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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

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting expert testimony by a “gang expert” tending to identify Mr. Rodriguez as a member of the Sureno gang.
2. The court erred in admitting into evidence the booking officer’s testimony about the defendant’s jail gang form and intake interview.
3. The court erred in imposing discretionary court costs.

B. ISSUES

1. Absent substantial evidence the defendant was affiliated with a gang, did the court abuse its discretion in ruling admissible expert testimony regarding local gang culture?
2. A booking officer in the jail asked the defendant if he would be in danger if housed with certain individuals, allegedly for safety reasons, then requested gang-related information tending to establish the defendant’s membership in a criminal street gang. Were the defendant’s statements in response to those questions involuntary and inadmissible under the Fifth Amendment?

3. Beyond evidence that the defendant had been employed at the time of the offense two years earlier, the record is devoid of evidence the defendant has the ability to pay costs. Did the court err in imposing costs including the filing fee, sheriff's service fee, jury fee and costs of incarceration, totaling up to \$960?

C. STATEMENT OF THE CASE

Angel Arredondo was attending a family gathering when his distant cousin Mario Cervantes drove by in an SUV. (RP 459-60) Mr. Cervantes agreed to give Mr. Arredondo a ride home to get his cell phone. (RP 460) They had driven a very short distance when Mr. Arredondo heard a vehicle speed up and as he turned to look he heard gunfire. (RP 460-61) The vehicle looked like a small Honda, which passed the SUV, pulled in front of it, and stopped at a stop sign. (RP 461-63) Mr. Cervantes stepped on the gas and rear-ended the small car, then drove around to get up speed and drove into it sideways, pushing it into an adjacent residence. (RP 465-66) Mr. Arredondo and Mr. Cervantes ran to a nearby hospital, Mr. Cervantes went inside and Mr. Arredondo walked home. (RP 467)

Mr. Cervantes was treated for a gunshot wound to his side in the emergency room at Toppenish Community Hospital. (RP 672, 674-75) He was released from the hospital later that day. (RP 678)

Officer Derrick Perez arrived at the scene moments after the collision occurred. (RP 566, 571) He found an individual later identified as Mr. Rodriguez trapped under the smaller of two cars apparently involved in the collision. (RP 573, 577) Another officer pointed out a bullet hole in the larger car, and Officer Perez saw the barrel of a handgun under Mr. Rodriguez's leg. (RP 576-77) Mr. Rodriguez was detained and later charged with attempted first degree murder of Mr. Cervantes and first degree assault of Mr. Cervantes and Mr. Arredondo, all while armed with a firearm and with intent to cause advantage to a criminal street gang. (RP 584; CP 129-31)

Defense counsel moved to suppress evidence related to gang membership of the accused or the alleged victims. (CP 16-21) The motion specifically challenged the admissibility of general evidence of gang culture, answers Mr. Rodriguez gave while being booked into the Yakima County Jail, and opinion testimony of a "Gang Expert." (CP 16-17)

The court ruled evidence of animosity between Sureno and Norteno gang members would be more probative than prejudicial and

would be admissible “to put in context why one car full of people would be shooting at another car full of people.” (CP 55; RP 38) The court also ruled the jail intake information would be admissible, provided it was otherwise admissible under the Fifth Amendment. (CP 56; Supp. RP 38-39) The court noted that the intake officer, Corporal Theresa Hartley, had not yet testified, and the admissibility of Mr. Rodriguez’s statements to her depended on the circumstances of the intake interview. (CP 55; Supp. RP 38-39) Corporal Hartley testified at a later pretrial hearing but the record does not include any decision on the voluntariness of Mr. Rodriguez’s statements to her. (July 7 RP 27-42)

Sheriff’s Deputy Ron Shepard told the jury he detained Jesse Reynoso, whom he saw walking near the scene of the shooting, because he fit the description of someone who left the scene of the collision and had blood on his shirt. (RP 597, 599-600) Detective Jaban Brownell testified that a cell phone found in the smaller car contained photographs of Mr. Reynoso throwing gang signs. (RP 629, 646) Detective Brownell also showed the jury a blue and white Dodgers shirt, a blue braided bracelet and necklaces he had received from Support Officer Brian Dean. (RP 691, 696) Officer Dean testified these items had been taken from Mr. Rodriguez in the emergency room shortly after the collision. (RP 745-46)

