

**FILED**

JUN 16, 2015

Court of Appeals  
Division III  
State of Washington

No. 31701-3-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

JOHN ANTHONY CASTRO, Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENTS OF ERROR

1. The court erred by denying the defense motion for mistrial after a detective intentionally violated the court's order prohibiting any mention of gangs and so tainted the proceedings that Mr. Castro could not get a fair trial.

2. The prosecutor committed misconduct by requesting that Mr. Castro's wife, Dyneshia Sleep, be excluded from the courtroom as a potential witness when the State had no intention whatsoever to call her at trial.

3. The court erred by sentencing Mr. Castro to life without the possibility of parole as a persistent offender because the second strike relied on by the State, *i.e.*, conspiracy to deliver a controlled substance with a deadly weapon enhancement, did not qualify as a most serious offense.

### *Issues Pertaining to Assignments of Error*

A. Did the court err by denying the defense motion for mistrial after a detective intentionally violated the court's order prohibiting any mention of gangs and so tainted the proceedings that Mr. Castro could not get a fair trial? (Assignment of Error 1).

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Mr. Castro's wife be excluded from the courtroom as a potential witness when the State had no intention whatsoever to call her as a witness at trial? (Assignment of Error 2).

C. Did the court err by sentencing Mr. Castro to life without the possibility of parole as a persistent offender because the second strike relied on by the State, *i.e.*, conspiracy to deliver a controlled substance with a deadly weapon enhancement, did not qualify as a most serious offense? (Assignment of Error 3).

## II. STATEMENT OF THE CASE

John Anthony Castro was charged by amended information with count 1: second degree murder of Jose Solis, count II: second degree assault of Jazman Quarles; count III: second degree assault of Dennis Bryant; count IV: riot; and count V: first degree unlawful possession of a firearm. (CP 230). Among other things, the State moved to admit gang affiliation evidence under ER 404(b) at trial. (CP 19-52). After hearing testimony, the court ordered that the State could not offer gang membership and gang affiliation evidence and excluded all gang evidence from the trial. (CP 262). On the State's motion to allow questioning of witnesses about gang membership to establish bias, the court also ordered that the State

could not do so. (CP 296).

The events leading up to the incident on November 27, 2011, began with a rap concert and birthday celebration at Ichiban where groups of people from Moses Lake and Spokane had gathered. (4/17/13 RP 748-50, 780, 802, 951-52; 4/18/13 RP 1016, 1033, 1080; 4/22/13 RP 1268; 4/23/13 RP 1544). After an altercation at Ichiban, the various groups ended up at the Quality Inn. (4/17/13 RP 753, 783, 806-08, 948-49; 4/18/13 RP 1017, 1033, 1081; 4/23/13 RP 1519, 1544).

At the Quality Inn, a fight broke out on the 4<sup>th</sup> floor with a lot of screaming and yelling. (4/17/13 RP 754, 785-87, 800, 810, 882; 4/18/13 RP 966-72, 1022-24, 1084). Shamela Freeman claimed to have seen Mr. Castro in the hallway during the melee. (4/17/13 RP 759). Jeremy Flores, whose room was on the 4<sup>th</sup> floor at the Quality Inn, was on the 6<sup>th</sup> floor at an after-hours party with a group of Moses Lake folks when he learned of the fighting on his floor and got involved. (*Id.* at 783-87).

Giovanni Powell hosted the party in his 6<sup>th</sup> floor room at the Quality Inn. (4/17/13 RP 808). When Mr. Castro and his friends showed up in his room, he told them to get out and they did. (*Id.*).

Mr. Powell went to the 4<sup>th</sup> floor and grabbed Jazman Quarles when a fight broke out. (*Id.* at 810). Mr. Castro was not in the hallway at the time. (*Id.* at 812). Dennis Bryant, Ms. Quarles' fiancé, did not see him in the elevator where arguing had started on the 6<sup>th</sup> floor. (*Id.* at 913). Both were involved in the fight, with Mr. Powell eventually pulling them into his room after each had suffered injuries. (4/18/13 RP 969-74). Isaac Bergeron of Moses Lake saw Mr. Castro on the 4<sup>th</sup> floor just standing there. (*Id.* at 1024).

Ashley Hix, whose room was 412 at the Quality Inn, had visitors, including Mr. Castro and his wife, that evening. (4/18/13 RP 1072, 1082-83). They were just hanging out when there was an altercation in the hall, whereupon Mr. Castro went out to see what was going on. (*Id.* at 1084). She heard a gunshot and the victim, Jose Solis, came into her room and fell on his stomach. (*Id.* at 1085).

