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NO. 68409-4-I

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

REC'D

NOV 07 2012

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

VELIA ARCHULETA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbra Mack, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting gang evidence.
2. The trial court erred by denying Appellant's motion to sever.
3. Pursuant to RAP 10.1(g)(2), Appellant adopts by reference the assignments of error set forth in the co-appellant's opening brief.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. Did the trial court err by admitting evidence that Appellant and her co-defendant were gang members after previously determining there was no nexus between the charged offense and gang membership?
2. To the extent evidence of gang membership was admissible against the co-defendant, did the trial court err in denying Appellant's motion to sever when such evidence was more prejudicial than probative with regard to Appellant?
3. Pursuant to RAP 10.1(g)(2), Appellant adopts by reference the issue statements set forth in the co-appellant's opening brief.

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<sup>1</sup> On September 27, 2012, this Court consolidated this appeal with State v. Anthony Archuleta, Jr., No. 68536-8-I.

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Velia Archuleta (Velia) and her brother Anthony Archuleta, Jr. (Junior), with first degree burglary. CP 1; RCW 9A.562.020. The prosecutor claimed that on August 5, 2011, Velia and Junior unlawfully entered the apartment of Vanessa Rodriguez and assaulted her. CP 2-3.

A jury convicted both Velia and Junior as charged. CP 84; 1RP-16RP 6.<sup>2</sup> A low-end standard range sentence of 15 months was imposed against Velia. CP 87-94; 17RP 15. She appeals. CP 96.

2. Substantive Facts

a. *Pretrial Proceedings*

The prosecution sought to add an aggravating allegation that Velia and Junior committed the burglary "with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership." RCW 9.94A.535(3)(aa); CP 14-15, 35; 1RP 3,

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<sup>2</sup> There are seventeen volumes of verbatim report of proceedings referenced as follows: 1RP - 11/29/11; 2RP 11/30/11; 3RP - 12-1-11; 4RP 12/12/11; 5RP - 12/15/11; 6RP 12/21/11; 7RP - 12/29/11; 8RP - 1/3/12; 9RP - 1/4/12; 10RP - 1/5/12; 11RP - 1/10/12; 12RP - 1/11/12; 13RP - 1/12/12; 14RP - 1/17/12; 15RP - 1/23/12; 16RP - 1/24/12; and 17RP - 2/24/12.

6, 8. Both defendants opposed the amendment. CP 37; 2RP 109-110. Velia also brought a motion to sever, based in part on the prospect that if gang evidence were admitted against Junior, it would be unduly prejudicial to Velia. CP 40-42; 2RP 110-111. Velia's motion was denied. 2RP 111.

The prosecution's request to add the gang aggravator allegation was also denied. The trial court reasoned that although there was substantial evidence Velia and Junior were gang members, the prosecution failed to show a nexus between gang affiliation and the alleged assault of Rodriguez, particularly because Rodriguez was not a gang member, and because there was no evidence of a gang-related motive. 8RP 93-99.

The trial court held, however, that evidence of gang membership was admissible "for purposes of res gestae" and because, according to the court, it was the only way the prosecution could argue its theory of the case against Junior, which was that because he was a high-ranking gang member he had the authority to direct Velia to assault Rodriguez and simply stand by and watch as she carried out the assault. 9RP 5-6.

*b. Trial*

35-year-old Vanessa Rodriguez began dating Anthony Archuleta, Sr. (Senior), Junior's and Velia's father, in 2010. 11RP 87, 130; 12RP 36. As a result, Rodriguez got to know both Velia and Junior. She came to

think of them as her own children, and would often have them over to visit or spend the night, and she would often give Velia a ride to work, even after she and Senior had split up. 11RP 88, 113, 115-16, 133-34; 12RP 11. By the time of the alleged burglary, however, Rodriguez was dating someone else, despite still being in love with Senior. 11RP 87, 137.

On the evening of August 5, 2011, Rodriguez was in the apartment she shared with her mother, her 15-year-old daughter and her 11-year old son. 11RP 86, 100. Rodriguez was in the living room with the front door open because it was hot, her mother was in her bedroom, her son was taking a bath, and her daughter was out for the evening. 11RP 100, 111.

