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Court of Appeals
Division II
State of Washington
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No. 53161-5-II

IN THE STATE OF WASHINGTON
COURT OF APPEALS DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOSE AYALA REYES,

Appellant.

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR PIERCE COUNTY
#16-1-02804-9

**BRIEF OF RESPONDENT
STATE OF WASHINGTON**

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INTRODUCTION

This case involves both a murder and a conspiracy that leads to and follows the crime. Defendant Jose Alaya Reyes wanted to join Mara Salvatrucha, MS-13, a violent gang from Central America. Conspiring with gang members, Defendant identified his victim, Samuel Cruces Vasquez, a fellow employee at Elemental Pizza in Tacoma, Washington. On April 28, 2016, Defendant lured Mr. Cruces into a car and stabbed him repeatedly. When he ran from the car, Mr. Cruces was struck by a hit and run driver, eventually dying from his injuries.

The State of Washington charged Defendant with first degree murder, second degree murder, and conspiracy to commit first degree murder. A Pierce County jury convicted Defendant of all three and at sentencing, after dismissing the second degree murder conviction, the trial judge imposed consecutive sentences for the remaining two convictions. Defendant now appeals, alleging that errors in voir dire deprived him of a fair trial. The State respectfully requests the Court to uphold Defendant's convictions, affirm the Court's Judgment and Sentence and dismiss this appeal with prejudice.

I. RESTATEMENT OF ISSUES PRESENTED

Defendant's appeal presents three issues:

A. "[U]nless a defendant can show prejudice, the mere fact that one uses his or her peremptory challenge to cure a wrongfully denied for-cause challenge does not establish a constitutional violation." State v. Fire, 145 Wn.2d 152, 167, 34 P.3d 1218 (2001) (Alexander, C.J., concurring). Defendant used three peremptory challenges to excuse three jurors he alleges were biased. Has Defendant failed to show prejudice from using some but not all his peremptories?

B. "A confession is voluntary, and therefore admissible, if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights." State v. Aten, 130 Wn.2d 640, 663, 927 P.2d 210 (1996). After receiving a Miranda warning in writing, Defendant freely and voluntarily answered questions in Spanish from an FBI agent. Does substantial evidence support the trial court's conclusion that Defendant waived his right to remain silent?

C. Under RCW 9.94A.589, "all sentences imposed [for two or more serious violent offenses arising from separate and distinct criminal conduct] shall be served consecutively to each

other.” RCW 9.94A.589(1)(b). The trial court found Defendant’s crime of first degree murder did not encompass the same conduct as conspiracy to commit first degree murder. Did the trial court abuse its discretion by entering consecutive sentences?

II. STATEMENT OF FACTS

Defendant’s opening brief summarizes the evidence and testimony that led to his conviction as both participant and co-conspirator in Samuel Cruces Vazquez’s murder. On appeal, his arguments overlook three facts. First, the jurors Defendant challenged for cause during voir dire were forthright and honest, showing insight into their ability to be impartial jurors. Second, Defendant understood his right to remain silent, waived it, and never reinvoked it. Third, the conspiracy to murder Mr. Cruces included planning and actions beyond Defendant’s conduct during the murder.

A. The Three Challenged Jurors Disclosed and Examined Their Concerns Appropriately.

Before voir dire began, the Court had all potential jurors fill out a questionnaire that included questions about gangs, gang violence, and concerns about being impartial. (VRP 58-59). The Court and counsel interviewed many of the potential jurors alone in open court,

including jurors 14, 24, and 39. All three disclosed issues with hearing evidence of gangs and gang violence.

Juror 14 was a retired teacher who had experience with gangs while teaching middle school.

Q. Do you believe that -- you said you struggle to have pity or understanding towards a gang member regardless of race. Tell me why you feel that way.

A. There is really two parts to that. The race part is not an issue for me. Anybody, I don't care what their heritage is, if you're involved in a group that is in my mind inherently dangerous or violent, it almost feels like my mind is already set in that regard; that they're coming to us with that already in the background, given my training and my knowledge. So it's kind of hard to not think that. If I'm trying to be completely honest and upfront about it, it would be very difficult to not think from that perspective.

(VRP 179-80). Having disclosed this, Juror 14 also affirmed that he could listen to the evidence with an open mind. "I would do my level best to hear the facts and just play on those, because I don't think anything is really -- the guilt in a case is not forgone." (VRP 181-82).