Corporal Hartley told the jury that the jail would not want to put Norteno and Sureno prisoners together “for safety reasons.” (RP 801)

She described the interview process:

We check their prior housing, these are one of the first questions, are there any particular inmates they can't be housed with, maybe, maybe they have an enemy, and then their gang affiliation because, like I said, we separate the gangs

She identified the form she used to interview Mr. Rodriguez. (RP 803-04)

According to Corporal Hartley, when she first asked him whether he was in a gang he just turned his head away. (RP 806) When she then asked “okay, so are you Norteno . . . that got a rise out of him . . . and he kind of said ‘no’”. (RP 806) Next, she said “‘Okay, so you’re Sureno,’ and he said, ‘yeah.’” (RP 807) She wrote “Sureno” for his gang affiliation, with a question mark because, she explained, she believed he had a codefendant who was Sureno. (RP 807-08) The form was admitted into evidence over defense counsel’s hearsay objection. (RP 808-09)

Heather Pyles testified that she examined DNA found on the firearm recovered at the scene of the collision and DNA samples taken from Mr. Reynoso and Mr. Rodriguez. The firearm DNA matched that of Mr. Rodriguez and did not match that of Mr. Reynoso.

Detective Brownell explained to the jury that there were two major gangs in the Toppenish area: the Surenos and the Nortenos. (RP 1013)

He testified that if an individual wore multiple items of red clothing, a person with knowledge of gangs might start thinking of the person as a potential gang member. (RP 1014) Similarly, blue jewelry and bandanas would suggest a possible member of a Sureno gang. (RP 1015) He noted that a Chicago Bulls jersey taken from Mr. Cervantes was red and black. (RP 1017) He suggested a connection between a blue-on-white Los Angeles Dodgers jersey and a Sureno gang. (RP 1018) He noted that the blue bracelet and necklaces taken from Mr. Rodriguez, together with the blue jersey, suggested gang membership. (RP 1019) He went on to describe the animosity between members of Sureno and Norteno gangs, generally shown by violence. (RP 1020-21) He explained that a person committing such violence gained respect from other gang members. (RP 1021-22)

Detective Brownell identified the voice heard on an audio recording as likely that of Mr. Rodriguez. (RP 1027) He told the jury that Mario Cervantes failed to appear at a court hearing held two days after the recorded call. (RP 1028-29) Mr. Cervantes's non-appearance resulted in a delay of the trial. (RP 1029) Estella Castro testified that she had translated a transcript of the phone call from Spanish to English. (RP 1109) The recording was played for the jury and over defense counsel's

objection the jury were given copies of Ms. Castro's translation, admitted solely for illustrative purposes. (RP 1110-12; Exh. 122, 123, 127)

Mr. Rodriguez told the jury he had met Mr. Reynoso a few weeks earlier at work. (RP 1146) He denied affiliation with any gang. (RP 1155-56) A third person, whom he did not know, was riding on the passenger side in the back seat of Mr. Reynoso's car, and Mr. Rodriguez believed this was where the shots came from. (RP 1149, 1152) Mr. Rodriguez said he did not even know Mr. Cervantes or Mr. Arredondo. (RP 1156-57, 1167-69)

Mr. Rodriguez was convicted and the court sentenced him to 240 months' incarceration for attempted first degree murder, 123 months for first degree assault, plus 120 months for committing both offenses while armed with a firearm. (CP 240) The court imposed discretionary costs of up to \$960 including the filing fee, sheriff's service fee, jury fee and costs of incarceration up to \$500.

D. ARGUMENT

1. EVIDENCE OF MR. RODRIGUEZ'S GANG AFFILIATION WAS INSUFFICIENT TO JUSTIFY ADMITTING EXPERT OPINION EVIDENCE ABOUT GANG CULTURE.

