COA No. 31187-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE JESUS MANCILLA,

Appellant.

BRIEF OF APPELLANT

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Issues Pertaining to Assignments of Error

1. Did the court abuse its discretion by admitting gang evidence when there was no nexus between the crimes and gang activity and the probative value of the evidence was far outweighed by its prejudicial effect? (Assignment of Error A).

2. Did the trial court err by admitting statements made to the jail booking officer as to gang affiliation in violation of Mr. Mancilla's *Miranda* rights? (Assignment of Error B).

3. Did the State fail to prove the essential element of specific intent as to each of the named victims in each of the seven counts of first degree assault? (Assignment of Error C).

4. Did the court err by giving an instruction on transferred intent when each of the victims was named in each of the seven counts of first degree assault? (Assignment of Error D).

5. Did the trial court err by imposing a 180-month firearm enhancement (3 weapons x 60 months) on each count of first degree assault when the enhancement should have been limited to 60 months on each count? (Assignment of Error E).

II. STATEMENT OF THE CASE

Mr. Mancilla was charged by second amended information with seven counts of first degree assault, one count of drive-by shooting, and one count of first degree unlawful possession of a firearm. (Mancilla Supp. CP 212). Alleging he was armed with an SKS assault rifle, .22 caliber rifle, and a .40 caliber pistol, the State sought three firearm enhancements for each count of first degree assault. (*Id.* at 213). The case proceeded to jury trial.

Upon convictions, the evidence must be viewed in a light most favorable to the State. *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997). That evidence, as adduced at trial, was summarized by Mr. Mancilla's counsel in his motion for arrest of judgment:

. . .

5. The matter proceeded to trial and evidence was presented that on March 14, 2011, at about 0416 dispatch advised of several shots fired in the Outlook, Washington area and a witness was following the suspect vehicle.

6. While delivering papers, Veronica Lopez and Carla Starks observed a gray Mitsubishi Galant in the area of the shooting and followed it for some distance .

7. A YSO Deputy arrived in the general area at approximately 0430 and observed a gray four door Galant and pulled over the vehicle.

8. The drive of the Galant was identified as Armando Lopez.

9. The other occupants of the vehicle were Jose Jesus Mancilla, Jaime Lopez, and Nicholas James.

10. Veronica Lopez and Carla Starks were contacted and told the police that the Galant was the same car they had seen in Outlook.

11. Maria Rincon, Jose Lopez, Daisy Cordoza, and Elias Rincon/Mendoza all testified that everyone in the house (including 3 juveniles, D.L., I.L., and J.L.) were asleep when they were awaken by gunfire from outside of the residence.

12. D.L., L.L., and J.L. did not testify at the trial.

13. Testimony was presented that no one inside of the residence was hit.
14. Elias Rincon testified that he was not frightened by the shooting.

15. Deputies conducted an investigation of the property/home. Officers observed spent .40 and

.22 shell casings, indicated that the rounds that were fired at the residence were from a .40 caliber and .22 caliber firearm. Officers also found an unfired 7.62 round as well as a magazine from a rifle.

16. From the position of the spent shell casing and rifle magazine, officers concluded that the shooters fired at the residence while standing directly in front of the residence.

17. Officers testified that the suspect vehicle left acceleration marks in the gravel and pavement of the driveway adjacent to the residence.

18. The evidence presented establishes that the shooters were transported to the area of the residence in the Mitsubishi, exited the vehicle and fled in the Mitsubishi.

19. Evidence was presented that a Deputy observed SKS rifle, a .22 caliber rifle and a .40 caliber semi-automatic handgun off the shoulder of Yakima Valley Highway. The evidence indicated that these three firearms had been thrown from the defendant's vehicle and had come to rest off the shoulder of the road.

20. The firearms, live rounds, and spent shell casings were all sent to the Washington State Patrol for fingerprinting and DNA analysis.