Rodriguez initially claimed Velia and Junior showed up at the apartment at about 10 p.m. 11RP 104. She admitted, however, previously claiming they showed up at between 9:30 pm and 9:45 pm., and leaving at about 9:50 p.m. 11RP 107; 12RP 8-9, 32-33. She then claimed they must have showed up between 10:28 p.m. and 10:33 p.m. because the encounter lasted about 10 minutes and Rodriguez recalled she posted on Facebook at 10:48 p.m., 5-10 minutes after they left. 11RP 157, 159-60; 12RP 30-31.

Rodriguez said Velia and Junior entered the apartment without permission, and Junior said to her several times, "what the fuck, you know, you calling us a snitch." 11RP 114, 122; 12RP 31. Rodriguez claimed Velia then held her against a wall, punched her 20 times in the

face with a closed fist as she chastised Rodriguez for accusing them of being snitches. 11RP 115, 155. According to Rodriguez, Junior simply stood and watched. 11RP 118. Rodriguez said her mother eventually came out of her room and tried to pull Velia off of her, and that the beating ended 10 minutes after it started, after which Velia and Junior left. 11RP 120, 156-57.

Rodriguez admitted failing to report the alleged incident for three days, and did so later only because her mother was scared. 11RP 122-23. Rodriguez also admitted she did not seek medical attention for the alleged beating until five days after the fact, on August 10, 2011. 13RP 7. She told the care providers she had been attacked by the 21-year old daughter of her ex-boyfriend, and complained of pain in her head, face, neck, lower back, lower lips, both arms and her left ankle. 13RP 9-10. She also said she was "a little dizzy" and a "little bit nauseous." 13RP 10. Finally, Rodriguez told a provider she got the abrasion on her left knee and hurt her left ankle when she fell trying to chase after Velia and Junior as they fled her apartment. 13RP 10.

At trial, however, Rodriguez denied her left knee and ankle injuries had anything to do with Velia, and instead explained they were the result of a fight she had on August 4, 2011. 11RP 91-93, 143-44. Rodriguez

also revealed she had been hit in the face four times by a 15-year old boy on August 4, 2011, in a wholly separate matter. 11RP 90, 146-47, 161.

Regarding gangs, Rodriguez explained Senior was the head of the Rancho San Pedro gang in Auburn, and that Junior and Velia were members. 11RP 88-89. Rodriguez's mother, Esmeralda Cervantez, confirmed Rodriguez's understanding of the Archuletas' gang affiliation. 12RP 39-40.

Cervantez also corroborated Rodriguez's claim she was beaten by Velia on August 5, 2011. 12RP 38, 41, 44. Cervantez testified she looked at a clock during the incident and was pretty certain it occurred at around 9:25 p.m. or 9:30 p.m. 12RP 45, 54, 84-85. She denied Rodriguez posted on Facebook immediately after the incident. 12RP 45. Cervantez conceded Rodriguez had injuries to her face from her fights the day before, but claimed at trial it was Velia's punches that caused her daughter's black eyes, despite a previous claim they were blackened during her daughter's August 4th fights. 12RP 48-50, 61, 65-67.

Auburn Police Officer Michael Ashbaugh responded to Rodriguez's August 8th report of the alleged assault. 11RP 33-34. Ashbaugh explained he knew Rodriguez from past contacts with her when he was seeking information about Auburn gangs because of her relationship with Senior. 11RP 34-35. Over defense objection, Ashbaugh

testified both Velia and Junior were "documented gang members" of the Rancho San Pedro gang, and that Junior was the highest-ranking member next to his father. 11RP 36-37.

Except for the physician in charge of Rodriguez's hospital visit on August 10, 2011, Auburn Police Officer Brian O'Neill, a "gang intel officer" for the City of Auburn, was the prosecution's final witness. 12RP 107. Before he was called, however, Velia's counsel renewed his objection to the gang evidence, arguing that allowing the prosecution to introduce evidence that the assault of Rodriguez was gang motivated based on the "snitch" comments was improper and unfairly prejudicial to Velia. 12RP 96-97. The court overruled the objection, agreeing with the prosecution that it needed to be able to show that Velia and Junior were not just members of an organization, but instead that they were members of an *illegal* organization, i.e., a "criminal street gang". 12RP 98.