Defendant challenged Juror 14 for cause, which the trial judge denied,

I don't think there's a basis to strike him for cause. He indicated he could be fair and impartial. If there is a concern, it really goes to whether or not there is a legitimate fear of after verdict retaliation, if there is a

guilty verdict. I don't think that that necessarily is a realistic fear at this point. I'll entertain a motion to seal the juror documents...

(VRP 199-200). Having seen him answer questions honestly and with insight, the Court kept Juror 24 in the jury pool. Defendant then used a peremptory strike to remove him.

The next juror, number 24, grew up in Arizona: "I was around Hispanics and they kind of had a reputation for that [fighting]". (VRP 220). He recognized that he had this belief from his upbringing, and that he would need to counterbalance it as a juror.

Q. Do you think it would be easier to hold the state to that burden if there were a white non gang member defendant than a Hispanic gang member defendant?

A. I think it would be easier, yeah.

Q. Does that mean there is a different burden for those two groups?

A. No, I think it's the same.

(VRP 223). The trial court denied Defendant's motion to excuse for cause, recognizing "despite that basis of his belief, [Juror 24] would be able to keep an open mind." (VRP 298). Again, the juror was honest about his background and assumptions, and as important, the need to put these aside when listening to the evidence. Defendant used a peremptory to strike him from the jury pool.

Finally, Juror 39 is a surveillance technician at the Capitol Campus in Olympia, Washington. He expressed concern that his training for examining surveillance video would influence how he evaluated the evidence.

I've been doing this for such a long time for the state. Putting aside that experience and skill level and things like that, and not accepting just what was presented in the court. It's really difficult for me to say I would be able to put aside the experiences that I've had in the past and just focus on what's presented in the court.

(VRP 262). When questioned about the depth of this concern, Juror 39 expressed no reservations holding the State to its burden of proof.

(VRP 266). The issue was making quick judgments based on appearances. (VRP 266) ("I've seen that before or dealt with that before").

The trial court denied Defendant's motion to excuse for cause, concluding that the Juror's work would not directly relate to the case.

It's not a case where he is monitoring gang activity from 23rd and J Street in Tacoma and analyzing those cameras. He's at the State Capitol where he's mostly focused on protests that are going on and demonstrations that are going on. And if something goes awry, then he's the person that goes and pulls up the image and provides that information to campus security.

(VRP 301). Juror 39 appropriately disclosed his concern, and with more detailed questioning, demonstrated that he could weigh the evidence fairly and follow the Court's instructions.

The three potential jurors did what the Court asked – disclosed potential bias, discussed it candidly, and assessed whether they could keep open minds. In all three cases, the jurors concluded they could put aside their concerns, *knowing they existed*. This is far better than the alternative -- potential jurors with no personal insight, but an unrealistic confidence they could be fair and impartial.

B. Defendant Purposefully Waived His Right To Remain Silent

On July 8, 2016, Defendant had a three-hour interview in Spanish with FBI Special Agent Dan Brewer. (CrR 3.5 Findings at 1; CP 49) (Attached as Appendix A). The transcript of the interview establishes that Defendant knew he had a right to remain silent and spoke with investigators voluntarily. (Interview Transcript; Exhibit 6 to CrR 3.5 Hearing).

The interview began with an advice of rights and Defendant signing his Miranda form, printed in Spanish. (CrR 3.5 Findings ¶¶

5-8; CP 50-51). The trial court found that Defendant agreed orally to speak with investigators, waiving his right to remain silent.

As the Miranda rights were being explained, the defendant repeatedly responded using the phrases “uh huh” and “okay.” After each of the Miranda rights were explained, Special Agent Brewer asked: “Okay. And, and having been fully advised of those rights, do you now decide to answer the questions voluntarily? That is, we will...uh, we are going to ask you some questions...” The defendant responded, “Okay.” The defendant’s use of the phrases “uh huh” and “okay” were affirmations, with “uh huh” equivalent to “I understand” and “okay” equivalent to “yes.” The defendant therefore stated that he understood his rights and was willing to waive those rights and speak to the detective and special agent.

(CrR 3.5 Findings ¶ 6; CP 51).

Defendant then formally waived his rights by signing the advice of rights form.