21. None of the evidence collected matched the fingerprints or DNA of Mr. Mancilla.

22. Evidence was presented that Mr. Mancilla is a member of LVL, a Sureno gang from the Sunnyside area. Mr. Mancilla's tag name is "Solo."

23. A "gang expert" testified that gang members will

often bring a witness along on crimes to witness the crime and report back to other non-participants.

24. The jury found Mr. Mancilla guilty of all of the crimes charged and also found he or an accomplice committed the crime with intent to benefit or advance a position in a criminal gang. (Mancilla Supp.CP 1272-74).

The court sentenced Mr. Mancilla to consecutive terms on the first degree assault convictions of 138 months for count 1 and 93 months on counts 2 through 7, for a total of 696 months. Added to each of the sentences on counts 1 through 7 were consecutive 180-month firearm enhancements, for a total of 1260 months. The court also sentenced Mr. Mancilla to concurrent terms of 87 months on counts 8 and 9. The total confinement ordered was thus 1956 months. (Mancilla Supp. CP 1308). This appeal follows. (*Id.* at 1328).

III. ARGUMENT

A. The court erred by admitting gang evidence.

The court admitted gang evidence and allowed a gang expert to testify. (8/18/12 RP 152-57). The State's case painted a canvas of gang culture. The admission of gang evidence is extremely prejudicial because it invites the jury to make the "forbidden inference" that Mr. Mancilla's gang membership showed

his propensity to commit the charged offenses. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). But that is what happened here.

A trial court's decision to admit evidence of other crimes or misconduct is reviewed for an abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A court abuses its discretion when the decision is manifestly unreasonable or is based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Evidence of other crimes, wrongs, or acts is not admissible to prove character or conformity with it, but may be admissible for other purposes such as motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). The record shows, however, that gang evidence was not admitted for any purpose other than to prove Mr. Mancilla acted in conformity with that culture.

The court allowed gang evidence because it would explain or make understandable what happened. But the events could be explained without any reference to gang culture. Unfortunately, the entire trial was about gangs – not Mr. Mancilla and what he was alleged to have done. The court's admission of the gang evidence

was an abuse of discretion because it was contrary to law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The error in admitting gang evidence was not harmless since, within reasonable probability, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). Mr. Mancilla was convicted of being a gang member, which is all the State proved. A new trial is required.

B. The court erred by admitting Mr. Mancilla's post-arrest statements to a jail booking officer regarding his gang affiliation.

After his arrest, Mr. Mancilla was given his *Miranda* warnings and did not waive them. (8/28/12 RP 140-41). The jail booking officer nonetheless asked about his gang affiliation and got an answer. The trial court denied the motion to exclude the statements because they fit the exception for routine booking process questions and gang affiliation was not an element of any of the crimes. (*Id.* at 153-57).

The Fifth Amendment and Wash. Const. art. 1, § 9 protect a person from being compelled to give evidence against himself. *See State v. Ellis*, 116 Wn.2d 364, 375, 805 P.2d 211 (1991). Mr. Mancilla did not waive that right. The issue is whether the court

erred by determining there was no interrogation, but merely routine questioning during the booking process.

Such routine questions may not be interrogation under *Miranda*. *See Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed.2d 297 (1980). The reason is that routine booking process questions usually do not generate incriminating responses and do not have the coercive element of forcing the defendant to speak against his will. *State v. Wheeler*, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). But here, the questions regarding gang affiliation certainly were reasonably likely to produce an incriminating response. *State v. Denney*, 152 Wn. App. 665, 670, 218 P.3d 633 (2009). Indeed, they did as the State later charged gang aggravators and relied heavily at trial on gang evidence. The court's determination that there was no interrogation is clearly erroneous because a mistake has clearly been committed. *Id.* at 671.

The court asks if the questioning party should have known that the question was reasonably likely to elicit an incriminating response. *Denney*, 152 Wn. App. at 671. The test is objective. *U.S. v. Booth*, 669 F.2d 1231, 1238, (9th Cir. 1981). Highly relevant is the relationship between the crime suspected and the question.