Ms. Freeman testified Mr. Castro had a gun, but she did not see anyone shoot. (4/17/13 RP 773). Mr. Flores heard a boom, turned around, and saw Tera Quarles grab Mr. Castro and ask him why he shot Mr. Solis. (*Id.* at 789-800). Mr. Powell did not at any time see Mr. Castro with a gun. (*Id.* at 816).

Jazman Quarles at some point heard a gunshot. (*Id.* at 974). She testified Mr. Castro tossed a gun to another man. (*Id.* at 977). Ms. Quarles did not see who fired the gun. (*Id.* at 994, 998). On cross examination, however, she said she did not whether she saw Mr. Castro with a gun. (*Id.* at 1002). Ms. Quarles just assumed it was a firearm. (*Id.* at 1005). Michelle Roberts was staying with Ashley Hix in room 412 at the Quality Inn. (*Id.* at 1032-33). At the time of the incident, Ms. Roberts had a lot to drink and was on heroin. (*Id.* at 1034). She thought Mr. Castro may have been in the room. (*Id.* at 1036). She later heard what she thought was a gunshot and the injured man came into the room. (*Id.* at 1038-39). Ms. Hix also heard the gunshot. (*Id.* at 1085).

Tera Quarles testified she was 6-8 feet away from Mr. Solis when he got shot. (4/22/13 RP1279). The gun went off and everyone ran. (*Id.*). Ms. Quarles said Mr. Castro lifted his hand up, pointed the gun, and shot Mr. Solis. (*Id.* at 1280). She asked why he did that. (*Id.*). Mr. Castro took off running. (*Id.* at 1281).

Mr. Solis died. (4/18/13 RP 958). Mr. Castro was subsequently identified as the suspect. (4/18/13 RP 1154-55, 1190-92; 4/22/13 RP 1318).

After his apprehension, no blood spatter was found on Mr. Castro's shirt or jacket. (4/22/13 RP 1235, 1239). As to the recovered handgun allegedly used in the shooting, a WSP crime lab DNA scientist excluded Mr. Castro as a significant contributor to DNA beneath the grip. (*Id.* at 1254). He was also excluded as a significant contributor on the gun's grip, trigger and release cylinders, rod, trigger guard, and hammer. (*Id.* at 1254-55).

On the defense's motion to dismiss, the court indicated that everyone agreed the second degree murder, unlawful possession of a firearm, and riot charges were not at issue. (4/23/13 RP 1428). After hearing argument, the court dismissed the two counts of second degree assault. (*Id.* at 1440).

The jury convicted Mr. Castro of count 1: second degree murder, count IV: riot, and count V: first degree unlawful possession of a firearm. (CP 592-96). Finding him to be a persistent offender with two prior convictions of most serious offenses, the court sentenced Mr. Castro to life in prison without the possibility of parole. (CP 727). All parties agreed that three 2004 offenses counted as only one strike. (5/23/13 RP 33; CP 601). The second strike was a 2007 conspiracy to deliver a controlled

substance with a deadly weapon enhancement. (CP 730). This appeal follows. (CP 715).

### III. ARGUMENT

A. The court erred by denying the defense motion for mistrial after a detective intentionally violated the court's order prohibiting any mention of gangs and so tainted the proceedings that Mr. Castro could not get a fair trial.

The State made a pretrial motion to admit gang evidence under ER 404(b). (3/28/13 RP 50). The court denied the State's motion and ordered that no gang evidence would be admitted. (4/2/13 RP 272-79). An agreed order with findings and conclusions was entered. (4/11/13 RP 295; CP 262). In relevant part, that order specifically found:

8. The State proposes to admit gang evidence in the form of membership and affiliation to show motive or intent. The specific issue raised is one of disrespect leading to an altercation between the Base Blocc group and their friends from Moses Lake and the Blocc Hustler Crips from Spokane. The State argued that the group on group dynamic was such that the defendant would have an intent or motive to become involved in the altercation on the side of his fellow gang associates.

9. The Court rejects the State's argument. The Court rejects the evidence presented to show that Mr. Castro

became involved due to a gang nexus. The Court rejects the State's theory the defendant acted to support and promote his gang versus that Mr. Castro was aiding in a fight. The Court rejects the State's evidence and theory and finds that there was no evidence presented that Mr. Castro was involved in this event because of the gang.

10. The Court rejects the State's theory that was a gang-on-gang or gang on group fight. To the contrary, Officer Roberge testified that other group of involved persons were the Base Blocc, a rap group out of Moses Lake, WA.