After the special agent explained the need for signatures and that it was “our formality,” the defendant responded, “Oh, well, I don’t know what you are talking about, but yes.” This statement was not a reference to the lack of understanding the Miranda rights. Rather, this statement was the defendant’s way of expressing that he was willing to waive his Miranda rights and be interviewed but he did not have information on the subject matter of the interview, *i.e.*, he did not know anything about the murder of Cruces Vazquez.

(CrR 3.5 Findings ¶ 8; CP 51).

For the next two and a half hours, Defendant spoke with Agent Brewer, occasionally refusing to answer for fear of retribution.

The central concern as expressed repeatedly by the defendant during the course of the interview was one of fear. He admitted association with the violent street gang "La Mara," a.k.a. Mara Salvatrucha, a.k.a. MS-13. He blamed them for forcing his involvement in the murder of Cruces Vazquez. He repeatedly expressed fear that MS-13 would kill him and his loved ones if he told law enforcement about the murder.

(CrR 3.5 Findings ¶ 10; CP 52). Although he would hesitate to answer or state "I'm not going to tell you anything", Defendant never stopped the interview or invoked his right to remain silent. (CrR 3.5 Findings ¶ 11; CP 52-54) ("defendant was expressing his fear that he would be harmed by MS-13").

Finally, the trial court concluded that Agent Brewer never coerced or intimidated Defendant, but rather questioned him about the issues he raised.

Special Agent Brewer's questioning and conversation with the defendant did not constitute explicit or subtle coercion that compelled defendant to make incriminatory statements. The two did discuss the defendant's fear of MS-13, in particular those who he said compelled him into the murder, and the defendant's fear of being deported to El Salvador where MS-13 maintained a significant presence and where they had threatened him and his family. The special agent's statements and questioning drew from the practical reality that law enforcement could not assist in protecting the defendant and his family, and possibly preventing his deportation to a country where the risk of harm was profound, if they did not know what had happened, why it had happened, who had been involved, and how those involved could be found.

Special Agent Brewer's statements and questioning were appropriate in the overall context of the case, the defendant's cultural background and the involvement of MS-13. Special Agent Brewer's statements did not override the defendant's free will or shock the conscience.

(CrR 3.5 Conclusions ¶ 3; CP 56).

C. The Conspiracy Included More Than The Murder

After a 15-day trial, the Pierce County Jury found Defendant guilty of both first degree murder and conspiracy to commit first degree murder. (Verdict Form A – Count I; CP 253); (Verdict Form C – Count III; CP 259). Although both crimes involved Samuel Cruces Vazquez's murder, the conspiracy charge encompassed more than the killing itself. As the trial court stated at Defendant's sentencing,

The killing of Samuel was a terrible set of circumstances and facts, and it was planned well in advance. It was carried without a degree, the precision. Both defendants participated in it fully. Mr. Chicas-Carballo facilitated the transport and met up ahead of time with Mr. Ayala Reyes, and they discussed what was going to occur. They discussed weapons that were going to be used.

(VRP 2349); (VRP 1268) (Defendant's girlfriend "heard them talking and Jose would tell me everything").

The criminal conspiracy did not end with the murder. "[The] [c]onspiracy continued even after the execution occurred where Mr.

Ayala Reyes is sending money to Mr. Chicas-Carballo in California as part of his tribute to the gang.” (VRP 2349) (VRP 1276) (receipts of money order transfers). Because the criminal conspiracy was not the same criminal conduct as the murder itself, the trial judge imposed consecutive, not concurrent sentences.

So I'm going to impose the standard range sentence of the 320 months plus 24 months on Count I. On Count II, the 240 months plus 24, so that's 344 plus 264 on Mr. Ayala Reyes for a total of 608 months. I'm not going to impose additional gang aggravator, because I think the two counts run consecutively is sufficient punishment for what occurred in this case.

(VRP 2350). Defendant had asked for concurrent sentences and a downward departure.

Defendant now appeals.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews denial of a for-cause challenge to a juror for an abuse of discretion. State v. Fire, 145 Wn.2d 152, 157, 34 P.3d 1218 (2001) (“whether the trial court abused its discretion in denying a challenge for cause to Juror No. 8”). The Court reviews defendant’s structural error allegations *de novo*. C.f., State v. Paumier, 176 Wn.2d 29, 34, 288 P.3d 1126 (2012) (“constitutional

right to a public trial has been violated is reviewed de novo on direct appeal”).

The Court reviews the trial court’s CrR 3.5 ruling under a two-part standard.