Id. Gang culture and assaults against rivals were the State's reasons for charging the crimes as it did. The questions went beyond mere identification and produced incriminating responses from Mr. Mancilla directly relevant to the crimes. *State v. Willis*, 64 Wn. App. 634, 636-37, 825 P2d 357 (1992). In these circumstances, the jail booking officer's questions were interrogation. *See State v. Sargent*, 111 Wn.2d 641, 650, 762 P.2d 1127 (1988).

Mr. Mancilla had already invoked his *Miranda* rights. The jail booking officer's interrogation violated those rights. *Denney*, 152 Wn. App. at 673-74. The court erred.

C. The State's evidence was insufficient to support the convictions for first degree assault.

The State must prove beyond a reasonable doubt every element of a charged crime. U.S. Const. amends. 5, 14; Wash. Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Even viewed in a light most favorable to the State, the evidence fell short of showing by the requisite quantum of proof that Mr. Mancilla was guilty of first degree assault. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Assault is not defined by statute and is defined by common law. *State v. Aumick*, 126 Wn.2d 422, 426 fn.12, 894 P.2d 1325 (1995). It requires the specific intent to either create apprehension of bodily harm or to cause bodily harm as an essential element of the offense. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). First degree assault is committed when a person, with the intent to inflict great bodily harm, assaults another with a firearm. RCW 9A.36.011(1)(a). The mens rea for this crime is the intent to inflict great bodily harm:

> Assault in the first degree requires a specific intent; but it does not, under all circumstances, require that the specific event match a specific victim. Consequently, once the intent to inflict great bodily harm is established, usually by proving that the defendant intended to inflict great bodily harm on a specific person, the mens rea is transferred under RCW 9A.36.011 to any unintended victim. 125 Wn.2d at 218

The State named seven specific victims in the seven counts of first degree assault with which Mr. Mancilla was charged. (Mancilla Supp. CP 212). The to-convict instructions (jury instructions 16-22) specifically named those victims in each respective count. (*Id.* at 1212-1218). Thus, the State chose to allege, and bore the burden of proving beyond a reasonable doubt, a specific intent to match a specific victim in those seven counts.

See State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009); *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). But the State did not prove in any of the counts of first degree assault the specific intent to match a specific victim.

The State could have charged these crimes in the language of the statute, that is, "assaults another," but it chose not to do so. The record shows that the State presented no evidence that Mr. Mancilla knew who his alleged intended victims were or intended to inflict great bodily harm on those specific victims. Without that knowledge or intent, he could not have the specific intent needed to convict him of any of the seven counts of first degree assault. *See Elmi*, *supra*.

Although credibility issues are for the jury to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). The jury necessarily resorted to guess, speculation, or conjecture to fill in the blanks for its guilty verdicts in the dearth of evidence presented by the State to prove Mr. Mancilla had a specific intent to assault a specific victim. The State's evidence was thus insufficient to support beyond a reasonable doubt the convictions for first degree assault. *Id.*; *Green*, 94 Wn.2d at 220-

21. Those convictions must be reversed and the charges dismissed.

D. The court erred by instructing the jury on transferred intent.

Over defense objection, the court gave instruction 15 on transferred intent:

> If a person assaults a particular individual or group of individuals with a firearm with the intent to inflict great bodily harm and by mistake, inadvertence, or indifference, the assault with the firearm took effect upon an unintended individual or individuals, the law provides that the intent to inflict great bodily harm with a firearm is transferred to the unintended individual or individuals as well. (Mancilla Supp. CP 1211).

The instruction should not have been given because each of the seven victims was specifically named in each of the seven counts of first degree assault. (Mancilla Supp. CP 212). There simply were no unintended individuals.

