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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28560-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Juan Zepeda,

Appellant.

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

The Honorable F. James Gavin

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

Juan Zepeda respectfully accepts this opportunity to reply to the State's brief and clarify certain issues. As to the issues not addressed herein, Mr. Zepeda requests that the Court refer to his arguments in his opening brief.

B. ARGUMENT ON REPLY

Issue 1: The State's response ignores several key points in Mr. Zepeda's gang evidence argument, including that (a) ineffectiveness of trial counsel may be raised for the first time on appeal, (b) the required analysis for admitting ER 404(b) evidence was never conducted, (c) the "expert" evidence was never properly qualified and (d) regardless, failure to provide a limiting instruction to the jury demands reversal.

- a. Ineffectiveness of counsel by failing to move to suppress evidence or request proper instructions is an issue of constitutional magnitude that may be raised for the first time on appeal so long as the record supports the argument.

First, the State attempts to avoid the prejudicial errors that occurred in this trial by summing up the appellant's arguments as having been improperly raised for the first time on appeal. *See* RAP 2.5. But "[i]neffectiveness of counsel is...an issue of constitutional magnitude, which can be raised for the first time on appeal..." *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000) (citing *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); RAP 2.5(a)(3)). "This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation which fell

below an objective standard of reasonableness.” *Id.* (internal citation omitted).

The State is correct that where the alleged constitutional error arises from trial counsel’s failure to move to suppress, an insufficient record may defeat the appellant’s argument on direct appeal. *State v. McNeal*, 98 Wn. App. 585, 594-95, 991 P.2d 649 (1999); *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). But this is not a case of an inadequate record; it is difficult to imagine a record more complete than that in this case. The record in this case abounds of the challenged evidence, and the Court has all the record before it necessary to be able to make an informed decision in this case. There is no additional evidence that would be necessary to address the merits of this case; resolution through a personal restraint petition with the taking of additional evidence is certainly not necessary (*see McNeal, supra*).

The question is not whether the record shows how the trial court would have ruled; the question is whether the record is sufficient to demonstrate how the trial court would have ruled had the proper objection been made by defense counsel. A substantive decision in this appeal is necessary to ensure that Mr. Zepeda is not left with an unjust verdict resulting from his attorney’s unreasonably deficient performance.

- b. The mandatory analysis for admitting the ER 404(b) evidence was not conducted and constitutes reversible error.

The State argues that the gang-related evidence was admissible. Mr. Zepeda, through counsel, vehemently disagrees and relies on the thorough argument in his opening brief to address basic admissibility. Mr. Zepeda also encourages this Court to closely review *State v. Asaeli*, because, like in this case, there was no evidence demonstrating the defendant was currently and unlawfully involved with a gang. 150 Wn. App. 543, 577, 208 P.3d 1136 (2009).

But what the State did not address in its response is the fact that the trial court never conducted the necessary analysis on the record to determine admissibility in the first place. This alone constituted reversible error.

Before admitting ER 404(b) evidence for the purpose the State suggested, such as *res gestae* or motive, the trial court must have conducted the required four-part analysis or adopted one of the parties' arguments in that regard. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); *Asaeli*, 150 Wn. App. at 577; *State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995).

Here, even when defense counsel questioned whether the gang-related evidence should have been admitted (IRP 560), the court still did not conduct the necessary inquiry. And no party presented argument to

address the required elements. Mr. Zepeda should not be punished for his attorney's failure to remind the court to conduct its necessary inquiry, nor should he be expected to remind the court of its own duty to do so. In a trial based almost entirely on credibility of Mr. Zepeda and the witnesses, it was extremely prejudicial to admit this inflammatory evidence without at least conducting the necessary analysis. Regardless of this Court's opinion on basic admissibility, the failure to conduct the mandatory four-part analysis requires reversal, an issue the State seems to have overlooked. *Foxhoven*, 161 Wn.2d at 175.

c. "Expert" testimony was not properly qualified, and its improper admission should result in reversal.

Another argument not addressed by the State is whether the improperly admitted "expert" testimony requires reversal. Mr. Zepeda thoroughly addressed the fact that the "expert" gang-related testimony was inadmissible, and he will not reiterate that argument at this time. *See Asaeli*, 150 Wn. App. at 578-79; Appellant's Opening Brief pg. 16-17. But he does take this opportunity to respectfully request that this Court not punish him for his attorney's deficiencies in failing to object to inadmissible evidence. Although the State failed to address this issue, it is one of merit that should be addressed for the first time on appeal in order to safeguard Mr. Zepeda's constitutional right to effective counsel.

- d. Regardless of this Court's decision on admissibility of the gang evidence, the failure to give any limiting instruction cries for reversal.

At a very minimum, where prejudicial gang-related evidence is admitted for some other purpose, like the State's suggested motive or *res gestae*, the jury must be given a limiting instruction. This is perhaps the most incredibly important issue that was completely glossed over in the State's response.

The law is well settled on this issue. If character or other bad acts evidence is admitted for some permissible purpose (such as motive or *res gestae*), "a limiting instruction must be given to the jury." *Foxhoven*, 161 Wn.2d at 175 (emphasis added). *See also* WPIC 5.30. This rule is important to protect defendant's rights to receive a just verdict based only on the substantive evidence pertaining to the elements of the charge rather than any inflammatory, prejudicial evidence. Whether or not this Court determines that the evidence was admissible, a limiting instruction was absolutely required.

Issue 2: Whether the State even minimally addressed the appellant's argument regarding the admissibility of his taped interview with law enforcement.