11. It is undisputed that John Castro did not start the fight. (CP 264).

From the findings, the court concluded:

1. The Court finds that there is no nexus between the alleged crimes and gang membership.
2. The Court finds that the admission of gang evidence under ER 404(b) to show the defendant's motive or intent would be far more prejudicial than probative. (*Id.*).

The court thus ordered:

The State's proffered gang membership and gang affiliation evidence is excluded under ER 404(b). The State may not proffer gang membership evidence or expert testimony to establish the defendant's motive in this case. At this time, all gang evidence is excluded from the trial. The State has indicated an intention to bring an additional motion regarding admitting gang evidence to demonstrate witness bias. *Until further order of the court, the State shall not*

*introduce any gang evidence and shall instruct the witnesses not to mention gang membership or evidence.* (emphasis added). (CP 264-65).

Subsequently, the court entered an order prohibiting the State from offering gang membership evidence to establish bias as the admission of gang membership was far more prejudicial than probative:

The State's proffered gang membership to establish bias is ruled inadmissible. The Court finds that the State will not be allowed to impeach the defendant's fellow gang members by questioning them about their mutual membership in the same or affiliated gangs. The Court also excludes any extrinsic evidence to show the defendant's fellow and affiliated gang members have a bias in their testimony. (CP 297).

The court made it crystal clear to the State that evidence of gangs, gang membership, and gang affiliation was forbidden. The State was also ordered to instruct its witnesses not to mention gang evidence or membership. Yet, Detective Kip Hollenbeck, who was the officer designated to sit at counsel table with the prosecutor, ignored the court's order and intentionally interjected gang evidence into the trial. (4/22/13 RP 1382-83).

During cross examination, Detective Hollenbeck was asked the whereabouts of a person named Jason St. Mark. (4/22/13 RP

1383). The detective answered:

The first day, the day of this incident, I was reviewing videos with gang experts. (*Id.*)

The defense immediately objected. (*Id.*) The court sustained the objection and instructed the jury “to disregard the witness’s last answer.” (*Id.*) But the damage had been done with the jury’s having heard the word “gang” and Mr. Castro was doomed to be convicted.

The defense moved for a mistrial based on Detective Hollenbeck’s interjecting gang evidence into the trial:

I would also note, and I don’t know if you want to hear this now, Detective Hollenbeck, when he was testifying, clearly violated the pretrial rulings that no gang testimony would be admitted, so that is another basis for dismissal or in the alternative for a mistrial. (4/23/13 RP 1412).

The court denied the motion for mistrial:

Now the next issue raised in this motion to dismiss is the situation that occurred yesterday. I am very dis – well, not guess, I know. I am very disappointed. I have a very experienced detective who has been sitting here through all the rulings I made on gangs and everything, and just – and as far as I could tell what he was referring to, I said just answer the question because he should have just answered the question. But the question was, you know, essentially, how can you make out all these people on the video. What he was referring to, and I know

about this because it came up during my 404(b) motions on the gang issue, was that at some point he sat down with some members of the gang task force just to sort out all these people as to who is who, because the videos are not the best, I think we would all agree with that. . .

Having said all of that, I understand what happened. I'm extremely disappointed. I think that experienced law enforcement officer, we have gone through all kinds of witnesses, both lay and law enforcement in this case, and everybody has adhered to my order 100%. So the question is, what am I going to do about it? I excluded the gang evidence because primarily, as I tried to make myself clear, there just is no nexus between, in my view, gang involvement and what happened here. The fact that these people were gang members, and I made a ruling that I felt Mr. Castro was a gang member, the fact that they were gang members did not make this melee that happened in the Quality Inn inherently a gang issue. In my view, there was no such nexus in order to put that together and that is why I denied it. . .

How does this potentially affect a jury? The reason it would be prejudicial is an argument that this all came about to promote gangs, to promote turf, to promote standing in the gang community, however you want to put it. That just is not here. That just is not here. So that is not what this particular statement is. This particular statement simply indicated he had used the task force in order to – when he was trying to identify individuals. So I sustained the objection and I told the jury to disregard the witness's last answer, *i.e.*, to disregard Detective Hollenbeck's last answer. I have been thinking about this because I knew I was going to get this motion. As the night follows the day, we were going to get it. I have thought about it for some time. In the overall scheme of things in how

this case has – how the testimony has flowed, how the case has been delivered, if you will, to the jury, I do not see it as so prejudicial as to cause a mistrial. I have told them to disregard it so they assume to follow my instructions. In addition, this comment, nor has testimony to date, generated any specific gang value, if you will, to having this fight that would promote the gang or that sort of thing. The jury has – in my view, has the ability to evaluate the evidence without – and there would be no reason to conclude that all of this happened because of somebody wanting to promote some sort of gang. It is pretty clear as the testimony had developed that most of this happened because of this fight that got started, and sort of quit then did not quit. . .