We review the trial court's findings of fact from a CrR 3.5 hearing to determine if they are supported by substantial evidence. We review de novo whether the trial court's conclusions of law are properly derived from its findings of fact. Unchallenged findings of fact are verities on appeal.

State v. Gasteazoro-Paniagua, 173 Wn. App. 751, 755, 294 P.3d 857 (2013) (citations omitted). The Court reviews the voluntariness of Defendant’s confession for substantial evidence in the record. “When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found the confession was voluntary by a preponderance of the evidence.” State v. Aten, 130 Wn.2d 640, 664, 927 P.2d 210 (1996).

Finally, the Court reviews the trial court’s consecutive sentences under RCW 9.94A.589 for an abuse of discretion. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803, 808 (2011) (“we review the trial court's determination of what constitutes the same criminal conduct for abuse of discretion or misapplication of the law”).

IV. DEFENDANT RECEIVED A FAIR TRIAL FROM AN IMPARTIAL JURY.

In State v. Fire, the Washington Supreme Court resolved the first set of issues Defendant raises in his appeal. Fire, 145 Wn.2d at 157. To challenge a conviction based on jury selection, Defendant must show the trial court abused its discretion in denying a motion to excuse for cause *and* prove prejudice from the resulting jury.

At issue in this case is whether the trial court abused its discretion in denying a challenge for cause to Juror No. 8 and whether, without a further showing of prejudice, reversal is the remedy for a trial court's error in not dismissing a potential juror for cause where the defendant later uses a peremptory challenge to remove that juror and exhausts his remaining challenges before the final selection of the jury.

Fire, 145 Wn.2d at 157. The Court concluded that the use of all peremptories alone is not prejudice. "In removing the juror, [defendant] did not lose a peremptory challenge, but used it for what it was for: to help secure an impartial jury." Fire, 145 Wn.2d at 158.

Here, Defendant fails to allege, let alone prove, prejudice because he had a fair trial with an impartial jury. First, the trial court did not abuse its discretion by refusing to dismiss Jurors 14, 24 and 39 for cause. None had the actual or implied bias that would make them unfit for service. RCW 4.44.170 ("the challenged person

cannot try the issue impartially and without prejudice to the substantial rights of the party challenging”).

The jurors’ candid assessments of their backgrounds and assumptions made it less likely they would exhibit implicit bias.

Implicit racial bias...primarily exists at an unconscious level, such that the biased person is unlikely to be aware that it even exists. This occurs because it is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Implicit racial bias can therefore influence our decisions without our being aware of it because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus.

State v. Berhe, 193 Wn.2d 647, 663, 444 P.3d 1172 (2019). The trial court had the best possible information to judge implicit bias – whether the potential jurors could describe their background assumption and how they would compensate for them to be impartial.

Second, Defendant does not allege the jury itself was biased or that racial animus affected his trial. He concedes he did not exhaust his peremptory challenges, and he offers no evidence that the resulting jury was somehow biased or unfair. (Amended Brief at 28). Under Washington law, “if a defendant through the use of a peremptory challenge elects to cure a trial court's error in not

excusing a juror for cause, exhausts his peremptory challenges before the completion of jury selection, and is subsequently convicted by a jury on which no biased juror sat, he has not demonstrated prejudice, and reversal of his conviction is not warranted.” Fire, 145 Wn.2d at 165.

Recognizing this lack of prejudice, Defendant argues that the trial court committed “structural error”, requiring automatic reversal. (Amended Brief at 29).

An error is structural when it necessarily renders a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. Examples of structural error include improper courtroom closure, complete lack of counsel, and racial discrimination in grand jury selection. State v. Wise, 176 Wn.2d 1, 15, 288 P.3d 1113 (2012); Vasquez v. Hillery, 474 U.S. 254, 263-64, 106 S.Ct. 617, 88 L.Ed. 2d 598 (1986); Gideon v. Wainwright, 372 U.S. 335, 342-44, 83 S.Ct. 792, 9 L.Ed. 2d 799 (1963). We have also held there was structural error in cases of double jeopardy clause violations, In re Pers. Restraint of Orange, 152 Wn.2d 795, 820-22, 100 P.3d 291 (2004), failure to require the State to prove its case beyond a reasonable doubt, In re Pers. Restraint of Gunter, 102 Wn.2d 769, 774, 689 P.2d 1074 (1984), and conflict of interest resulting in deprivation of counsel, In re Pers. Restraint of Richardson, 100 Wn.2d 669, 679, 675 P.2d 209 (1983).

