

NO. 35019-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYNA RA,

Appellant.

APPELLANT'S
COURT OF APPEALS II
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STATE OF WASHINGTON
BY [Signature]

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

The Honorable Frederick Fleming

CORRECTED REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT FAILED TO FOLLOW ITS OWN RULINGS EXCLUDING ANY ALLEGED GANG EVIDENCE, AND THIS ISSUE WAS PROPERLY PRESERVED BY MR. RA'S TRIAL COUNSEL.

The trial court's error in allowing prejudicial gang suggestions into evidence and argument infringed Mr. Ra's right to due process and a fundamentally fair trial. See U.S. Const. amends. 5; 14. Thus, the standard of review is reversal of Mr. Ra's conviction unless this court is persuaded, beyond a reasonable doubt, that the error was harmless. See Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

Despite the State's contention otherwise (See Br. of Respondent, at 12-13), Mr. Ra was not required to object to the wrongful admission of gang theory in order for this court to review this issue on appeal - as the trial court, in allowing gang theory to be injected into evidence and argument, committed a manifest constitutional error, and thus, the issue may be raised for the first time on appeal. State v. Kassahun, 78 Wn.App. 938, 948, 900 P.2d 1109 (1995), citing State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992); citing also: State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988); RAP 2.5(a)(3); State v. Ellis, 71 Wn.App. 400, 404, 859 P.2d 632 (1993).

In any event, Mr. Ra's trial counsel did object, ad nauseum, to the introduction of gang theory as either proof of premeditation, intent, or, as presence of motive. This was accomplished through motions in limine, repeated arguments to the court throughout trial, and, through accompanying mid-trial briefing. See RP 22, 795-96; CP 47-48, 136-148; see also, Opening Br. of Appellant at 15-28.

Nevertheless, the State maintains that, since the trial court continuously held that gang evidence was inadmissible, and Mr. Ra failed to object at each and every instance that the State placed gang theory and argument before the jury, Mr. Ra waived the right to appeal this issue. In essence, the State argues that Mr. Ra, as the "winner" of the gang evidence rulings which took place outside the presence of the jury, cannot avail himself of any "standing objection." See Br. of Respondent at 21, citing State v. Powell, 126 Wn.2d 244, 893 P.2d 651 (1995). It is far from sound precedent to hold that only the "loser" in an evidentiary argument preserves the issue for appeal.

Indeed, what difference does "winning" make to the defendant when, after success outside the presence of a jury, he is bombarded with irrelevant and highly prejudicial theory in direct disregard of the ruling suppressing it. In reality, Mr. Ra was the losing party. What's more, Mr. Ra did object on numerous occasions when gang intent and motive was

suggested to the jury. See Opening Br. of Appellant at 15-28. However, based on the posture of the court in response to these objections, they became futile, and it is understandable that trial counsel did not continue to object in every instance, with surgical precision – the trial was already gutted.

The trial court and the State were both fully aware – before and throughout trial, of Mr. Ra’s objection to any suggestion to the jury that gang membership inspired any of the events that occurred on the Ruston Way waterfront. The unique phenomenon presented when the court, outside the presence of the jury, ruled in favor of Mr. Ra’s motions, yet, in front of the jury, allowed gang theory to permeate the trial should not act as a barrier to Mr. Ra’s claims (i.e. – although he was supposedly not the “losing” party, Mr. Ra should still be viewed as having had a standing objection to any and all gang suggestion, evidence, and argument) See Falk v. Keene Corporation, 113 Wn.2d 645, 657-60, 782 P.2d 974 (1989).

The trial court’s failure to adhere to its own rulings throughout the trial made Mr. Ra’s objections futile – the substance of Mr. Ra’s objection to any and all gang evidence or suggestion was “thoroughly explored,” and this appeal ground preserved. United States v. Varela-Rivera, 279 F.3d 1174, 1177-79 (9th Cir. 2002).

The trial court abused its discretion in disregarding its own blanket ruling regarding gang evidence and allowing the State to inject irrelevant and highly prejudicial gang suggestion into evidence and argument. See State v. Rehak, 67 Wn.App. 157, 162, 834 P.2d 651, rev denied, 120 Wn.2d 1022 (1992). Mr. Ra urges this court to reverse his conviction as the trial court's position was wholly unreasonable. See Rehak, 67 Wn.App. at 162.