That is my feeling in this matter, counsel, so I am going to deny the motion to dismiss at least at this point. (4/23/13 RP 1423-26).

But the court missed the point and ignored the basis on which it relied to order gang evidence inadmissible. It was not admitted and could not be mentioned because gang evidence would be far more prejudicial than probative. (CP 264, 297). Indeed, the court's analysis regarding the fight as promoting a gang or gang activity has nothing to do with the real issue that the mere mention of gangs, as recognized by the court itself, is presumptively prejudicial. The court erred.

The admission of gang evidence when the court has expressly ruled it is admissible cannot be cured by instructing the

jury to disregard it when the presumption is that gang evidence is extremely prejudicial because it invites the jury to make the “forbidden inference” that gang membership alone shows a propensity to commit the crime. *Cf. State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). As noted by the court, the detective’s intentional violation of its order excluding any mention of gangs was totally unacceptable. But a curative instruction, even though the jury is presumed to follow it, cannot unring the bell sounding extreme prejudice to Mr. Castro’s chances of a fair trial once the word “gang” was interjected. *State v. Holmes*, 122 Wn. App. 438, 446, 93 P.3d 212 (2004).

Indeed, the admissible evidence against Mr. Castro was extremely slim on all charges. (See 4/23/13 RP 1440; CP 608). The dearth of evidence produced by the State was, however, cured by the detective’s intentional and wholly improper interjection of gangs. See *State v. Campbell*, 78 Wn. App. 813, 823, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995) (grave danger of unfair prejudice); *State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009) (gang affiliation protected First Amendment right of association). Detective Hollenbeck’s intentional violation of the

court's order tainted the trial with presumptively prejudicial gang evidence that cannot be deemed harmless in these circumstances. "Intentional violations of court orders cannot be tolerated." *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 46, 829 P.2d 765 (1992).

The trial must be fair; it was not. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). The court's decision on a motion for mistrial is reviewed for an abuse of discretion. *State v. Slone*, 133 Wn. App. 120, 126, 134 P.3d 1217 (2006), *review denied*, 159 Wn.2d 1010 (2007). A mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure the defendant will be treated fairly. *Id.* The intentional interjection of gang evidence contrary to the order of the court caused extreme prejudice to Mr. Castro as the mere mention of gangs alone inevitably led to his conviction. (CP 629). After the trial, a juror posted on KHQ's news website about Mr. Castro's trial:

I was a juror on this trial, and yes, they were all a bunch of gang members. I saw it first hand. I was blown away by their cocky attitudes, and pure lack of respect towards the attorneys and the judge. He is exactly where he should be. (CP 629).

Review of the trial record shows that the State's evidence

did not convict Mr. Castro; rather, he was convicted because the incident was about gangs. (CP 604-24, 626-31). There was no tenable reason for the court to deny the motion and its decision was also contrary to law establishing that gang evidence is presumptively prejudicial. The court therefore abused its discretion by denying the motion for mistrial. *Slone, supra*.

B. The prosecutor committed misconduct by requesting that Mr. Castro's wife, Dyneshia Sleep, be excluded from the courtroom as a potential witness when the State had no intention whatsoever to call her at trial.

During the trial, the defense expressed concern to the judge about the exclusion of Mr. Castro's wife, Dyneshia Sleep, from the courtroom as a potential witness:

Your Honor, I'm a bit concerned. Before we had went for lunch, I asked [the prosecutor] when he was calling Ms. Sleep, Mr. Castro's wife. And he's still indicating he does not know if he's calling her. It seems like the state doesn't really intend to call her, but they're keeping her under the subpoena to keep her out of the courtroom, which is what Mr. Garvin actually said is "I don't want her in the courtroom." So it seems like he's purposefully keeping her under subpoena, and that they don't intend to call her. And that just does not seem particularly fair to me. She wants to be able to be here for her husband and she's not able to come in at this point in time. And so I guess if they're gonna call her, I'd like them to call

her, and if they're not gonna call her, let her come into the courtroom and watch. She's entitled. (4/18/13 RP 1043-44).