Matter of Meredith, 191 Wn.2d 300, 309–10, 422 P.3d 458 (2018)

(citation omitted).

As the Court recognized in Meredith, there is no structural error if an objectionable juror does not actually sit on the jury.

Here, the trial court did not erroneously deny a peremptory challenge and then allow that objectionable juror to determine Meredith's guilt. Rather, the court gave a lesser number of peremptory challenges than each party was entitled to and neither party raised any objection.

Meredith, 191 Wn.2d at 310. The same conclusion is appropriate here. Even if the trial court erred by not excusing the challenged jurors, they did not sit on the jury or affect deliberations.

Furthermore, Defendant's proposed rule – that any mention of bias requires automatic dismissal for cause – will thwart removing racial bias and animus from court proceedings. Rather than allowing jurors to disclose concerns and potential bias, Defendant would close all discussion and label any juror with issues "racist". In the last 20 years, Washington courts have moved past the illusion that all participants be "colorblind" and have recognized the need to identify, discuss, and address implicit bias. As the Supreme Court recently stated, "everyone harbors implicit biases that are difficult to recognize in oneself." Berhe, 193 Wn.2d at 661.

Finally, there is no compelling reasons to adopt a different State constitutional standard. Employing the Gunwall factors,

Defendant argues that the Washington Constitution should recognize that “failure to excuse a racially biased juror undermines the fundamental integrity of the court proceeding”, requiring automatic reversal. (Amended Brief at 33). The Supreme Court has already found this unpersuasive.

No Washington case has thus far recognized a difference between the right to an impartial jury guaranteed under the federal constitution and that guaranteed under the Washington constitution...Thus, Washington law does not recognize that article I, section 22 of the Washington State Constitution provides more protection than does the Sixth Amendment to the United States Constitution.

Fire, 145 Wn.2d at 163. Defendant does not provide a compelling reason for a different result.

V. DEFENDANT WAIVED HIS RIGHT TO REMAIN SILENT.

Defendant challenges the admissibility of his statements to investigators, arguing that “judged by the totality of the circumstance, Mr. Ayala’s statement to Agent Brewer was not freely and voluntarily given and should have been suppressed by the trial court.” (Amended Brief at 49). This is incorrect – as established in the trial court’s CrR 3.5 Findings and Conclusions.

First, Defendant does not contest that he signed the Miranda form after receiving a full explanation of his rights in Spanish. He

argues that describing the rights as a “formality” minimized them. (Amended Brief at 49) Instead, it reinforced the significance of signing – formally waiving his right to remain silent. (CrR 3.5 Finding ¶ 7; CP 51). As the trial court found, Defendant “knowingly, voluntarily, and intelligently waived his Miranda rights in deciding to interview with the detective and special agent.” (CrR 3.5 Conclusion ¶ 2; CP 55).

Second, Defendant never reinvoked his right to remain silent. In hindsight, Defendant argues that he wanted to end the interview and remain silent whenever he told Special Agent Brewer that he did not want to answer a question. (Amended Brief at 44) (“five separate times Mr. Ayala’s request to stop the questioning was ignored”). But the trial court addressed each of the five instances, concluding instead what the transcript shows – Defendant was expressing fear for answering, not the desire to stop the interview. (CrR 3.5 Finding ¶ 11; CP 54) (“defendant’s refusal to answer any further question identifying the specific individuals in MS-13 that were involved”). Defendant kept talking, negotiating with investigators to see his girlfriend and limit his culpability.

Substantial evidence supports the trial court’s finding that Defendant understood his rights, waived them, and participated fully

in the interviews. “At no point during the defendant’s contacts with law enforcement on July 8, 2016...was he subject to any threats, coercion, or intimidation.” (CrR 3.5 Finding ¶ 15; CP 55).

VI. THE TRIAL COURT APPROPRIATELY ENTERED CONSECUTIVE SENTENCES.

Under the Sentencing Reform Act, the trial court must enter consecutive sentences for “two or more serious violent offenses arising from separate and distinct criminal conduct.” RCW 9.94A.589(1)(b). Defendant argues that the trial court abused its discretion by sentencing him to consecutive sentences for first degree murder and conspiracy to commit first degree murder. (Amended Brief at 53).