O'Neill testified Velia and Junior were both "validated" members of the criminal street gang known as "Rancho San Pedros", and that when Senior is absent, Junior is the leader. 12RP 117, 121. O'Neill explained that higher ranking gang members, such as Junior, tend to be "shot callers", which is "someone who has the credibility within the organization to direct the actions of other members of the gang." 12RP 122. According to O'Neill, "shot callers" rarely have to do the "dirty

work" of the gang, but often accompany and observe lower ranking gang members as they act on behalf of the gang. 12RP 122-23, 137.

With regard to "snitching", O'Neill explained it is one of the more serious offenses that can be committed against a gang, and it tends to be dealt with "[v]ery seriously." 12RP 123-24. O'Neill also testified that assaulting someone considered to be a snitch is "consistent with gang behavior." 12RP 156-57. O'Neill agreed, however, that there is a general distain for snitching, whether one is in a gang or not. 12RP 143.

At the conclusion of the prosecution's case-in-chief, Velia's counsel renewed his motion to sever, noting that evidence that Junior is a shot caller for the Rancho San Pedros gang could be unfairly used against Velia. 13RP 25-26. That motion was again denied. 13RP 29.

The defense case focused on showing Velia and Junior were somewhere other than at Rodriguez's apartment during the time Rodriguez and Cervantez claimed it occurred. In support, the defense introduced a Walmart surveillance video showing Velia at the Federal Way Walmart store between 9:53 pm and 10:06 pm on August 5, 2011. 13RP 44-53.

In addition, Velia's job supervisor, Jason Wood, testified he was with Velia at work until sometime between 9:30 p.m. and 10 p.m. on August 5, 2011, waiting for Junior and her mother to pick her up. 13RP 71. Wood also confirmed it was Velia in the Walmart video. 13RP 90.

Velia and Junior's mother, Fofu Terese Tuilefano, testified she was visiting from Denver between August 4, 2011 and August 8, 2011. 13RP 94-95. Like Woods, she recalled that on the evening of August 5th she and Junior picked up Velia from work at about 9:30 p.m. and immediately went to the Auburn Walmart so Velia could cash her paycheck. 13RP 105, 116. When that store declined to cash the check, they went to the Federal Way Walmart to try again. 13RP 106-07. They then went to a drive-thru Mexican restaurant before going to Velia's apartment for the rest of the evening. 13RP 109-110.

C. ARGUMENT

1. THE INTRODUCTION OF GANG EVIDENCE DEPRIVED VELIA OF A FAIR TRIAL.

Evidence of prior bad acts and misconduct is not admissible to prove a defendant's character or to show a general propensity for misconduct. ER 404. Such evidence, however, "may...be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake." ER 404(b). The trial court's admission of ER 404(b) is reviewed under an abuse of discretion standard. State v. Embry, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_, 2012 WL 5331565 at 5 (Slip Op. filed October 30, 2012); State v. Vy Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). Discretion is abused when it is exercised on

untenable grounds or for untenable reasons. State ex rel Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Gang membership is protected by the First Amendment of the U.S. Constitution as part of a citizen's right to freedom of association. State v. Scott, 151 Wn. App. 520, 526, 213 P.2d 71 (2009), review denied, 168 Wn.2d 1004 (2010) (citing Dawson v. Delaware, 503 U.S. 159, 164-67, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)). Evidence of gang affiliation is therefore doubly inadmissible when it proves no more than a defendant's abstract beliefs. Dawson, 503 U.S. at 167.

Evidence of gang affiliation falls within the scope of ER 404(b), and is generally characterized as prejudicial. Embry, at 5; Scott, 151 Wn. App. at 526; State v. Boot, 89 Wn. App. 780, 788-89, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998). Accordingly, before a court may admit such evidence, it must follow the requirements of ER 404(b), which include:

- 1) Find[ing] by a preponderance of the evidence that the misconduct occurred,
- 2) Identify[ing] the purpose for which the evidence is sought to be introduced,
- 3) Determin[ing] whether the evidence is relevant to prove an element of the crime charged, and
- 4) Weigh[ing] the probative value against the prejudicial effect.