Evidence of gang affiliation is inadmissible in a criminal trial unless there is evidence of a connection between the crime and the gang organization before the evidence becomes relevant. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing *Dawson v. Delaware*, 503 U.S. 159, 166, 168, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)). Accordingly, such evidence is admissible only if the trial court “identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact.” *State v. Scott* at 526-27; ER 404(b); *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009). Admission of such evidence is reviewed for abuse of discretion. *Id.*

The connection between the crime and gang affiliation must be more than the absence of any other obvious motive for the crime. See *State v. Yarbrough*, 151 Wn. App. 66, 210 P.3d 1029 (2009); *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136 (2009); *State v. Ra*, 144 Wn. App. 688, 701–702, 175 P.3d 609, review denied, 164 Wn.2d 1016, 195 P.3d 88 (2008); *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050,

review denied, 128 Wn.2d 1004, 907 P.2d 296 (1995). In *Yarbrough* the charged offenses had been preceded by a verbal confrontation between a group that included the defendant and another group that included one of the victims, during which threats were exchanged and each group orally announced its gang affiliation. 151 Wn. App. at 75. In *Campbell*, the State presented evidence the defendant was a self-proclaimed gang member engaged in selling drugs while the victims were members of a rival gang, also engaged in selling drugs; and the crimes were preceded by a confrontation between the victim and the defendant in which the victim confronted the defendant for encroaching on his business. 78 Wn. App. at 816.

Ra, on the other hand, merely involved a confrontation between four individuals in one car and the defendant and three friends in another car, in which occupants of Ra's vehicle directed insulting and threatening comments to the occupants of the other vehicle. 144 Wn. App. at 692-93. Evidence of Mr. Ra's gang membership was held prejudicial, requiring reversal of his conviction. 144 Wn. App. at 702.

Here, the only evidence of Mr. Rodriguez's having any gang affiliation was his ambiguous response to Corporal Hartley's questioning, the blue jersey and jewelry he was wearing at the time of the shooting and photographs of the alleged driver of the car in which he was a passenger

wearing blue clothing and making gang signs. Testifying as a “gang expert,” Detective Brownell suggested that a suspect’s use of blue items of clothing “suggested” gang membership. This, without more, is hardly sufficient to support the inference Mr. Rodriguez was, in fact, a gang member. This “gang expert” testified to the existence of general animosity between the local Norteno and Sureno gangs, that this animosity was expressed by violence, and that gang members seen to commit such violence received respect. The State did not present evidence showing any prior gang-related encounters or confrontations between Mr. Rodriguez and either Mr. Cervantes or Mr. Arredondo, or any contemporaneous actions that would create any nexus between the offenses and any gang affiliation. The gang-related evidence was admitted to suggest a motive for an apparently motiveless crime.

Even if there had been overwhelming evidence that Mr. Rodriguez and the alleged victims belonged to rival gangs, the State failed to present any evidence that the charged crimes were connected to their gang affiliation. The trial court’s ruling was premised on a belief that mere gang affiliation, without more, establishes a motive for any violence that occurs between members of rival gangs. The State’s expert testimony falls far short of establishing this premise.

2. STATEMENTS CORPORAL HARTLEY ELICITED FROM JUAN RODRIGUEZ WERE INVOLUNTARY AND THEIR ADMISSION AT TRIAL VIOLATED THE FIFTH AMENDMENT.

The Fifth Amendment to the United States Constitution protects a person from being compelled by the state to give evidence against himself. U.S. Const. amend. V; *State v. Unga*, 165 Wn.2d 95, 100, 196 P.3d 645 (2008) (citing *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986)). Article I, § 9 of the Washington State Constitution affords the same protection. *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991).

In determining whether a statement made during custodial interrogation is voluntary, the court considers the totality of the circumstances under which the statement was given. *State v. Unga*, 165 Wn.2d at 100 (citing *Fare v. Michael C.*, 442 U.S. 707, 724-25, 99 S. Ct. 2560, 61 L. Ed. 2d 197 (1979)); *Schneckloth v. Bustamonte*, 412 U.S. 218, 226, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Miranda v. Arizona*, 384 U.S. 436, 475-77, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). “[C]oercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’” *Unga*, 165 Wn.2d at 100-101 (quoting *Colorado v. Connelly*, 479 U.S. at 167). Accordingly the court should consider both the conduct of law enforcement officers and the suspect’s ability to resist

the pressure. *United States v. Brave Heart*, 397 F.3d 1035, 1040 (8th Cir. 2005).

