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Division II
State of Washington
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NO. 49933-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALEX QUINTANA JR.,

Appellant.

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

The Honorable Stephen Warning, Judge

REPLY BRIEF OF APPELLANT AND
BRIEF OF RESPONDENT IN CROSS-APPEAL

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A. ARGUMENT IN RESPONSE TO CROSS APPEAL

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PERMITTING MR. ARQUETTE'S INCULPATORY STATEMENT TO BE PRESENTED TO THE JURY

During opening statements, counsel for Alex Quintana, said that Justice Arquette knew where Erica Osorio-Heaton and Chris Jones lived, that he was angry with Mr. Jones, and that unknown to the occupants of the SUV, Mr. Arquette was armed. Report of Proceedings (RP) (C) at 112.¹ Counsel stated that Justice Arquette fired “a couple shots off in the air.” RP (C) at 112. Counsel for Mr. Quintana stated that during the defense’s presentation, the jury would first hear from “Justice Arquette, who is going to come up here and say whatever he’s going to say. Who knows, we’ll find out.” RP (C) at 112.

Mr. Arquette, after being sworn under oath, immediately asserted his Fifth Amendment privilege against self-incrimination. RP (C) at 114. He then answered several questions by counsel and stated that he told Detective Michael Maini that Mr. Quintana borrowed his phone and charger, which were found in the SUV used in the incident. RP (C) at 117-18. He then again asserted his right against self-incrimination and the jury was excused. RP (C) at 118. The court asked Mr. Arquette if he intended to testify consistently with his statements to Detective Maini, denial of

¹Report of Proceedings (C) consists of the trial record of December 9, 2016.

knowledge of the shooting or involvement in the shooting, in which case he would not be in danger of incriminating himself. RP (C) at 121. Mr. Arquette stated that he was going to testify consistently with his statement. RP (C) at 121. The court ruled that based on his answer, Mr. Arquette did not have a Fifth Amendment right to not answer questions by Mr. Quintana's counsel. RP (C) at 121. After being asked if he understood the ruling, Mr. Arquette stated:

I—I'm the one that pulled the trigger. He (witness pointing from stand) shouldn't even be here for this charge. Plain and simple, it was me who pulled the trigger. The phone—

The court then stated "Okay, let me stop you," and Mr. Arquette continued, "— that was my phone."

RP (C) at 122.

Defense counsel contacted Josh Baldwin, counsel for Mr. Arquette on another matter, who spoke with Mr. Arquette by phone. RP (C) at 123. Mr. Arquette indicated that he was asserting his privilege against self-incrimination. RP (C) at 124. After discussion, the State argued that Mr. Arquette's "testimony" should be stricken because the State would not be able to cross-examine him. RP (C) at 132. The trial court found that Mr. Arquette was unavailable as a declarant under ER 804(a) and found the statement was admissible. RP (C) at 136. In the presence of the jury, the court stated:

We continued to speak to Mr. Arquette after you went out. Mr. Arquette made some additional statements, and that's what you're going to hear. At that point, thought Mr. Arquette asserted his Fifth

Amendment privilege to speak no further; and, because of that, he's not here now.

So, what's going to happen is you're going to hear what was said on the witness stand while you were out.

RP (C) at 141.

The court played the audio recording of Mr. Arquette's statement to the jury. RP (C) at 142-43. Exhibit 65.

a. The court did not abuse its discretion by admitting Mr. Arquette's inculpatory statement

The Sixth Amendment guarantees, among other rights, a defendant's right to present a defense and cross-examine witnesses. *State v. Levy*, 156 Wn.2d 709, 731, 132 P.3d 1076 (2006). Notwithstanding these rights, a witness's valid assertion of "Fifth Amendment rights justifies a refusal to testify despite the defendant's Sixth Amendment rights." *Levy*, 156 Wn.2d at 731 (quoting *United States v. Goodwin*, 625 F.2d 693, 700 (5th Cir.1980)). The Fifth Amendment privilege against self-incrimination is applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

"The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). Both the Compulsory Process Clause of the Sixth Amendment² and art. I, § 22³ of

²The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . ."

the Washington Constitution guarantee an accused the right to compulsory process to compel the attendance of witnesses. *Washington v. Texas*, 388 U.S. 14, 18, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967); U.S. Const. amends. VI; XIV. "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense.... This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. at 19; see also *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

The State's interest in cross-examining defense witnesses, on the other hand, is not rooted in the Constitution, but is statutory in nature. *United States v. Pardo*, 636 F.2d 535, 542 n. 21 (D.C.Cir.1980) ("The government of course has no Sixth Amendment or other constitutional right to cross-examine defense witnesses.").

The trial court must be vigilant in ensuring that a defendant has a full and fair cross-examination, (see *United States v. Cardillo*, 316 F.2d 606, 611(2d Cir.1963)), it must similarly safeguard the government's cross-examination.

