

NO. 33881-5-II
COURT OF APPEALS
DIVISION II
See

NO. 33881-5-II

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

STATE OF WASHINGTON, Respondent, v. BRENT WARD LUYSTER and MICHAEL M. RUND, Appellant.
FROM THE SUPERIOR COURT FOR CLARK COUNTY THE HONORABLE JOHN F. NICHOLS CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-01463-6 and 05-1-01464-4
BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

MICHAEL C. KINNIE, WSBA #7869
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney's Office
Franklin Center
1013 Franklin Street
PO Box 5000
Vancouver, WA 98666-5000
Telephone (360) 397-2261 and (360) 397-2183

TABLE OF CONTENTS

I. STATEMENT OF FACTS1

**II. RESPONSE TO ASSIGNMENTS OF ERROR NO. 1 (RUND BRIEF) AND
NO. 1 AND 2 (LUYSTER BRIEF).....1**

**III. RESPONSE TO ASSIGNMENT OF ERROR NO 2 (RUND BRIEF) AND
ASSIGNMENT OF ERROR NO. 3 (LUYSTER BRIEF).....7**

IV. RESPONSE TO FOURTH ASSIGNMENT OF ERROR (LUYSTER ONLY)13

V. CONCLUSION.....16

TABLE OF AUTHORITIES

Cases

<u>Cienfuegos</u> , 144 Wn.2d at 227	13
<u>Cienfuegos</u> , 144 Wn.2d at 228-229	14
<u>Farr-Lenzini</u> , 93 Wn.App. at 461	11
<u>Ortiz</u> , 119 Wn.2d at 309	12
<u>Ortiz</u> , 119 Wn.2d at 310	12
<u>State v. Baird</u> , 83 Wn.App. 477, 485, 922 P.2d 157 (1996)	12
<u>State v. Benn</u> , 120 Wn.2d 631, 663, 845 P.2d 289 (1993)	15
<u>State v. Boot</u> , 89 Wn.App. 780, 789, 950 P.2d 964 (1998)	3, 9
<u>State v. Boot</u> , <i>supra</i>	10
<u>State v. Brown</u> , 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997)	6
<u>State v. Campbell</u> , 78 Wn.App. 813, 822, 901 P.2d 1050 (1995) ...	9
<u>State v. Campbell</u> , <i>supra</i>	9
<u>State v. Cienfuegos</u> , 144 Wn. 2d 222, 226, 25 P.3d 1011 (2001) 13	
<u>State v. Farr-Lenzini</u> , 93 Wn.App. 453, 460, 970 P.2d 313 (1999) 10	
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 78, 917 P.2d 563 (1996) ...	14
<u>State v. Johnson</u> ,. 124 Wn.2d 57, 69, 873 P.2d 514 (1994)	3
<u>State v. King</u> , 113 Wn.App. 243, 270-273, 54 P.3d 1218 (2002)..	15

<u>State v. McPherson</u> , 111 Wn.App. 747, 762, 46 P.3d 284 (2002)	12
<u>State v. Nelson</u> , 72 Wn.2d 269, 276, 432 P.2d 857 (1967)	12
<u>State v. Ortiz</u> , 119 Wn.2d 294, 308, 831 P.2d 1060 (1992)	11
<u>State v. Ortiz</u> , 119 Wn.2d 294, 311, 831 P.2d 1060 (1992)	11
<u>State v. Saltarelli</u> , 98 Wn.2d 358, 665 P.2d 697 (1982)	6
<u>State v. Sanders</u> , 66 Wn.App. 380, 386, 832 P.2d 1326 (1992)	12
<u>State v. Smith</u> , 115 Wn.2d 434, 444, 798 P.2d 1146 (1990)	3
<u>State v. Talley</u> , 122 Wn.2d 192, 211, 858 P.2d 217 (1993)	3
<u>State v. Tharp</u> , 27 Wn.App. 198, 205, 616 P.2d 693 (1980)	6
<u>State v. Thomas</u> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987)	14
<u>State v. Valdobinos</u> , 122 Wn.2d 270, 279, 858 P.2d 199 (1993)	11
<u>State v. White</u> , 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)	15
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	13
<u>Strickland</u> , 466 U.S. at 687	14
<u>Strickland</u> , 466 U.S. at 693	14
<u>Strickland</u> , 466 U.S. at 694	14
<u>Tharp</u> , 27 Wn.App. at 204 (quoting McCormack's Law of Evidence, §190, 448 2d Ed. 1972))	6
<u>United States v. Abel</u> , 469 U.S. 45, 48, 54, 105 S.Ct. 465, 83 L.Ed.2 450 (1984)	9

