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Court of Appeals  
Division III  
State of Washington

32867-8-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JUAN A. RODRIGUEZ, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

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APPELLANT'S SECOND SUPPLEMENTAL BRIEF

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## A. ANALYSIS

The court has requested additional briefing on the issue of whether, in light of evidence only Mr. Rodriguez’s DNA was found on the gun, the improper admission of his booking statement was harmless beyond a reasonable doubt.

1. IN DECIDING WHETHER THE ERROR WAS HARMLESS THIS COURT MUST DETERMINE WHETHER THE STATE HAS DEMONSTRATED THAT THE ADMISSION OF THE INVOLUNTARY STATEMENTS DID NOT CONTRIBUTE TO THE CONVICTION.

Under the constitutional harmless error standard, the reviewing court “will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict.” *State v. DeLeon*, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (quoting *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011)). “The State bears the burden of showing that the constitutional error was harmless.” *State v. DeLeon*, 185 Wn.2d at 488.

The *DeLeon* Court held that admission of the jail intake evidence violated due process. 185 Wn.2d at 487. It then determined that in the absence of the defendants’ “clear admission” of gang affiliation, evidence such as gang-related clothing and tattoos was insufficient to render the constitutional error harmless. *Id.* at 488-89; see *State v. Mancilla*, 197

Wn. App. 631, 2017 WL 354306 1 (*slip. op.* no. 31187-2, January 24, 2017). In *Mancilla*, this court held that the evidence of gang affiliation was insufficient as to one of four defendant's emphasizing that the sole evidence of his alleged gang affiliation was photographs of his tattoos.

In *DeLeon*, the Court reviewed all the State's untainted evidence of the defendants' gang affiliation and the expert testimony relating to gang culture, and concluded that "[i]n light of the harmful unconstitutional evidence presented at trial, we must reverse these convictions and gang aggravators." 185 Wn.2d at 489. The Court did not expressly attempt to balance the circumstantial evidence of guilt against the prejudicial effect of the constitutional error before reaching this conclusion.

In giving short shrift to the evidence that was unrelated to Mr. DeLeon's coerced confession, the Court may have had in mind the very stringent harmless error analysis applied in another coerced confession case, in which a reluctant majority applied the constitutional harmless error analysis: "[I]t must be determined whether the State has met its burden of demonstrating that the admission of the confession . . . did not contribute to [the] conviction." *Arizona v. Fulminante*, 499 U.S. 279, 296, 111 S. Ct. 1246, 1257, 113 L. Ed. 2d 302 (1991). The Court's deep concern was two-fold: "the risk that the confession is unreliable" and "the profound impact that the confession has upon the jury." *Id.* These

considerations require “a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.” *Id.*

In *Fulminante*, the court recognized that the coerced statement had prejudicial consequences beyond the mere facts asserted in the statement: it led to the admission of other prejudicial evidence; it affected the jury’s assessment of other evidence; and finally, the otherwise inadmissible evidence reflected on the defendant’s character “depict[ing] him as someone who willingly sought out the company of criminals.” *Id.*

The improper admission of gang evidence is generally prejudicial. *State v. Mee*, 168 Wn. App. 144, 159, 275 P.3d 1192 (2012). In the present case, the admission of the coerced statement led to the admission of other prejudicial evidence: absent that statement, the evidence would have been insufficient to render any of the gang culture testimony relevant. The State relied on that testimony to prove motive. (RP 647, 1017-1020) The statement likely affected the jury’s assessment of other evidence: in closing the prosecutor relied on that testimony to support the argument that Mr. Cervantes’s failure to testify was attributable to a fear of gang retribution. (RP 1223-25).

The otherwise inadmissible evidence reflected on the defendant’s character: “Merely suggesting an accused is a gang member raises the

concern he or she will be judged guilty based on negative stereotypes as opposed to actual evidence of wrongdoing.” *Mancilla*, 197 Wn. App. at 631.

Thus, the issue is whether the DNA evidence is so overwhelming it overcomes the State’s pervasive reliance on the coerced statements to establish motive and impugn Mr. Rodriguez’s character and credibility.