Wilson, 125 Wn.2d at 219, is instructive:

> There is no reason justifying use of the legal fiction known as transferred intent to prove that [defendant] assaulted [the unintended victims] in the first degree. The State tried, convicted, and sentenced [defendant] for offenses against his intended victims, the seriousness of which was consistent with his state of mind. It was error for the trial court to allow proof of [defendant's] intent to inflict great bodily harm against [the intended victims] to support charges of assault

> in the first degree against [the intended victims] and against [the unintended victims].
>
> We hold the doctrine of transferred intent is unnecessary to convict [defendant] of assaulting [the unintended victims] in the first degree. Under a literal interpretation of RCW 9A.36.011, once the mens rea is established, RCW 9A.36.011, not the doctrine of transferred intent, provides that any unintended victim is assaulted if they fall within the terms and protections of the statute. Transferred intent is only required when a criminal statute matches specific intent with a specific victim. RCW 9A.36.011 does not include such a rigid requirement.

Thus, an instruction on transferred intent was unnecessary. *Id.*

Here, the State chose to accept the burden of proving specific intent with a specific victim even though RCW 9A.36.011 does not require it. *Wilson*, 125 Wn.2d at 219; *Hickman*, 135 Wn.2d at 102. There were no unintended individuals in any event as all were named victims. The transferred intent instruction could only confuse the jury and relieve the State of its chosen burden. Moreover, the State failed to prove by the requisite quantum of proof that Mr. Mancilla was guilty of first degree assault against any of those named victims. *Wilson* and *Elmi* do not support giving the transferred intent instruction because, under the particular facts of this case, no such instruction was warranted. The court erred by giving it.

E. The court erred by imposing 180-month firearm enhancements on each of the seven counts of first degree assault.

Because there were three firearms involved in the first degree assaults, the court imposed consecutive 180-month firearm enhancements on each of the seven counts of first degree assault, a term of 1260 months on top of the base sentence of 696 months. (Mancilla Supp. CP 1308). But there is only one 60-month firearm enhancement for each assault. Nowhere in RCW 9.94A.533 does it provide for a firearm enhancement on an eligible offense for each firearm with which a defendant may be armed. Because the statute is silent on this point, the court had no authority to "stack" firearms in order to impose a 180-month firearm enhancement. Rather, RCW 9.94A.533(3)(a) states the following additional times shall be added to the standard sentence range:

> Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both . . .

Each firearm with which a defendant is armed is not a "unit of prosecution" for purposes of a firearm enhancement. In *State v. Neff*, 163 Wn.2d 453, 459, 181 P.3d 819 (2008), the court imposed a 36-month enhancement when three firearms were involved. In *State v. O'Neal*, 159 Wn.2d 500, 503, 150 P.3d 1121 (2007), the

court imposed one statutory enhancement when over 20 guns were involved. In *State v. Eckenrode*, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007), the court also imposed one statutory enhancement when two guns were involved. The clear import of these decisions is that only one firearm enhancement can be imposed for one eligible offense, no matter how many separate firearms with which a defendant may have been armed. *Id.*

The court therefore erred by imposing 180-month firearm enhancements on each of the seven first degree assaults when it had no authority to do so. The most it could have imposed was 6-month firearm enhancements for each assault for a total of 420 months, not 1260 months. RCW 9.94A.533(3)(a). Mr. Mancilla should be resentenced.

IV. CONCLUSION

Based on the foregoing, Mr. Mancilla respectfully urges this court to reverse his convictions of first degree assault and dismiss the charges and/or remand for resentencing.

DATED this 3rd day of September, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 3, 2013, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Jose Mancilla, # 311667, 1830 Eagle Crest Way, Clallam Bay, WA 98326; and by email, as agreed by counsel, on Kevin G. Eilmes at kevin.eilmes@co.yakima.wa.us, Andrea Burkhart at andrea@burkhartandburkhart.com; Gregory Link at greg@washapp.org; and David Gasch at gaschlaw@msn.com.

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