<u>United States v. Abel</u> , 469 U.S. 45, 48, 54, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984)	3
<u>United States v. Abel</u> , <u>supra</u>	10

Rules

ER 402	6
ER 403	3, 6
ER 404 (b)	6
ER 404(b)	6
ER 702	10, 11

I. **STATEMENT OF FACTS**

The State accepts the Statement of Facts as set forth by the defendants in their Briefs of Appellant. Where additional information is necessary, it will be supplemented in the argument section of this brief.

II. **RESPONSE TO ASSIGNMENTS OF ERROR NO. 1 (RUND BRIEF) AND NO. 1 AND 2 (LUYSTER BRIEF)**

The first assignments of error deal with the evidence at the time of trial concerning malicious harassment and a claim that the prosecution had failed to present substantial evidence of that charge, together with the admissibility of highly prejudicial evidence, with a claim being made that it only had marginal probative value.

When we boil the facts of this case down to its essential elements, it is a fact pattern dealing with a young, black male talking to someone on the street, when he is approached by five white males, walking together. They approach him and the

individual he is talking to and one of the groups enters into a conversation with the person that the young black is speaking to and is referring to him using the "N" word repeatedly. He then assaults the young, black male who defends himself. While being assaulted by the one white male, another white male enters into the fray also and when the young, black man tries to run from the scene a third member of this group shoots him in the leg after putting the gun to his chest, but apparently, a misfire. A call is made to 911 discussing the fact that five "skinheads" had attacked a young, black male on the street.

Two of the members of the group that assaulted this young man were the defendants in this case. Those two together with a third person (identified as the shooter) all have swastika tattoos and at least one of them claimed that he was a white supremacist.

The defendants on appeal make complaint that they should not have been lumped together as acting in concert and as accomplices. They note specifically that there was no testimony or evidence that they knew that the third person was armed with a firearm. However, they are not charged with that crime. What they are charged with is acting as principals and accomplices to a malicious harassment based on the young man's color of his skin.

Evidence of a defendant's gang membership may be relevant to show motive where the trial court finds a sufficient nexus between the gang affiliation and the motive for committing the crime. State v. Boot, 89 Wn.App. 780, 789, 950 P.2d 964 (1998); United States v. Abel, 469 U.S. 45, 48, 54, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984); State v. Johnson,. 124 Wn.2d 57, 69, 873 P.2d 514 (1994).

In State v. Talley, 122 Wn.2d 192, 211, 858 P.2d 217 (1993), it was held that evidence of bigoted beliefs may be admissible to show that the victim's selection as a target was a form of malicious harassment. In our case, the admission of the evidence concerning tattoos (of swastikas) and the identification of belonging to a specific type of group is reviewed for a manifest abuse of discretion. The court has found that this was relevant evidence and that its probative value outweighed its prejudicial effect. ER 403; State v. Smith, 115 Wn.2d 434, 444, 798 P.2d 1146 (1990).

