

FILED

DEC 21 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 28170-1-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JAVIER CALDERON, JR.,

Appellant.

**APPEAL FROM THE SUPERIOR COURT FOR
FRANKLIN COUNTY**

BRIEF OF RESPONDENT

**STEVE M. LOWE
Prosecuting Attorney**



by: **David W. Corkrum, #13699
Deputy Prosecuting Attorney**

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Pasco, WA 99301
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STATEMENT OF THE CASE

A. Procedural History

Appellant, Javier Calderon, Jr., was charged by an Information filed December 31, 2008, with the felony crime of Robbery in the First Degree, RCW 9A.56.190 and 9A.56.200(1)(b), a class "A" felony. (CP 163-164). A First Amended Information was filed April 22, 2009, charging the Appellant with Robbery in the First Degree, (RCW 9A.56.190 and 9A.56.200(1)(b), with the special allegation that said person or an accomplice was armed with a Deadly Weapon at the time, RCW 9.94A.602 and 9.94A.510(4)(a) and a second special allegation that the current offense was a gang-related felony and that Javier Calderon, Jr., involved a minor in the commission of the offense by threat or by compensation (RCW 9.94A.833), thereby subjecting him to the enhanced penalty as provided by RCW 9.94A.533(10). The matter proceeded to trial on April 22, 2009. (CP 50-57). The State did not submit instructions to the Court supporting a special allegation that the offense was a gang-related felony. (CP 119-143). The Appellant was found guilty by a jury verdict of the crime of Robbery in the First Degree with a special finding that the Appellant was armed with a deadly weapon

at the time of the commission of the crime on April 24, 2009 and was sentenced to 55 months incarceration on May 21, 2009 by the trial court. (CP 17-32).

B. Facts Relevant to Motion

Officer Anthony Aceves of the Pasco Police Department offered testimony that on December 28, 2008, he responded to the Fiesta Foods located in Pasco, Washington, for a robbery complaint. (RP 17-19). The officer arrived in the area at approximately 9:00 p.m. and contacted the complaining witness, Hector Garcia. In the officer's presence Mr. Garcia pointed to the Appellant as being one of the two individuals who had robbed him. (RP 21). The victim was able to give a description of the black and white checkered hat and shirt worn by the Appellant during the robbery to Officer Aceves. (RP25). Officer Aceves had previously shown the hat to the Appellant and asked if it belonged to him. Appellant stated it did not. Officer Aceves offered testimony that the hat had the name, "Toker" written on it and that the Appellant is a known "MPS" gang member and his moniker is "Toker." (RP 26). A small wooden bat was also taken into evidence. (RP 28).

Hector Garcia offered testimony that he had pulled off the

roadway to look for his cell phone. While in the back seat of his pickup truck Mr. Garcia was approached by two unknown individuals. One of the two got the victim's attention when he touched the victim's foot. Mr. Garcia stated, "And they pulled me. They wanted money." Neither the Appellant nor his accomplice said why they needed money. (RP 37-38). Mr. Garcia told them "he did not have any on him, that he was coming back from doing laundry, and that he was going to look for his wallet to see if there was something he could give him." The victim said. "at first he wasn't going to give him any money, either one of them any money because I didn't have any. That was all I had. They showed me a bat." (RP 39). The victim stated he was in fear and saw that the Appellant had a knife in his hand. He testified, "All I wanted was for them not to hurt me. I told them to wait that I was going to give them some money. I had a shirt on that had a pocket on it and I gave them what I had in my pocket. When I gave him the money, they took off running" Mr. Garcia then found his phone and called the police. (RP 41).

Officer Patrick Barnett of the Pasco Police Department offered testimony that he participated in the robbery investigation.

He arrived at a small white home and assisted in the search of a bedroom within the residence. (RP 53). While searching the bedroom the officer located a bat with the moniker "Toker" on it laying on a yellow chair. (RP 54). The officer described the bat as having "different monikers on it, 'Toker' and other various gang symbols." (RP 54-55). The Appellant offered testimony that he in fact had the baseball bat in his possession the evening Mr. Garcia was robbed and that the name, "Toker," written on the bat was indeed the Appellant. (RP 83).

ARGUMENT

1. APPELLANT RECEIVED A FAIR TRIAL AND WAS NOT PREJUDICED BY THE LIMITED TESTIMONY REGARDING HIS GANG ASSOCIATION.

There was no abuse of discretion by the trial court in allowing the very limited testimony by the State's witnesses regarding the Appellant's gang association. On review the trial court's admission of evidence is reviewed for an abuse of discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). Denial of a motion for a mistrial will only be overturned if there is a substantial likelihood that prejudice affected the jury's

verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). A mistrial is warranted where an irregularity occurs during trial and, as a result, the defendant's right to a fair trial is "so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979). The reviewing court should examine the seriousness of the irregularity, whether the improper statement was cumulative evidence, and whether it could have been cured by an instruction to disregard the remark. State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987), citing State v. Weber, 99 Wn.2d 158, 164-65, 569 P.2d 1102 (1983).

