. CONCLUSION

For the reasons stated, the convictions should be reversed, or in the alternative, the unauthorized sentencing condition should be stricken.

Respectfully submitted September 21, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 21, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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