2. THE PERVASIVE PREJUDICIAL EFFECT OF COERCED STATEMENTS OUTWEIGHS THE INCONCLUSIVE IMPLICATIONS OF DNA EVIDENCE.

Apart from the gang-related evidence, the testimony merely shows Mr. Rodriguez was possibly, but not probably, the shooter. Mr. Rodriguez himself testified that the third person in the car, whom he could not identify, was the shooter. (RP 1149, 1152) Mr. Arredondo testified there may have been a third person with Messrs. Reynoso and Rodriguez in the car from which shots were fired. (RP 463, 478)

Ms. Kroes testified that she saw Mr. Rodriguez lying on the floor behind the driver’s seat immediately after the car hit the side of her house. (RP 485-88) This testimony tends to support the inference there was a third person who occupied the front passenger seat. Alternatively the witness may have actually observed the third person in the back of the car and failed to notice Mr. Rodriguez lying under the car.

Officer Perez testified that when he arrived on the scene he found Mr. Rodriguez lying partially under the car on the ground. (RP 575) Officer Perez said after other officers arrived, he noticed for the first time the barrel of a gun that was under Mr. Rodriguez's leg. (RP 576-77, 590) It appeared to Officer Perez that Mr. Rodriguez had moved the gun. (RP 593-94) Detective Brownell photographed the gun lying close against the edge of the house. (RP 638) He also photographed a holster, lying on the back seat of the car, that was consistent with the gun next to the house. (RP 649)

This testimony is consistent with various scenarios. (RP 1268-69) Mr. Rodriguez was seated in the front passenger seat but the shots were fired from the back seat; Mr. Rodriguez and the gun were both thrown from the car at the time of the collision; Mr. Rodriguez was trapped under the car, and the shooter was the passenger in the back seat who fled, leaving the holster behind, without being observed; or Mr. Rodriguez was thrown to the ground from the front seat during the collision and the shooter was the other passenger in the back seat, who dropped the gun next to Mr. Rodriguez as he fled; or Mr. Rodriguez was seated in the back seat, the shooter, who was seated in front, fled dropping the gun as he exited the car, Mr. Rodriguez succeeded in extricating himself from the back seat and fell from the car onto the gun; or Mr. Rodriguez was seated

in the front seat, fired the shots, and was thrown from the car along with the gun, having left the holster in the back of the car for unknown reasons. The evidence supports various other scenarios, but in the end none of this testimony enables a trier of fact to draw any inferences as to what happened in the time between the firing of the shots and the arrival of police officers.

The only evidence Mr. Rodriguez fired the shot that injured Mr. Cervantes, or any of the other shots, is the fact that his DNA was found on the gun that was found under his leg several minutes after the shooting.

The DNA expert testified that one could briefly handle something without leaving a detectable amount of DNA. (RP 890-91) The DNA sample was taken from the grip, trigger, hammer, cylinder, cylinder release and sight of the gun. (RP 886) No testimony shows that the DNA was found in locations on the gun that would be inconsistent with being there as the result of a person lying on the gun or touching to gun in order to move it, or that the DNA was found in locations that would more likely be associated with firing the gun.

Officer Perez told the jury that under the circumstances it was apparent to him that Mr. Rodriguez had moved the gun and was lying on it by the time the officer first saw it. (RP 590) His testimony provides an ample explanation for Mr. Rodriguez's DNA having been found on the

gun regardless of whether he fired it. The expert's testimony suggests that someone else might have fired the gun without leaving a detectible amount of DNA. (RP 890-91)

The prejudicial effect of inflammatory testimony about his alleged gang affiliation and gang culture cannot be ignored. The only evidence of guilt is the presence of Mr. Rodriguez's DNA on the gun. In the absence of any corroborating evidence, and the impossibility of showing whether the actual shooter may have taken protective measures, such as wearing gloves, this evidence is not so overwhelming and unambiguous that this court can conclude that the admission of the coerced statement did not contribute to the jury verdict.

#### B. CONCLUSION

The improper admission of Mr. Rodriguez's involuntary statements was not a harmless error. His conviction should be reversed.

Dated this 24th day of April, 2017.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32867-8-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JUAN A. RODRIGUEZ,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on April 24, 2017, I served a copy of the Appellant's Second Supplemental Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

David Trefry  
David.Trefry@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on April 24, 2017, I mailed a copy of the Appellant's Second Supplemental Brief in this matter to:

Juan A. Rodriguez  
#378214  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

Signed at Spokane, Washington on April 24, 2017.

  
Janet G. Gemberling  
Attorney at Law

**JANET GEMBERLING, PS**  
**April 24, 2017 - 11:01 AM**  
**Transmittal Letter**

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Case Name: Juan A. Rodriguez

Court of Appeals Case Number: 32867-8

Party Respresented: Juan A. Rodriguez

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**Comments:**

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to David.Trefry@co.yakima.wa.us.

Sender Name: Robert S Canwell - Email: [admin@gemberlaw.com](mailto:admin@gemberlaw.com)