The State submits that the evidence concerning the tattoos specifically related to the crime charged because it tended to prove that the defendants had a racial motive in selecting the victim, an African American. The tattoo may have been relevant to prove the

defendant assaulted the young African American because of his perception of the victim's race. Likewise, the information concerning the other young men there with the defendants further demonstrates that they were acting in concert as a group (or gang). The three that were identified (Luyster, Rund and Prueitt) all bore the same types of tattoos and, the evidence would clearly indicate, that they were acting in concert on the day of the attack.

The State submits that the evidence in this record is sufficient to support an inference of racial animus. Rund was a member of a white supremacist group. When people of like persuasion noticed the victim, one or more of its members uttered racial slurs directed towards him. Immediately thereafter, Rund assaulted the victim. Taking the reasonable inferences in the light most favorable to the State, a rational juror could find that the attack was orchestrated and that they were acting in concert in aiding and assisting each others display of racial animus.

The victim of our assault mentions that all five of the individuals that he saw approaching him were "talking about me." (RP 159-161). That when the "N" word was being used by Mr. Rund, that he considered this to be fighting words (RP 171). He further testified that he believed that the group of young whites had

singled him out. (RP 173). There had been no indication in the evidence that he had done anything to any of these individuals. He was merely standing on the street talking to someone else. It appeared that they had driven by on a previous occasion and actually come back, parked and got out and approached him. The victim knew the defendant, Rund, and the defendant, Luyster, from previous occasions. However, he did testify that he had never seen Rund in a group like this (RP 178) nor had he ever seen defendant, Luyster, in a group like this. (RP 183).

The trial court conducted a balancing to determine whether or not the probative outweighed the extreme prejudice to this type of evidence. In ruling it admissible, the court made the following comment on balancing:

“(THE COURT): Under – under that balancing, I think it’s clear that its highly prejudicial. All evidence usually is. But the probative value is relating, as I said before, the association with the motive, with the words used and – and the conduct.

And, again, it’s gonna be focused toward the fear experienced by the victim in his mind, is what we have – is what the State has to prove.

And so in doing so, I think it would be admissible.”
(RP 43, L. 9-20).

As previously stated, the appellate court reviews the trial court's evidentiary rulings for an abuse of discretion. State v. Brown, 132 Wn.2d 529, 571-572, 940 P.2d 546 (1997). While prior bad acts are generally inadmissible under ER 404(b) Washington courts have recognized exceptions to this rule. One of them is the res gestae exception. State v. Tharp, 27 Wn.App. 198, 205, 616 P.2d 693 (1980). Under this exception, evidence of other crimes is admissible "to complete the story of the crime on trial by providing its immediate context of happenings near in time and place." Tharp, 27 Wn.App. at 204 (quoting McCormack's Law of Evidence, §190, 448 2d Ed. 1972)). This flashing out of the evidence also goes hand in hand with the concepts of motive and intent. Clearly, these become relevant and probative. The question is are they so highly prejudicial that it prevents the defendants from receiving a fair trial. State v. Saltarelli, 98 Wn.2d 358, 665 P.2d 697 (1982). ER 404 (b) must be read in conjunction with ER 402 and ER 403. They provide the information that relevant evidence still must be weighed to determine whether its probative value is substantially outweighed by the danger of unfair prejudice. Here, the trial court was made aware of the concerns pre-trial, had a full opportunity to discuss it with counsel and balanced the prejudice against the

probative value. There has been no showing made that the trial court abused its discretion in ruling as it did.

III. **RESPONSE TO ASSIGNMENT OF ERROR NO 2 (RUND BRIEF) AND ASSIGNMENT OF ERROR NO. 3 (LUYSTER BRIEF)**

The next issue raised by both defendants is the State's use of Detective Zapata as a gang expert and his discussion with the jury about white supremacist groups.

The State called Detective Marshall Henderson of the Vancouver Police Department who testified about the statements that he took from Mr. Rund after the incident. He asked Mr. Rund if he was a white supremacist and Mr. Rund indicated that he was a white separatist. (RP 187, L. 7– 16). He further talked about the tattoos that were present on the body of Mr. Rund and he was also familiar with the swastika tattoo on Mr. Luyster. (RP 186-188).