The trial court correctly concluded that the conspiracy included criminal conduct outside the murder itself. “Two crimes manifest the same criminal conduct only if they require the same criminal intent, are committed at the same time and place, and involve the same victim.” State v. Graciano, 176 Wn.2d 531, 540, 295 P.3d 219 (2013). Here, only the victim was the same. Defendant completed substantial steps for the conspiracy in Los Angeles and his home. The murder took place on a Tacoma street.

Furthermore, Defendant's intent to participate in the conspiracy – to join MS-13 – was different from his intent to kill Mr. Cruces.

The trial court did not abuse its discretion by concluding these were separate and distinct crimes, not the same criminal conduct.

CONCLUSION

Defendant Jose Ayala Reyes had a fair trial with an impartial jury. Although he faults the trial court for not excusing three jurors, Defendant has shown no prejudice from the trial court's actions.

The State of Washington respectfully requests this Court to uphold Defendant's convictions, affirm his Judgment and Sentence, and dismiss this appeal with prejudice.

DATED this 21st day of January, 2020.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

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DATED this 21st day of January, 2020.



HEIDI MAIN

APPENDIX A



16-1-02804-9 51601215 FNFCL 07-09-18



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NOS. 16-1-02804-9

vs.

JOSE JONAEI AYALA REYES,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR CRR 3.5 HEARING

Defendant.

This matter came before the Honorable ^{DC} ~~Gerald~~ Jerry Costello for a CrR 3.5 hearing on June 16, 2018. The State was represented by Deputy Prosecuting Attorneys Gregory Greer and Jesse Williams. The defendant was present and represented by his attorney, Jason Johnson. The court, having taken evidence, orally pronounced findings and conclusion in support of its rulings that the defendant's interview with law enforcement on July 8, 2016, is admissible in the State's case-in-chief, and the defendant's proffer interview with law enforcement on September 28, 2016, is admissible for impeachment purposes should the defendant testify. The court now sets forth the following written findings of fact and conclusions of law as to its rulings.

FINDINGS OF FACT

1. On July 8, 2016, at shortly after 3 p.m., detectives with the Tacoma Police Department contacted the defendant at a restaurant where he was working. The defendant's native language was Spanish and his English proficiency was limited. Tacoma Police Officer

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FOF/COL for CrR 3.5

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1 Sam Lopez, a native Spanish speaker, accompanied the detectives and served as a
2 translator. The detectives explained that they were investigating the homicide of the
3 defendant's friend, Samuel Cruces Vasquez, and asked the defendant if he would be
4 willing to voluntarily come down to the police station for an interview. The defendant
5 agreed and Detective Greg Rock provided the defendant with a ride in his civilian vehicle
6 to the station.

- 7 2. At the station, the defendant was escorted to an interview room that was video and audio
8 recorded. The recording equipment was turned on and the events that followed are
9 captured in recordings admitted into evidence as Exhibits 2-5. Certified transcripts in the
10 English language of these recordings, prepared by a court-certified Spanish-language
11 interpreter, were admitted into evidence as Exhibit 6. The substance of the recordings
12 and transcripts are hereby incorporated by reference.
- 13 3. Nothing of significance happened in the moments between when the defendant entered
14 the interview room and the recording equipment was turned on and the interview
15 commenced.
- 16 4. Present for the interview with the defendant were Detective Rock and FBI Special Agent
17 Daniel Brewer. Special Agent Brewer was fluent in Spanish. Though Detective Rock
18 was the lead investigator for the homicide, he did not speak Spanish and so Special Agent
19 Brewer was utilized to lead the interview and to develop a rapport with the defendant.
- 20 5. Before any questioning related to the homicide or questioning likely to elicit an
21 incriminating response, Special Agent Brewer fully advised the defendant of his rights
22 pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).
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24
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1 These rights were read from a Spanish language preprinted form admitted into evidence
2 as Exhibit 7.