The trial judge's decision in striking that balance will be overturned only for abuse of discretion. *United States v. Garcia-Rosa*, 876 F.2d 209, 237 (1st Cir. 1989). See also *United States v. Berrío-Londoño*, 946 F.2d

³Art. 1, § 22, Const., provides in part, "In criminal prosecutions the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf . . ."

158, 160 (1st Cir. 1991) (holding that trial court did not abuse its discretion by refusing to strike witness's testimony on direct examination when witness asserted Fifth Amendment on collateral matters on cross-examination, particularly when witness was required to invoke privilege in presence of jury). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). "[W]here the rights of the defendant and the government can be reconciled, the defendant's constitutional right to procure testimony in his favor must prevail." *Pardo*, 636 F.2d at 544.

Relying on federal cases, the State argues the trial court erred by not striking the testimony of the nonresponsive witness, arguing that exclusion of the testimony is the proper remedy when the witness cannot be cross-examined. Brief of Respondent/Cross Appellant at 29-30. The State argues that the court applied the wrong legal standard. *Id.*

The court was correct in permitting the jury to hear Mr. Arquette's statements, and the court's ruling was not an abuse of discretion.

b. The prosecution could have impeached Arquette's testimony even in the absence of his answers on cross-examination.

Arquette initially answered a number of direct examination questions and did not engage in a blanket refusal to answer any question asked by the defense, even after initially asserting his right against self-

incrimination. Arquette initially invoked his privilege, then after apparently changing his mind, answered approximately 17 questions during direct examination, and then asserted his Fifth Amendment privilege a second time RP (C) at 114-18. The court conducted an examination and determined that Mr. Arquette could not rely on the Fifth Amendment, at which time he *sua sponte* volunteered his statement exculpating Mr. Quintana. RP (C) at 120-122.

The prosecution, however, did not need Arquette's answers on cross-examination in order to impeach his testimony by use of a prior statement to Detective Maini, which was admissible for impeachment purposes under ER 804(b)(3). ER 804(b) permits the introduction of a statement against interest if the declarant is unavailable. Under ER 804(a)(2), unavailability includes a declarant who "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." Here, the trial court found that Arquette was an unavailable declarant under ER 804(a). RP (C) at 136.

A statement against interest made by an unavailable declarant is not excluded by the hearsay rule. ER 804(b)(3).⁴ Under this rule, Mr.

⁴ ER 804(b)(3) defines a "Statement Against Interest" as:
A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Arquette's denial to Detective Maini that he was involved or had knowledge of the shooting was admissible; its admission could have been impeached Mr. Arquette's statement inculcating himself by contradicting it.

c. The court did not abuse its discretion by balancing the State's interest with Mr. Quintana's Sixth Amendment right

The court's ruling harmonized a conflict between a defendant's Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor," U.S. Const. amend. VI, and the government's interest in cross-examining a defense witness who has invoked his Fifth Amendment right against self-incrimination.

The court allowed the jury to hear Mr. Arquette invoke his Fifth Amendment privilege and have it explained to him by the court. That solution strikes an appropriate balance between the government's and the defendant's interests because the State could have used the recorded testimony to impeach Mr. Arquette's statement and could have relied upon the adverse inference of the witness's invocation of the Fifth. *United States v. Kaplan*, 832 F.2d 676, 684 (1st Cir.1987), cert. denied, 485 U.S. 907, 108 S.Ct. 1080, 99 L.Ed.2d 239 (1988), (when "a non-party government witness invokes the Fifth Amendment on cross-examination at trial, the court should permit the assertion of the privilege in the presence of the jury. The invocation of the privilege acts as a form of impeachment.")

d. Mr. Arquette waived his Fifth Amendment privilege by making the voluntary, inculpatory statement

Last, the State's argument also overlooks the fact that Mr. Arquette waived his right to assert his Fifth Amendment privilege by spontaneously stating that he was the shooter. A witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details. See *Rogers v. United States*, 340 U.S. 367, 373, 71 S.Ct. 438, 95 L.Ed. 344 (1951). The privilege is waived for the matters to which the witness testifies, and the scope of the "waiver is determined by the scope of relevant cross-examination," *Brown v. United States*, 356 U.S. 148, 154-155, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958). See *United States v. Constantine*, 263 F.3d 1122, 1128 n. 4 (10th Cir. 2001) ("It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.") (quoting *Mitchell v. United States*, 526 U.S. 314, 321, 119 S.Ct. 1307, 143 L.Ed. 2d 424 (1999)). Here, Mr. Arquette's spontaneous, voluntary statement, when no question was posed, constitutes a waiver, and he should have been precluded from asserting his Fifth Amendment privilege after making the statement.

The State's argument fails as the trial court did not err in refusing to

strike Mr. Arquette's statement following his assertion of the Fifth Amendment.