The testimony regarding the identification of the baseball bat used during the commission of the crime and its link to the Appellant was a crucial part of trial. The same was true of the baseball hat found with the Appellant's street name, "Toker." Any limited testimony offered by the State's witness regarding the Appellant's association with a criminal gang was admissible for the purposes of proving that link to the deadly weapon used during the commission of the robbery and the clothing worn by the Appellant. ER 404(b) prohibits a court from admitting "evidence of other crimes, wrongs,

or acts . . . to prove the character of a person in order to sow action in conformity therewith.” This includes any evidence offered to “show the character of a person to prove the person acted in conformity” with that character at the time of the crime.” State v. Foxhoven, 161 Wn.2d 168, 174-75, 163 P.3d 786 (2007). However, evidence may be admitted for other purposes such as proof of motive, plan or identity. Foxhoven, 161 Wn.2d at 175.

Prior to admitting evidence under an exception to ER 404(b), “the trial court must 1) find by a preponderance of the evidence that the misconduct occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value of the evidence against its prejudicial effect.” Pirtle, 127 Wn.2d at 648-49.

In this case, testimony regarding the Appellant’s gang involvement was deemed admissible to allow the State to pursue an exceptional sentence based upon this being a gang-related offense. Ultimately the State chose not to seek an exceptional sentence based upon the Appellant’s gang involvement. During the course of the trial the State did not elicit testimony from witnesses regarding

the Appellant's gang affiliation, with the exception of seeking testimony regarding the defendant's "moniker" or street name and a request for police officers to describe the symbols found on the baseball bat used by the Appellant in the commission of this crime. There was testimony from police officers that the Appellant was a gang member and that his "moniker" was "Toker," which was inscribed on the baseball bat taken into custody. This testimony was relevant and necessary for the purpose of linking the Appellant to the baseball bat described by the victim of this robbery as being used by the Appellant in its commission. The trial court failed to undertake an ER 404(b) analysis on the record regarding the admission of this evidence for the purposes of assisting the triers of fact in identifying the Appellant. However, the record would support the admission had a hearing actually would have been conducted regarding this issue.

The evidence presented of the Appellant's guilt was overwhelming and the outcome of the trial would not have been different had the evidence not been presented. Any statements by witnesses later found inadmissible would not have affected the final determination of guilt and should be viewed as harmless error.

An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Because evidentiary errors under ER 404 are not of constitutional magnitude, any error here is harmless unless the outcome of the trial would have differed had the error not occurred. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999).

Appellant has cited State v. Ra, 144 Wn. App. 688, 175 P.3d 609 (2008) as part of his argument for a new trial. Ra was charged with attempted murder in the first degree while armed with a firearm, drive-by shooting, and unlawful possession of a firearm. Ra, 144 Wn. App. at 692. In Ra, the State questioned a detective regarding his gang unit and why the case was assigned to him. Id. At 701. The State then questioned a co-defendant regarding his and the group's gang-like behavior, asking "whether carrying guns is 'what they do,' whether 'when they carry guns . . . nobody messes with them,' and whether there was a 'loyalty involved.'" Id. The court found that the "evidence portrayed Ra and his companions as inherently 'bad guys,' willing to commit the most serious acts of

violence to elevate their status in the group.” Id. at 702. Because the State suggested that his was a gang crime, and that the defendant intentionally shot the victim to “elevate his status in his group,” the defendant was prejudiced by the wrongly admitted evidence and the conviction was reversed. Id.

The facts differ significantly in the case at bar. Here, testimony regarding the defendant’s gang involvement was minimal. The testimony consisted of identifying the Appellant as being in a gang, and also identifying his gang “moniker” or street name. The testimony relating to these issues was extremely limited. Even without the gang references, there was abundant evidence of the Appellant’s guilt. There does not exist a reasonable probability that the jury would have found the Appellant not guilty, but for the gang related testimony. The victim offered testimony in the instant matter and his credibility was beyond reproach.

CONCLUSION

Upon a review of the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of robbery in the first degree with the special allegation that the Appellant or an accomplice was armed with a deadly weapon. No

deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity.

I hereby certify that on the 17th day of December, 2010, a copy of the foregoing was delivered to Javier Calderon, Jr., c/o Green Hill School, 375 SW 11th, Chehalis, WA 98532 and to Julia a. Dooris, opposing counsel, 2920 S. Grand Blvd. #132, Spokane, Washington 99203 by depositing in the mail of the United States of America a properly stamped and addressed envelope.

Cari A. Domas

Signed and sworn to before me this 17th day of December, 2010.

Cari A. Johnston

Notary Public in and for
the State of Washington,
residing at Passo

My appointment expires: 9/2/14