A classic example of coercive pressure is a state agent's offer to protect an imprisoned suspect from violence threatened by others in exchange for potentially self-incriminating information. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Payne v. Arkansas*, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958).

In *Payne v. Arkansas*, the defendant was suspected of killing a white man. 356 U.S. at 562-64 (1958). The police chief promised to protect him from an angry mob that had gathered outside the jail in exchange for his confession. The court concluded:

It seems obvious from the totality of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice,' and that its use before the jury, over petitioner's objection, deprived him of 'that fundamental fairness essential to the very concept of justice,' and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.

356 U.S. at 567.

In *Fulminante*, a prison informer offered to protect the defendant from "credible threats of violence" by other inmates who suspected him of killing a young girl, on condition the defendant tell him the truth about the killing. 499 U.S. at 288. Concluding that the resulting confession was not

voluntary, the Court said: “a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. As we have said, ‘coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition.’” *Id.* at 287 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L. Ed. 2d 242 (1960)).

Corporal Hartley and Detective Brownell made it clear to the court that being housed with members of a rival gang carried a high risk of violence for the defendants, that the implied threat was not an idle threat, and that the purpose in preparing the forms was to assure the suspects’ personal safety and protection. (RP 355) That protection would only be available if the defendants provided the booking officer with the requested information.

Admission of Mr. Rodriguez’s involuntary statements to Corporal Hartley, both those reported on the gang form and those related to the jury by Corporal Hartley, violated Mr. Rodriguez’s rights under the Fifth and Fourteenth Amendments and Const. Art. I, § 9.

The error was constitutional and the State bears the burden of showing it was harmless. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Constitutional error is only harmless if a reviewing court is convinced beyond a reasonable doubt that without the error any reasonable

jury would still reach the same result, and the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Aumick*, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990).

The State's theory of the case was that Mr. Rodriguez was motivated to participate in the shooting at the home because the occupants belonged to a rival gang and in the gang culture such rivalry can provide a motive for such a shooting. Apart from his statements to Corporal Hartley, the only evidence of Mr. Rodriguez's membership in a gang consisted in Detective Brownell's testimony that members of the Sureno gangs sometimes wear blue items of clothing. The State presented evidence Mr. Rodriguez was wearing a blue and white jersey and a bracelet and necklaces made of blue braid. The State presented evidence that Mr. Reynoso was the driver of the car in which Mr. Rodriguez was a passenger. (RP 597, 599-600) Detective Brownell testified that he found photographs showing Mr. Reynoso "throwing gang signs." (RP 629, 646-47) Mr. Rodriguez did not appear in these photographs. (Supp. RP 40) This evidence was wholly insufficient to support the inference that Mr. Rodriguez was personally involved in a gang, or had any reason to participate in the alleged assaults in any way.

According to Corporal Hartley's testimony, Mr. Rodriguez responded negatively when she suggested he was a Norteno, and may have given an affirmative response when she asked whether he was a Sureno. She testified that her tentative identification of Mr. Rodriguez was based on her awareness that he had a codefendant who was a Sureno. The record does not disclose how she became aware of such information.

This evidence was essential to the State's case against Mr. Rodriguez; without it the jury would not have found that he had any motive for shooting into another vehicle. The evidence against him included his presence at the scene of the shooting and the presence of his DNA on the weapon that fired shots at the vehicle driven by Mr. Cervantes. There was evidence of a second passenger in the same vehicle, and as that individual was never identified, no effort was made to determine whether that individual may have fired the handgun. Evidence suggesting to the jury that the shooting was motivated by gang animosity and that Mr. Rodriguez and the victims were members of rival gangs was highly prejudicial; without such evidence the outcome of the prosecution would likely have been different.

3. IMPOSITION OF DISCRETIONARY COSTS WAS ERROR.

The imposition of legal financial obligations (LFOs) is governed by statute:

(3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160.