State v. Asaeli, 150 Wn. App. 543, 576, 208 P.3d 1136, review denied,

167 Wn.2d 1001 (2009) (citing State v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995)). Evidence of gang affiliation is admissible only upon a showing of “a nexus between the crime and gang membership.” Scott, 151 Wn. App. at 526.

For example, evidence of gang involvement demonstrated motive and “extreme indifference,” when the evidence showed two local groups of “Bloods” and “Crips” had many recent conflicts shortly before the defendant - a member of the local Crips - pulled a gun in a crowd outside a nightclub and fired into the crowd in an effort to shoot a rival Blood. State v. Yarbrough, 151 Wn. App. 66, 74-76, 82-86, 210 P.3d 1029 (2009).

Somewhat similarly, in Boot, evidence of gang involvement was appropriate in part because it showed motive and that the defendant had premeditated the crime. 89 Wn. App. 789-90. In a previous assault, the defendant had pointed a gun at a woman’s head, and onlookers had laughed at him and told him he was too much of a baby to shoot anyone. Id. at 790. Evidence also showed the defendant had been escalating in his use of guns in order to improve his status in his gang. Id. For these reasons, his prior use of a gun and his membership in the gang were admissible. Id.

Most cases wherein the use of gang evidence is affirmed involve use of gang membership to prove motive or mental state. See e.g., Boot,

Yarbrough, supra; see also State v. Campbell, 78 Wn. App. 813, 822-23, 901 P.2d 1050, review denied, 128 Wn.2d 1004 (1995)(gang evidence admissible to prove premeditation and intent). Here, the court admitted evidence of Velia's and Junior's gang membership ostensibly for *res gestae* and to prove Junior's motive for allegedly accompanying Velia to Rodriguez's apartment. 9RP 5-6. But just before this ruling the court had determined there was no nexus between the alleged crime and the defendants' gang membership, and therefore precluded the prosecution from adding the requested gang aggravator. 8RP 93-99. Under Scott, the trial court committed *per se* error by then admitting gang evidence. 151 Wn. App. at 526 (gang evidence admissible only if there is "a nexus between the crime and gang membership."). Moreover, gang membership by Velia and Junior was unnecessary to prove motive and did not fall within the *res gestae* exception.

The only motive advanced by the prosecution was that the Archuleta siblings believed Rodriguez had accused them of being snitches. See 11RP 114-15 (Rodriguez testifies both Velia and Junior accused her of calling them snitches); 12RP 41 (Cervantez claimed Velia and Junior accused Rodriguez of calling them snitches). There was no need to introduce evidence of gang membership to show this was a plausible motive. As Officer O'Neill testified, snitching is generally recognized as a

bad thing whether it is in the context of a gang or not. 12RP 143. The motive exception was inapplicable.

In Boot, as here, the trial court admitted the evidence, at least in part, under the *res gestae* exception to ER 404(b). 89 Wn. App. at 790. The trial court in Boot noted that the unrelated gang activities the defendant and his co-defendant had engaged in previous to the murder showed how the two worked together as a team and how their crimes were escalating in seriousness over a short period of time. Id. They were therefore relevant to show “a complete picture” of the instant crime. Id.

Here, however, there was no similar justification to show why Velia and Junior might have worked together. There was no evidence Velia and Junior had engaged in gang-related activities together in the past, or that their alleged displeasure with Rodriguez had any connection to the Rancho San Pedros gang. The court’s assertion that gang evidence was justified to show *res gestae* is simply not supported by the record.

In Scott, the Court noted that in cases where gang membership had been admitted to show motivation or how members of a gang had acted in concert, “there was a connection between the gang’s purposes or values and the offense committed.” 151 Wn. App. at 527. In contrast, where no connection was made between the gang affiliation and the charged offense, “admission of the gang evidence was found to be prejudicial

error.” Id. (citing, Asaeli, supra; State v. Ra, 144 Wn. App. 688, 701-02, 175 P.3d 609, review denied, 164 Wn.2d 1016 (2008)); see also, Embry at 30-31 (J. Armstrong dissenting)(res gestae exception for gang evidence should be inapplicable when there is a lack proof defendants acted in concert as a gang in the past and that such past conduct is characteristic of the charged offense).