The State focuses on the fact that Mr. Zepeda's recorded statement to law enforcement was voluntary and that no error was assigned to the court's conclusion regarding voluntariness in this appeal. Indeed, Mr.

Zepeda does not dispute that the statement was voluntary, else he would have assigned error in the first place. But whether or not the statement was voluntary does not even slightly address the issue that is actually on appeal. *See* Appellant's Opening Brief at pgs. 20-27. Just because a statement was voluntary does not mean it is automatically admissible without satisfying other evidentiary hurdles, such as those existing for relevance, impeachment and character evidence, ER 403, and, finally, the ever-important limiting instruction requirement. The State completely failed to address this argument, and Mr. Zepeda refers the Court back to the actual argument made in Issue 2 of his opening brief.

Issue 3: Whether a conviction can be upheld for threatening a person in order to “influence the testimony of that person” when no official proceeding had yet begun.

The State agrees that the intimidating a witness statute is an alternate means statute so that a unanimity instruction must be given to the jury or else sufficient evidence must support each means offered. The flaw in the State's argument is in suggesting that Mr. Zepeda's conduct could somehow satisfy both means submitted to the jury.

The intimidating a witness statute has four distinct parts, two of which are at issue in this case. RCW 9A.72.110(1)(a) makes intimidating a person unlawful when done in an attempt to influence that person's testimony. This section of the statute is only implicated when an official

proceeding has already begun. *See e.g. State v. Brown*, 162 Wn.2d 422, 428-30, 173 P.3d 245 (2007); *State v. Wiley*, 57 Wn. App. 533, 536-37, 789 P.2d 106 (1990). A separate and distinct subsection of the same statute makes intimidating a person unlawful when it is for the purpose of “[i]nduc[ing] that person not to report the information relevant to a criminal investigation... or not to give truthful or complete information relevant to a criminal investigation...” RCW 9A.72.110(1)(d).

If Mr. Zepeda’s conduct fell within any part of this statute, it would have only fallen within subsection (d). No official proceeding had yet begun, so subsection (a) was never implicated. *Brown*, 162 Wn.2d at 428-30; *Wiley*, 57 Wn. App. at 536-37. If Mr. Zepeda’s conduct – i.e., pointing a gun at someone and telling them to stop taking pictures before any criminal investigation had begun – fit within both subsections of the statute, there would be no reason to have separate sections within the same statute. The former subsection ensures that anyone intimidating a person *after* official proceedings have begun will be held accountable, and the final subsection ensures that anyone intimidating a person *before* official proceedings is also held accountable.

RCW 9A.72.110(1) (a) and (d) are distinct alternate means, and evidence did not support them both: either Mr. Zepeda intimidated Mr. Smith before official proceedings had begun or he did so afterward, not

both. Since evidence does not support both alternate means, the failure to give a unanimity instruction was reversible error.

Issue 4: The State is mistaken that Mr. Zepeda's argument results in him going unpunished for assault with a firearm; Mr. Zepeda received the lengthier sentence associated with unlawful possession of a firearm.

Both parties have thoroughly briefed this issue and Mr. Zepeda only takes this opportunity to clarify the practical effects of his argument as it relates to his punishment.¹

Mr. Zepeda's standard range sentence for unlawful possession of a firearm, based on the offender score previously used by the trial court, was 31-41 months. CP 10. He was sentenced to 36 months, and RCW 9.94A.533(f) specifically precludes adding any firearm enhancement onto this sentence. The Legislature already determined that this crime would receive a harsher punishment and set the standard range higher for that reason.

Mr. Zepeda's standard range for second-degree assault, again based on the incorrect offender score used by the trial court, was 15-20 months. CP 10. He was sentenced to 18 months plus a consecutive 36-month firearm enhancement on *this count*. *See id.* His total punishment for second-degree assault with a firearm, based on the already elevated

¹ For simplicity, this discussion assumes the same offender scores as the trial court used, which will likely need to be adjusted down one point upon remand based on the State's conceded error.

offender score from having the other current convictions including unlawful possession of a firearm, was 54 months.

For some reason, the State and trial court thought that a firearm enhancement had to be added to the unlawful possession of a firearm count in order for Mr. Zepeda to be sufficiently punished. But this result is precluded by RCW 9.94A.533(f). And, the defendant was already punished for the multiple current convictions by receiving an elevated offender score, so no crime is going unpunished in this case.

Issue 5: The State concedes error respecting the second-degree assault and intimidating a witness counts.

Mr. Zepeda maintains that remand for retrial is necessary. If this Court affirms, Mr. Zepeda agrees that remand for resentencing is at least appropriate to determine whether the intimidating a witness and second-degree assault counts constituted the same criminal conduct so as to lessen Mr. Zepeda's offender score.

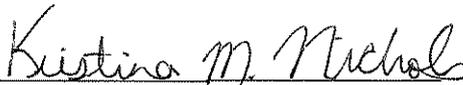
Issues 6-8: Argument on remaining issues is incorporated herein.

Appellate counsel has reviewed the State's remaining arguments and believes that the parties have sufficiently briefed the issues. The arguments set forth for these issues in appellant's opening brief should withstand the State's responding arguments. In sum, the vast number of errors in this case requires a new trial.

F. CONCLUSION

At a minimum, this matter should be reversed and remanded for resentencing based on the State's conceded error. Ultimately, Mr. Zepeda requests that this Court reverse his conviction based on any one or the cumulative effect of the many errors in this case.

Respectfully submitted this 20 day of October, 2010.


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