2. THE PROSECUTORIAL MISCONDUCT COMMITTED AT TRIAL WAS PERVASIVE AND HARMFUL – AND PROPERLY PRESERVED FOR REVIEW BY MR. RA'S TRIAL COUNSEL.

As addressed in Appellant's opening brief, and section one (above) of his reply brief, the issue of improper suggestion and argument of gang theory is properly before this court.

The State's improper suggestions began with its direct questioning of Detective Bair – and asking, specifically, what unit the detective was in. RP 714. The State anticipated the answer – "I'm in the gang unit." Id.

The State continued with its repetitious and leading questions of its own witness – Mr. Bun. The State: interrogated the witness as to why both he and Mr. Ra had guns with them that evening; suggested to the witness that he and Mr. Ra carried guns to guard against retaliatory shootings; stated to Mr. Bun that he and Mr. Ra had guns because that's what they do – carry guns; argued that when Mr. Bun, Mr. Ra and their

friends are together and have guns, nobody messes with them; suggested there was a loyalty amongst Mr. Bun and Mr. Ra; and, suggested that they carried guns to be “prepared for anything[.]” See RP 737-755. The State’s testimonial questioning of Mr. Bun was designed to suggest to the jury that Mr. Ra, along with Mr. Bun and everybody else in the SUV, were gang members - prone to carrying guns and committing unprovoked acts of gun violence.

This line of questioning was all within the desired purpose of the State to ensure that the jury believed that the witness and appellant were gang members. This constituted misconduct. See State v. Torres, 16 Wn.App. 254, 258-59, 554 P.2d 1069 (1976). All the while, the State pried at the door in hopes of opening the flood gates to even more substantive irrelevant and prejudicial gang evidence. See State v. Ortega, 134 Wn.App. 617, 626, 142 P.3d 175 (2006); see also State v. Avendano-Lopez, 79 Wn.App. 706, 713-16, 904 P.2d 324 (1995).

In State v. Campbell, 78 Wn.App. 813, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (1995), the Court of Appeals noted that the trial court, after properly admitting gang evidence, carefully limited its admission and use – specifically excluding expert opinion evidence that gang members ordinarily carry and use guns. See Campbell, 78 Wn.App. at 818. In the present case, even though any and all gang evidence was ruled

inadmissible, and even though there was no expert testimony, the State, through its own testimonial and leading questioning of its own witness, told the jury that Mr. Ra and his entourage routinely carried guns – because that’s what they do.

The prosecutor’s entire closing argument was based on this theory - that Mr. Ra was a gang-member, who, violent by nature, sought to elevate his status by killing complete strangers. See RP 912:13-17; 912:24 – 913:2; 913:13-17. Ironically, the prosecutor even argued that Mr. Ra’s desire for elevated status provided a motive to “shoot for no reason.” See RP 931:22-25.

As far as the State was concerned, all it had to do was avoid uttering the word “Gang.” As long as the State did this much, it was free to argue that gang membership inspired not only the entire Ruston Way incident, but provided premeditation and intent evidence, and even supplied a motive – to “elevate” Mr. Ra’s status and be “the baddest of the bad.” Even without the “G” word, arguing this theory to the jury decimated Mr. Ra’s right to a fair trial.

The devastating effect of the “elevated status” argument, and its restriction to those cases with competent, relevant, and properly admitted gang evidence is well explained in State v. Johnson, 124 Wn.2d 57, 873 P.2d 514 (1994). In Johnson, the trial was replete with strong and relevant

gang evidence – the defendant admitted belonging to a gang and was openly accused of a retaliatory gang shooting. See *Id.* During trial, a police officer was allowed to testify as an expert on gangs. See *Id.*, at 62-63. The defendant was convicted, and, in imposing an exceptional sentence, the sentencing judge made certain findings of fact. See *Id.* at 64. One of these findings was that a purpose of gangs (including the CRIPS and Black Gangster Disciples) was to commit violent offenses in general. *Id.* Another finding of fact was that a gang member “elevates his position in this hierarchy and enhances his status by committing violent acts[.]” *Id.* The primary issue before the Washington State Supreme Court was whether an exceptional sentence could be premised on “gang motivation.” See *Id.* at 65. After a detailed analysis of gang evidence, the Court found that not only was “gang motivation” evidence properly admitted, but that it could serve as a factor in an exceptional sentence. See *Id.*, at 65-70.