- 3 6. As the *Miranda* rights were being explained, the defendant repeatedly responded using
4 the phrases “uh huh” and “okay.” After each of the *Miranda* rights were explained,
5 Special Agent Brewer asked: “Okay. And, and having been fully advised of those rights,
6 do you now decide to answer the questions voluntarily? That is, we will . . . uh, we are
7 going to ask you some questions . . .” The defendant responded, “Okay.” The
8 defendant’s use of the phrases “uh huh” and “okay” were affirmations, with “uh huh”
9 equivalent to “I understand” and “okay” equivalent to “yes.” The defendant therefore
10 stated that he understood his rights and was willing to waive those rights and speak to the
11 detective and special agent.
- 12 7. After the defendant orally indicated that he was willing to waive his rights and agree to
13 an interview, the special agent asked the defendant to sign the *Miranda* rights form. The
14 special agent also explained that he would sign the form as well and indicated “that is our
15 formality.” The special agent’s use of the term “formality” was accurate and did not
16 trivialize the *Miranda* rights or their waiver in any respect.
- 17 8. After the special agent explained the need for signatures and that it was “our formality,”
18 the defendant responded, “Oh, well, I don’t know what you are talking about, but yes.”
19 This statement was not a reference to a lack of understanding the *Miranda* rights. Rather,
20 this statement was the defendant’s way of expressing that he was willing to waive his
21 *Miranda* rights and be interviewed but he did not have information on the subject matter
22 of the interview, *i.e.*, he did not know anything about the murder of Cruces Vasquez.
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1 9. An interview followed with the defendant that lasted approximately 2.5 to 3 hours with
2 several breaks.

3 10. The central concern as expressed repeatedly by the defendant during the course of the
4 interview was one of fear. He admitted association with the violent street gang "La
5 Mara," a.k.a. Mara Salvatrucha, a.k.a. MS-13. He blamed them for forcing his
6 involvement in the murder of Cruces Vasquez. He repeatedly expressed fear that MS-13
7 would kill him and his loved ones if he told law enforcement about the murder.

8 11. The interview contains a number of points where one might assert that the defendant was
9 invoking his right against self-incrimination.

10 a. At Volume I page 92 of 139, the defendant stated, "I don't have anything to say."
11 This was not a reference to the defendant's desire to exercise his right to remain
12 silent. Rather, the defendant was denying that he spoke with Cruces Vasquez
13 outside of work because they would have nothing to talk about.

14 b. At Volume I page 104 of 139, the defendant stated, "I am afraid of . . . I'm not
15 going to say anything." This was not an unequivocal invocation of the right
16 against self-incrimination. Rather, the defendant was expressing his fear that he
17 would be harmed by MS-13 if he told law enforcement about the murder. This
18 statement paralleled other statements that the defendant made throughout the
19 interview, e.g., "Do you want me to tell you then I . . . they'll kill me?"¹ The
20 defendant explained his statement ("I am afraid of . . . I'm not going to say
21 anything") later in the interview: "[T]hey made me go. . . . I didn't want to go. I
22 didn't want to be involved I that. That is why I'm scared, that is why I'm telling
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¹ Volume I page 115 of 139.

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- you that . . . that I don't want to talk."² The defendant repeated this concern later when the special agent discussed his desire to ensure that MS-13 did not harm the defendant's younger siblings and the defendant responded: "All I want it for nothing to happen to them. . . . I know that . . . and if I remain quiet, I know that nothing will happen. . . . But if I talk, you know that it will happen."³ The defendant's statement, "I am afraid of . . . I'm not going to say anything" was the equivalent of "I cannot tell you anything because it will get me killed" or "if I tell you what happened, they will murder me and I am not going to have that happen." These statements of a fear to talk must be distinguished from a desire not to implicate one's self and the concomitant right against self-incrimination.

c. At Volume II page 45 of 77, the defendant stated, "I'm not going to talk. I just want to see her." This was not a reference to the defendant's desire to exercise his right to remain silent. Rather, the defendant was trying to negotiate with the special agent into allowing him to see his girlfriend, who was also at the police station. The defendant wanted to see her but he would not talk to her.

d. Likewise, at Volume II page 46 of 77, the defendant stated, "I'm not going to say anything," the special agent responded, "No? Okay. All right," and the defendant responded, "I want you to show me if she is really here." This again was not a reference to the defendant's desire to exercise his right to remain silent. Rather, the defendant was still trying to negotiate with the special agent into allowing him to see his girlfriend.

² Volume III pages 27 and 28 of 66.

³ Volume III page 15 of 66.