The jury also heard from James Fessel who was a witness to this shooting and who was the person who called 911. In his excited utterances on the 911 call (which was played to the jury), he indicated that the young whites that attacked the person were

“all Skinheads”. (RP 202). Part of the 911 call where he describes the activities is as follows:

“9-1-1: What happened out there?”

“MALE CALLER: Okay, um wait a minute. What happened is that these guys, there’s a group of skinheads. See, my friend, the guy that got shot, is black.”

“9-1-1: Okay.

“MALE CALLER: Okay, they went by and they mentioned (indiscernible) and he goes, ‘What – what you say?’ He goes, ‘What – what – what you say?’ and they go, ‘Uh, nothin’.’ (Indiscernible.)

“And then, anyway, once they got (indiscernible) and he go (indiscernible) – he goes, ‘What do you guys say?’ and the Skinhead, Bobo, he goes, ‘Oh, you want to fight?’ and he went to go hit him. The black guy hit him, beat him down, (indiscernible), you know, so he goes, ‘No, I’m cool, I’m cool.’

“So another guy comes up, he goes (indiscernible, the other one, and so he went (indiscernible) with him and they – got the (indiscernible) on him, and the other guy pulled out the gun and shot him.” (RP 204, L. 3-24).

Officer Lawrence Zapata from the Vancouver Police Department testified that he has specialized training to assist in the investigation of white supremacy cases. That he has attended several different conferences throughout the United States and has also lectured and taught on the issue of white supremacy. (RP

295-296). He was asked specifically concerning swastika tattoos with respect to white supremacists and do they have a meaning towards African American people. He indicated that "it's recognized as a symbol of hate by various civil rights groups." (RP 296).

Evidence of a defendant's gang membership may be relevant to show motive where the trial court finds a sufficient nexus between gang affiliation and motive for committing the crime. State v. Boot, 89 Wn.App. 780, 789, 950 P.2d 964 (1998). But evidence of gang membership lacks probative value "when it proves nothing more than a defendant's abstract beliefs. State v. Campbell, 78 Wn.App. 813, 822, 901 P.2d 1050 (1995). It has probative value, however, when it proves premeditation, intent, motive, or a bias of a witness. United States v. Abel, 469 U.S. 45, 48, 54, 105 S.Ct. 465, 83 L.Ed.2 450 (1984). State v. Campbell, supra, involved a gang member who is charged with killing two rival gang members. The State theorized that the defendant had been motivated to kill the victims because they invaded his "turf" and challenged his authority. The State was allowed to show the defendant was a gang member, that the victims were rival members who disrespected the defendant and sold drugs on his

turf, and that in gang culture these are grounds for violent retaliation. The appellate court held that the trial court had not abused its discretion.

State v. Boot, supra, was another murder case. The trial court properly admitted, as probative of motive and premeditation, evidence that the defendant was a gang member and that killing someone tended to enhance status within his gang. The appellate court affirmed.

Finally, United States v. Abel, supra, was a case in which the government was allowed to show that a defense witness and the defendant belonged to the same gang; that each member of the gang took an oath to lie on behalf of other members; and thus that the defense witness was arguably biased. The United States Supreme Court affirmed the conviction.

In our case, the State used to explain the facts and circumstances expert testimony concerning white supremacists and the tattooing of certain members of the group. ER 702 requires that the witness be qualified as an expert and that the testimony be helpful to the trier of fact. State v. Farr-Lenzini, 93 Wn.App. 453, 460, 970 P.2d 313 (1999). Expert testimony is helpful if it concerns matters beyond the common knowledge of the

average layperson and does not mislead the jury. Farr-Lenzini, 93 Wn.App. at 461. Detective Zapata, who testified as an expert, told the jury that his testimony and opinions on white supremacy were acquired knowledge gained through experience, observation and study. State v. Ortiz, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992). The use of this type of evidence and testimony is admissible at the discretion of the trial court. The parties entered into lengthy discussions with the court pre-trial concerning issues surrounding this question. The trial court balanced the probative value versus the prejudice and also balanced whether or not these are items of common knowledge to the average lay person or whether or not there is additional clarification needed. A trial court's decision to admit opinion testimony is admitted for abuse of discretion. State v. Ortiz, 119 Wn.2d at 308. A court abuses its discretion when it bases a decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable. State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993). When considering the admissibility of testimony under ER 702, the appellate court engages in a two-part inquiry:

- (1) Does the witness qualify as an expert; and

(2) Would the witness' testimony be helpful to the trier of fact. Ortiz, 119 Wn.2d at 309.

Concerning the first part of the test, the qualifications of a witness to testify as an expert are primarily for the trial court. State v. Nelson, 72 Wn.2d 269, 276, 432 P.2d 857 (1967). Practical experience and training may be sufficient to qualify a witness as an expert. Ortiz, 119 Wn.2d at 310; State v. McPherson, 111 Wn.App. 747, 762, 46 P.3d 284 (2002).

Concerning the second part of the test, a police officer's explanations of the significance of tattooing in the gang culture is admissible at the trial court's discretion. This is often seen in the situation of gangs and selling of drugs. State v. Sanders, 66 Wn.App. 380, 386, 832 P.2d 1326 (1992); State v. Baird, 83 Wn.App. 477, 485, 922 P.2d 157 (1996).

The State submits that there is nothing to indicate that the trial court abused its discretion in allowing this expert opinion to be given to the jury to help them understand the evidence and testimony in the case.

IV. RESPONSE TO FOURTH ASSIGNMENT OF ERROR
(LUYSTER ONLY)

The last assignment of error raised by the defendant, Luyster only, deals with ineffective assistance of counsel and a claim that the defendant did not receive effective assistance of counsel because trial counsel failed to move to exclude statements of the non-testifying co-defendant. Specifically, the claim is that the trial counsel failed to object to the admission of the statements that Mr. Rund gave to Detective Henderson and that these statements implied that the defendant, Luyster, acted out of racial motivation. Washington applies the two-part Strickland test in determining whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn. 2d 222, 226, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. In this assessment, the appellate court will presume that the defendant was properly represented. Cienfuegos, 144 Wn.2d at 227. Second, the defendant must show that the deficient performance prejudiced the defense. This showing is made when there is a

reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 687; State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant, however, need not show that counsel's deficient conduct more likely than not altered the outcome in the case. Strickland, 466 U.S. at 693; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The appellate court will look to the facts of the individual case to see if the Strickland test has been met. Cienfuegos, 144 Wn.2d at 228-229

In our case, the claim is that defense counsel failed to object to the use of Mr. Rund's statements at the time of trial. Mr. Rund was only asked questions concerning himself. There was no Bruton issue involved. Further, the subject matter of the testimony was found after the 3.5 Hearing and was ruled to be admissible concerning Mr. Rund in the case in chief. There is absolutely nothing in this record nor has counsel given any indications as to why this would be inadmissible. Assuming that the defense attorney for Mr. Luyster had made objection at the time of trial, there is no showing that it would have prevented the jury from

hearing Mr. Rund's statements that he gave to Detective Henderson. The State submits that the objection would have been overruled and the jury would have been able to hear the information. This is based on a review of the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). The State submits that the defendant cannot claim ineffective assistance of counsel without first showing that there was some comment or question, an objection to which would have been sustained by the trial court. State v. King, 113 Wn.App. 243, 270-273, 54 P.3d 1218 (2002); State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993).

There simply has been no showing of ineffective assistance of counsel.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 18 day of July, 2006.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNE, WSBA #7869
Senior Deputy Prosecuting Attorney

DOCUMENTS: BRIEF OF RESPONDENT

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Date: July 20, 2006.
Place: Vancouver, Washington.