2. ARGUMENT IN REPLY

a. Mr. Quintana was denied his right to effective assistance of counsel when his defense attorney failed to request a limiting instruction

Evidence of other bad acts "is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Evidence of a defendant's affiliation with gangs is not automatically precluded under this rule. There are certain limited circumstances under which a jury may consider gang evidence for a non-propensity purpose. See *State v. Campbell*, 78 Wn. App. at 821-22, 901 P.2d 1050 (1995) (evidence properly admitted to show premeditation, motive, and intent).

But as a number of courts have recognized, gang evidence is inherently prejudicial. And when a jury may have considered this evidence for an improper purpose, a new trial is the only sufficient remedy. See *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009); *United States v. Roark*, 924 F.2d 1426, 1430-34 (8th Cir. 1991) (gang affiliation causes jurors to "prejudge a person with a disreputable past, thereby denying that person a fair opportunity to defend against the offense that is charged.")

Where evidence of other misconduct, such as gang affiliation, is admitted, it should be accompanied by a limiting instruction under ER 105

directing a jury to disregard the propensity aspect of the evidence and focus solely on its proper purpose. *State v. Griswold*, 98 Wn. App. 817, 825 991 P.2d 657 (2000). Here, the State utilized the gang evidence for the wholesale purpose of arguing that one individual gang member could and did exert control over all the other members. The State argued “[t]hese people are in a gang,” (RP (D) at 237)⁵ and that the jury had been exposed to “gang mentality in action.” RP (D) at 244-45. The State argued that the jury “get[s] to see the inner workings of this, and how they play off of each other, and how one person can have control over a group,” that the gang members have pledged loyalty to each other and to the gang, that they are expected to assist in retribution against anyone who has offended against another member of the gang, and that the gang not only controls the motive of the gang members, but it “controls the statements that they make.” RP (D) at 267.

Under ER 105, a limiting instruction would have been appropriate to explain that the evidence could only be considered for limited, specified purposes. Based on the facts and the law, Mr. Quintana was entitled to limiting instructions. Considering the circumstances of this case, moreover, counsel’s failure to request limiting instructions was unreasonable.

Counsel’s conduct is not deficient if it can be characterized as a legitimate trial strategy. However, “[t]he relevant question is not whether

⁵RP(D) refers to the report of proceedings dated December 9, 2016.

counsel's choices were strategic, but whether they were reasonable.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

It is correct that appellate courts have held that the omission of a request for a limiting instruction can be legitimate trial strategy where such an instruction would merely reemphasize damaging evidence. See, e.g., *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms represented a tactical decision not to reemphasize damaging evidence). See also, *State v. Yarbrough*, 151 Wn. App. 66, 90-91, 210 P.3d 1029 (2009) (presuming that Yarbrough’s attorney decided not to request a limiting instruction on gang-related ER 404(b) evidence as a legitimate trial strategy to avoid reemphasizing the evidence); *State v. Price*, 126 Wn. App. 617, 649, 109 P.3d 27 (2005) (“[w]e can presume that counsel did not request a limiting instruction” for ER 404(b) evidence to avoid reemphasizing damaging evidence), review denied, 155 Wn.2d 1018 (2005). In this case, however, the damaging testimony was pervasive and went to the heart of credibility issues, as argued by the State. The argument that counsel wanted to “deemphasize” the gang evidence does not apply to the facts of this case. The defense gained no benefit whatsoever by essentially ignoring the plethora of gang testimony and hoping for the best.

The prosecutor introduced a large amount of testimony describing in great detail the behavior of a gang members, and was free to argue that not only did gang members pledge loyalty, but that the loyalty “controls the statements that they make,” implying that the gang-affiliated witnesses were not truthful. RP (D) at 267. Without a limiting instruction, the jurors were free to convict Mr. Quintana not because they were convinced beyond a reasonable doubt that he fired the gun, but simply because he was in a gang. The jury was free to base its determination of guilt on the general picture that the State painted of gang members. Trial counsel’s failure to propose a limiting instruction was prejudicially ineffective, and requires reversal of Mr. Quintana’s convictions.

B. CONCLUSION

For the reasons in section 1, this Court should reject the State’s cross-appeal. For the reasons contained in argument 2, and in Mr. Quintana’s opening brief, this Court should reverse his convictions and remand for a new trial or in the alternative, reverse his convictions with instructions to dismiss.

DATED: February 21, 2018.

Respectfully submitted,
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CERTIFICATE OF SERVICE

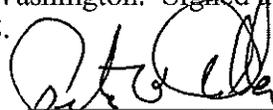
The undersigned certifies that on February 21, 2018, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and Mr. Thomas Ladouceur, Cowlitz County Prosecutor's Office and copies were mailed by U.S. mail, postage prepaid, to the following Appellant:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 21, 2018.


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