In *State v. Boot*, 89 Wn.App. 780, 950 P.2d 964, rev. denied, 135 Wn.2d 1015 (1998), the Court of Appeals held that evidence of the defendant’s gang membership, a prior incident involving the defendant’s use of a gun, and, testimony which established that killing someone elevated a gang member’s status was relevant to prove premeditation. *Id.* at 789-90. The Court of Appeals discussed the relevance of the gang evidence as applied to the facts presented at trial:

[K]illing someone increased a gang member's status and the defendant was a gang member. This shows premeditation since it suggests he had a deliberate intent to kill Ms. Reese to gain higher gang status. Mr. Boot's prior acts involving a gun demonstrated his escalating gun use in the context of his quest for higher gang status and was also evidence of premeditation.

Id, at 789-90.

In the present case, the State introduced and argued the “elevated status” motive – without having any basis upon which to do so. The State had no competent evidence that a desire to elevate his status in an hierarchy by committing acts of violence served as motive to kill – but argued this theory thoroughly.

In its response brief, the State cites State v. Negrete, 72 Wn.App. 62, 863 P.2d 137 (1993) for the proposition that the State’s comment, during closing argument, that it was defense counsel’s job to twist the evidence did not adequately prejudice Mr. Ra. See Response Br. at 30-31. In Negrete, defense counsel had first argued that the undercover police agent was a “trained liar” and the confidential informant was paid to “frame people.” See Negrete, 72 Wn.App. at 66. The prosecutor argued in rebuttal that there was no evidence presented at trial of the above accusations, and returned the salvo with the thought that “[defense counsel] is being paid to twist the words of the witnesses[.]” Id. No curative instruction was requested. Id, at 67. While the appellate court

found the prosecutor's remarks improper, it did not find them "irreparably prejudicial." *Id.* The court cited the overall strength of the case against the defendant, and the isolated nature of the remarks. *Id.*

Quite another result was reached in Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983), wherein the prosecutor, in closing argument, with the purpose of attacking the credibility of a defense witness' trial testimony, "labeled defense counsel's actions as unethical and perhaps even illegal" without backing this claim with references to any evidence produced at trial. See Bruno, 721 F.2d at 1194. The 9th Circuit Court of Appeals noted that during his summation, the prosecutor attacked the defendant's claims of innocence by suggesting to the jury that merely by hiring a defense attorney, the defendant was guilty. *Id.* The prosecutor implied as well that defense counsel is generally retained "solely to lie and distort the facts and camouflage the truth," *Id.* On appeal from the Northern District of California, the government argued that these remarks were appropriate, based on evidence produced at trial – namely, the reversal of the witness' memory after speaking with defense counsel. *Id.* The government further argued that any error was harmless beyond a reasonable doubt. *Id.* In strong disagreement, both with the propriety of the statements and with the effect of the error, the 9th Circuit Court of Appeals stated:

At the outset, we feel it incumbent on us to note that in no situation in a criminal trial such as this one do we feel the mere act of hiring an attorney is probative in the least of the guilt or innocence of defendants. “[L]awyers in criminal cases are necessities not luxuries,” and even the most innocent individuals do well to retain counsel. Neither is it accurate to state that defense counsel, in general, act in underhanded and unethical ways, and absent specific evidence in the record, no particular defense counsel can be maligned. Even though such prosecutorial expressions of belief are only intended ultimately to impute guilt to the accused, not only are they invalid for that purpose, they also severely damage an accused's opportunity to present his case before the jury. It therefore is an impermissible strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice. Furthermore, such tactics unquestionably tarnish the badge of evenhandedness and fairness that normally marks our system of justice and we readily presume because the principle is so fundamental that all attorneys are cognizant of it. Any abridgment of its sanctity therefore seems particularly unacceptable.

Id., at 1194-95 (citations omitted).

The 9th Circuit Court of Appeals, finding the prosecutor's remarks an error of constitutional dimension, determined that they were not harmless beyond a reasonable doubt, and granted the defendant's writ of habeas corpus. *Id.* at 1195, citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 795 (1967).