Here, the court accepted the prosecution's claim that gang evidence was necessary to explain why Junior allegedly stood by while his sister beat Rodriguez. 9RP 6. But the record fails to establish such conduct was typical for the Rancho San Pedros gang, or that Junior or Velia ever engaged in such conduct in the past on behalf of a gang. As the trial court correctly found, there was no nexus between the alleged offense and gang membership. 8RP 93-99. This Court should therefore reverse and remand for a new trial. See Scott, Asaeli, Ra, supra.

2. THE COURT’S FAILURE TO SEVER VELIA TRIAL FROM JUNIOR’S DENIED VELIA A FAIR TRIAL.

Prior to trial, Velia moved to sever her trial from Junior's, in part on the prospect that gang evidence would be admitted against Junior to explain his alleged role in the offense. CP 40-42; 2RP 110-111. The motion was denied. 2RP 111. At the conclusion of the prosecution's case-in-chief, Velia renewed her request, arguing the evidence that Junior was a

shot caller for the Rancho San Pedros gang could be unfairly used against her. 13RP 25-26. That request was also denied. 13RP 29. This was error that warrants reversal of Velia's conviction.

A court should sever the trials of properly joined defendants where severance is necessary to promote a fair determination of guilt. Under CrR 4.4(c)(2):

The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.

A trial court's denial of a motion to sever is reviewed under the abuse of discretion standard. State v. Phillips, 108 Wn.2d 627, 640, 741 P.2d 24 (1987). Where a defendant is prejudiced by a joint trial, it is an abuse of discretion to deny a severance motion. State v. Alsup, 75 Wn. App. 128, 131, 876 P.2d 935 (1994).

On appeal, an appellant must show manifest prejudice resulting from a joint trial outweighed judicial economy concerns. The appellant must point to specific prejudice. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6

(1982), cert. denied sub nom., Frazier v. Washington, 459 U.S. 1211 (1983).

Specific prejudice may be demonstrated by:

(1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants.

State v. Canedo-Astorga, 79 Wn. App. 518, 528, 903 P.2d 500 (1995) (quoting United States v. Oglesby, 764 F.2d 1273, 1276 (7th Cir. 1985)), rev. denied, 128 Wn.2d 1025 (1996).

Here, the massive and complex quantity of gang evidence introduced to prove Junior was an accomplice to the alleged burglary made it impossible for the jury to properly disregard it during deliberation on Velia's guilt or innocence. From the beginning the prosecution claimed it needed the gang evidence to prove Junior guilty as an accomplice because it was the only way to explain why he merely stood by while his sister beat Rodriguez, i.e., because he was a "shot caller" for the Rancho San Pedros gang there to ensure Velia properly carried out the gang's business.

There was no need, however, to show Velia's alleged gang membership in order to obtain a conviction of her. Rather, if the jury believed Rodriguez and/or Cervantez, it could convict. By refusing to sever

Velia's trial from her brother's, the trial court created the situation where highly prejudicial gang membership evidence would be unnecessarily used against her.

Because the unfair prejudice to Velia outweighed the judicial economy of joint trials, severance should have been granted. The court abused its discretion in denying severance and Velia conviction must be reversed. State v. Bythrow, 114 W.2d 713, 717, 790 P.2d 154 (1990).

3. ADOPTION OF ARGUMENTS OF CO-APPELLANT.

To the extent applicable, pursuant to RAP 10.1(g)(2), Velia adopts by reference the arguments set forth the co-appellant's opening brief.

D. CONCLUSION

This Court should remand with an order that the trial court strike the unsupported finding from the judgment and sentence.

DATED this 7<sup>th</sup> day of November 2012.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 68409-4-1
	)	
VELIA ARCHULETA,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7<sup>TH</sup> DAY OF NOVEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL

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DIVISION ONE

**SIGNED** IN SEATTLE WASHINGTON, THIS 7<sup>TH</sup> DAY OF NOVEMBER 2012.

x *Patrick Mayovsky*