The prosecutor responded:

Your Honor, Ms. Dyneshia Sleep is under subpoena. She was a percipient witness to these events, she was present in hotel room 412 when the fight goes on, so she is a potentially significant witness. Now, that said, it is true, and I've been candid with counsel, that it is my hope through the trial without calling her. The reason I think is fairly obvious; she's the defendant's wife. She's a very – I'm trying to think of another word besides dangerous witness for the state, but that's the word that comes to mind. I'm sure she's worked carefully with [defense counsel] and is fully prepared to testify in ways that are – would be challenging for the state in terms of presenting her as a witness. So I don't know what more I can say. The purpose of having her under subpoena is there may be facts that we need to prove, and at the same time I'm hoping to not call her. So I would leave it to the court's discretion to if you want to change your rules with regard to witness exclusion or not. (*Id.* at 1044-45).

The court did not want to change its rules regarding witness exclusion. (*Id.* at 1045). Ms. Sleep remained excluded from the courtroom. (*Id.* at 1046).

A criminal defendant alleging prosecutorial misconduct has the burden of establishing the prosecutor's conduct was indeed improper and prejudicial as well. *State v. Korum*, 157 Wn.2d 614, 650, 141 P.3d 13 (2006). The prosecutor here simply did not want

Ms. Sleep in the courtroom and putting her under subpoena as a potential witness for the state was purportedly the reason for doing so. But review of the trial record, particularly the colloquy between the court and counsel on this issue, reveals that the subpoena was merely a ruse to prevent Ms. Sleep from attending the trial as she was not going to be called as a witness for the State by any stretch of the imagination. This is a wholly improper purpose of the prosecutor for excluding her from the trial and was akin to an officer of the court promoting a public trial violation. U.S. Const. amend VI; Wash. Const., art 1, §§ 10, 22.

Because of the prosecutor's improper purpose of putting Ms. Sleep under subpoena so she could be excluded from the courtroom as a potential witness, Mr. Castro's right to public trial was violated. *State v. Strode*, 167 Wn.2d 222, 226, 217 P.3d 310 (2009); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). A violation of that right is structural error and is presumptively prejudicial. *State v. Wise*, 176 Wn.2d 1, 14-16, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 36-37, 288 P.3d 1126 (2012). Mr. Castro must therefore be granted a new trial.

C. The court erred by sentencing Mr. Castro to life without the possibility of parole as a persistent offender because the second strike relied on by the State, *i.e.*, conspiracy to deliver a controlled substance with a deadly weapon enhancement, did not qualify as a most serious offense.

In its sentencing brief, the State asked the court to impose a sentence of life without the possibility of parole, claiming Mr. Castro met the definition of a persistent offender:

4. The State anticipates that the evidence will prove that Mr. Castro has two prior convictions for “Most Serious Offenses” and meets the definition of a persistent offender. In particular he was [*sic*] multiple offenses in 2004 which would qualify as his first “Most Serious Offenses.” In 2008 he was convicted of Conspiracy to Delivery of a Controlled substance with a deadly weapon enhancement which qualifies as his second “Most Serious Offense.” (CP 600-01).

The court agreed and sentenced Mr. Castro as a persistent offender to life without the possibility of parole. (5/23/13 RP 25, 31, 33, 43-44; CP 727).

But *State v. Soto*, 177 Wn. App. 706, 714, 309 P.3d 596 (2013), held that RCW 9.94A.533(3), the firearm enhancement, does not apply to unranked offenses. Conspiracy to deliver a

controlled substance is an unranked felony. *State v. Mendoza*, 63 Wn. App. 373, 378, 819 P.2d 387 (1991); *State v. Hebert*, 67 Wn. App. 836, 837-38, 841 P.2d 54 (1992); *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 864, 50 P.3d 618 (2002). The deadly weapon enhancement thus does not apply to the 2007 conspiracy conviction. *Soto, supra*.

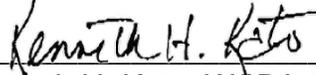
Since there can be no deadly weapon enhancement to the unranked offense of conspiracy to deliver a controlled substance, the court erred by relying on this conviction as a second strike. And sentencing errors resulting in unlawful sentences may be raised for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Conspiracy, without the deadly weapon enhancement, is not a most serious offense. See RCW 9.94A.030. Accordingly, Mr. Castro had only one strike and was improperly sentenced to life without the possibility of parole as a persistent offender. He must be resentenced to the standard range. *Soto, supra*.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Castro respectfully urges this court to reverse his convictions and remand

for new trial. Moreover, he must be resentenced because his second strike is not a most serious offense and his sentence of life without possibility of parole cannot stand.

DATED this 16<sup>th</sup> day of June, 2015.



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#### CERTIFICATE OF SERVICE

I certify that on June 16, 2015, I served the brief of appellant by first class mail, postage prepaid, on John A. Castro, # 849936, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362; and by email, as agreed by counsel, on Brian O'Brien at SCPAAppeals@spokanecounty.org.