In the present case, similar to Bruno, the State told the jury that it was defense counsel's **job** to twist and turn the **evidence**. This posed the same problem as the Bruno court faced – i.e. – the government claiming

that the defendant hired an attorney simply for the purpose of distorting the facts and camouflaging the truth. See *Id.*, at 1194.

Unlike the Negrete case, in the present case, the State's improper argument did not come on the heels of ignoble or dubious argument by defense counsel. Nor was this comment the only improper argument by the State. Furthermore, pursuant to Bruno, the State's remarks struck at the heart of Mr. Ra's right to counsel and right to a fair trial, and thus, this court review them and the extent of their prejudicial impact. On this basis, Mr. Ra asks this court for a reversal of his conviction and a new trial. See Chapman, 386 U.S. 18.

3. THE RELEVANT AND PROPERLY ADMITTED EVIDENCE, ON ITS OWN, WAS INSUFFICIENT TO SUPPORT MR. RA'S CONVICTION FOR ATTEMPTED PREMEDITATED MURDER

Challenges to the sufficiency of the evidence require "whether after viewing the evidence most favorable to the State, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." State v. Guloy, 104 Wn.2d 412, 417, 705 P.2d 1182 (1985), citing State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

Paring away all of the improper gang theory, suggestion, and argument, this court should find that there was no competent evidence of premeditation or intent.

4. THE TRIAL COURT LACKED THE APPEARANCE OF IMPARTIALITY, THEREBY DENYING MR. RA HIS RIGHT TO DUE PROCESS - A CONSTITUTIONAL VIOLATION WHICH THIS COURT SHOULD REVIEW.

Criminal defendants have a due process right to a fair trial by an impartial judge. Wash. Const. art. I, sec. 22; U.S. Const. amends. VI, XIV. The United State Supreme Court recognizes that some constitutional deprivations so destroy a defendant's rights as to warrant automatically, a reversal of conviction – regardless of any “harmlessness” – this includes adjudication before a biased judge. Rose v. Clark, 478 U.S. 570, 577, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986), citing Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

In its response brief, the State cites State v. Tolias 135 Wn.2d 133, 954 P.2d 907 (1998) for the proposition that Mr. Ra failed to object to any appearance of unfairness, and thus waived the issue for appeal. See Response Br. at 38-40. In Tolias, the appellate court specifically noted that the appellant did not claim that the court's appearance of unfairness implicated the Constitution – for this reason, the court deemed the failure to object as a waiver of the right to appeal the issue. See Tolias, 135 Wn.2d at 140. Furthermore, the issue before the Tolias court was the appellant's objection to the judge having previously been involved in “pre-filing” civil mediation efforts – the appellant did not allege any judicial

animus towards appellant. See Id.

Unlike Tolias, Mr. Ra claims that his Constitutional right to Due Process and fair trial were violated by apparent court bias. See Opening Br. at 47-49. Of all the examples of apparent court bias, Mr. Ra reiterates that the trial court suggested much of the State's improper argument See RP 825:5 – 836:10.

5. CUMULATIVE ERROR DENIED MR. RA A FAIR TRIAL.

Mr. Ra reiterates his argument presented in his opening brief. See Opening Br. at 49-50.

B. CONCLUSION

For the foregoing reasons, Mr. Ryna Ra respectfully requests this Court reverse his convictions and remand for a new trial.

DATED this 5th day of July, 2007.

Respectfully submitted:



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Attorney for Appellant

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DIVISION II

CERTIFICATE OF SERVICE

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I, Holly Fisher, hereby declare as follows:

STATE OF WASHINGTON
BY [Signature]
DEPUTY

That I am the legal assistant to Robert C. Freeby, attorney for the Appellant herein.

That on the 6th day of July, 2007, affiant delivered via legal messenger the original and one copy of Appellant's Corrected Reply Brief to the Court of Appeals, and a copy to the Pierce County Prosecutor's Office, Appellate Division.

A copy was also mailed on the same day to Appellant by first-class postage prepaid at:

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

DATED this 6th day of July 2007, at Tacoma, Washington

[Signature]

Holly Fisher,
Legal Assistant to Robert C. Freeby
Attorney for Appellant