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e. At Volume II page 49 of 77, "the defendant stated, "I'm not going to tell you anything." This was at best an equivocal invocation of the defendant's right to remain silent, and in fact, was an effort by the defendant to negotiate answering a question on whether the special agent would tell him where a photograph had come from that ^{sc was} visible to the defendant.

f. At Volume II page 72 and 73 of 77, the defendant stated, "I can't say anything to you" and "I am not going to tell you anything else." These statements were at best equivocal invocations. The defendant's statement, "I am not going to tell you anything else," was not a total invocation but simply the defendant's refusal to answer any further question identifying the specific individuals in MS-13 that were involved.

12. The defendant was arrested on July 8, 2016, and subsequently charged with murder under this cause number. Subsequent thereto, the defendant sought to submit to a proffer interview where he would be questioned about the events of the case. This interview was sought in the hopes of receiving potential consideration in the defendant's case. The parties agreed that the interview would not be used in the State's case-in-chief but could be used in the defendant testified at trial and was inconsistent with statements made at the proffer interview.

13. The proffer interview occurred on September 28, 2016. The interview was recorded, Officer Lopez served as an interpreter, and the defendant's attorney was present for the interview.

14. At no point during the defendant's contact with law enforcement on July 8, 2016, did he express any confusion regarding his *Miranda* rights.

1 15. At no point during the defendant's contacts with law enforcement on July 8, 2016, or
2 September 28, 2016, was he subject to any threats, coercion, or intimidation.

3 16. At no point during the defendant's contacts with law enforcement on July 8, 2016, or
4 September 28, 2016, was he under the influence of any mind-altering substance.

5 17. At no point during the defendant's contact with law enforcement on July 8, 2016, or
6 September 28, 2016, did he exercise his right to remain silent.

7 18. At the time of the defendant's interviews, his level of intelligence was "in the average
8 range," he suffered from no mental disease or defect, and any intellectual difficulties
9 were the result of his cultural background. The defendant also maintained a relative level
10 of sophistication as evidenced by (a) understanding of the law of complicity and what he
11 did that made him an accomplice to the murder, and (b) his effort to negotiate terms such
12 as seeing his girlfriend during the course of the interview.

13
14 19. Detective Rock testified at the CrR 3.5 hearing before this court and the court finds his
15 testimony credible.

16 CONCLUSIONS OF LAW

17 1. The defendant's interview with law enforcement on July 8, 2016, is admissible pursuant
18 to CrR 3.5. This ruling does not address other potential evidentiary objections to certain
19 statements made during the course of the interview.

20 2. To the extent that law enforcement's interview on July 8, 2016, would be considered
21 "custodial" questioning, that interview was preceded by a full advisement of *Miranda*
22 rights. The defendant knowingly, voluntarily, and intelligently waived his *Miranda*
23 rights in deciding to interview with the detective and special agent.
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3. Special Agent Brewer's questioning and conversation with the defendant did not constitute explicit or subtle coercion that compelled the defendant to make incriminatory statements. The two did discuss the defendant's fear of MS-13, in particular those who he said compelled him into the murder, and the defendant's fear of being deported to El Salvador where MS-13 maintained a significant presence and where they had threatened him and his family. The special agent's statements and questioning drew from the practical reality that law enforcement could not assist in protecting the defendant and his family, and possibly preventing his deportation to a country where the risk of harm was profound, if they did not know what had happened, why it had happened, who had been involved, and how those involved could be found. Special Agent Brewer's statements and questioning were appropriate in the overall context of the case, the defendant's cultural background, and the involvement of MS-13. Special Agent Brewer's statements did not override the defendant's free will or shock the ~~conscious.~~

Conscience.

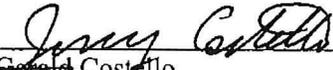
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4. By agreement of the parties, the defendant's interview with law enforcement on September 28, 2016, is admissible for impeachment purposes should the defendant testify at trial and testify inconsistent with statements made at the proffer interview. This proffer interview was freely, intelligently, and voluntarily given.

DONE IN OPEN COURT this 6th day of ~~June~~^{July}, 2017.



Judge ~~Gerald~~ Costello
Jerry JERRY T. COSTELLO

Presented by:



Jesse Williams
Deputy Prosecuting Attorney
WSB# 35543

Approved as to Form:



Jason L. Johnson
Attorney for Defendant
WSB# 31813



BURI FUNSTON MUMFORD, PLLC

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Appellate Court Case Title: State of Washington, Respondent v. Jose Jonael Ayala Reyes, Appellant
Superior Court Case Number: 16-1-02804-9

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