In *State v. Blazina*, the Supreme Court recognized serious defects in the state's system of imposing costs and fees on indigent defendants in criminal cases. 182 Wn.2d 827, 344 P.3d 680 (2015). Looking at the situation involving imposition of legal financial obligations at the trial court level, the *Blazina* majority chronicled national recognition of "problems associated with LFOs imposed against indigent defendants," including inequities in administration, impact of criminal debt on the ability of the state to have effective rehabilitation of defendants and other serious, societal problems "caused by inequitable LFO systems." 182 Wn.2d at 835.

RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a

defendant's other debts, including restitution, when determining a defendant's ability to pay.

182 Wn.2d at 839. To determine the amount and method for paying the costs, “the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.* (emphasis added). In short, the superior court must conduct on the record an individualized inquiry into an indigent defendant’s current and future ability to pay in light of all relevant factors including nondiscretionary legal financial obligations, his other debts, and the factors for determining indigency status under GR 34.¹ 182 Wn.2d at 838.

¹ GR 34 provides in relevant part:

- (3) An individual who is not represented by a qualified legal services provider (as that term is defined below) or an attorney working in conjunction with a qualified legal services provider shall be determined to be indigent within the meaning of this rule if such person, on the basis of the information presented, establishes that:
 - (A) he or she is currently receiving assistance under a needs-based, means-tested assistance program such as the following:
 - (i) Federal Temporary Assistance for Needy Families (TANF);
 - (ii) State-provided general assistance for unemployable individuals (GA-U or GA-X);
 - (iii) Federal Supplemental Security Income (SSI);
 - (iv) Federal poverty-related veteran's benefits; or
 - (v) Food Stamp Program (FSP); or
 - (B) his or her household income is at or below 125 percent of the federal poverty guideline; or
 - (C) his or her household income is above 125 percent of the federal poverty guideline and the applicant has recurring basic living expenses (as defined in RCW 10.101.010(4)(d)) that render him or her without the financial ability to pay the filing fees and other fees or surcharges for which a request for waiver is made; or
 - (D) other compelling circumstances exist that demonstrate an applicant's inability to pay fees and/or surcharges.
- (4) An individual represented by a QLSP, or an attorney working in conjunction with a QLSP that has screened and found the individual

The record does not reflect that the State presented any evidence of Mr. Rodriguez's ability to pay any LFOs, including the likelihood that his ability to work was likely to result in any employment in the near future; what level of income such employment had generated or was likely to generate; and whether he had significant current debts. (RP 5) The State presented no evidence of Mr. Rodriguez's financial resources. The imposition of court costs does not comply with statutory requirements. The remedy is remand to the trial court for a new sentencing hearing for inquiry into defendant's ability to pay. 182 Wn.2d at 839.

While an appellate court may refuse to review any claim of error which was not raised in the trial court, RAP 2.5(a) grants appellate courts discretion to accept review of claimed errors not appealed as a matter of right. 182 Wn.2d at 839. In *Blazina* the court opined that each appellate court must make its own decision to accept discretionary review. *Id.* But the court stated that national and local cries for reform of broken LFO systems demand that it exercise its RAP 2.5(a) discretion. *Id.* This court should agree and reach the merits of the issue in the present case.

eligible for services, is presumptively deemed indigent when a declaration from counsel verifies representation and states that the individual was screened and found eligible for services.

E. CONCLUSION

Mr. Rodriguez was convicted on the strength of testimony that identified him as a member of a gang and a likely participant in gang violence. Evidence that Mr. Rodriguez belonged to any gang was minimal and the admission of evidence suggesting otherwise, combined with evidence suggesting such gang affiliation constituted a credible motive of the shooting that occurred in this case, denied Mr. Rodriguez a fair trial. His conviction should be reversed, and the case remanded for a new trial.

Dated this 12th day of October, 2015.

JANET GEMBERLING, P.S.



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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.)	

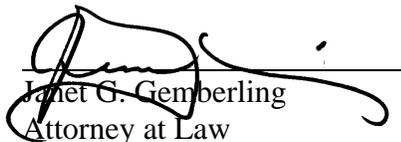
I certify under penalty of perjury under the laws of the State of Washington that on October 12, 2015, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on October 12, 2015, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on October 12, 2015.


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