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Division III
State of Washington

NO. 32867-8-III

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON
Plaintiff/Respondent,
Vs.
JUAN A. RODRIGUEZ,
Defendant/Appellant.

BRIEF OF RESPONDENT
BY YAKIMA COUNTY

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A. INTRODUCTION

Both in his opening and supplemental briefs Appellant challenged the State’s use of a booking questionnaire. The Washington State Supreme Court as now addressed this issue in State v. DeLeon , 185 Wn.2d 478, ___ P.3d ___, slip op. No. 91185-1 (May 5, 2016).

Clearly DeLeon is applicable to this case and the challenge to the booking information was properly raised. However, it is the State’s position that when this court looks to the totality of the evidence presented, which is independent of the booking information, it will determine that any prejudice introduced by the booking documents was the harmless and therefore the harmless error test set out in DeLeon supports the State’s position that the error was not sufficient to require reversal of Rodriguez’s convictions.

B. ISSUES PRESENTED BY PETITION

Issue set forth in Supplemental Brief of Appellant:

- 1) State v. DeLeon is applicable to this case. The error here was not harmless

Issues set forth in opening brief;

- 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?

ANSWERS TO ISSUES PRESENTED BY PETITION

- 1) The court's ruling in DeLeon is controlling. However unlike DeLeon, in this case the evidence is such that this court may find the introduction of the booking information harmless beyond a reasonable doubt.

C. STATEMENT OF THE CASE

Because of the ruling in DeLeon requires the State to demonstrate that the error that occurred here was harmless the State has set forth the facts presented to the jury which demonstrate to this court that the error that occurred here, the use of the very limited booking information, was overcome by the overwhelming untainted evidence of guilty presented by the State. The Appellant has set forth a more general fact section that encompasses the information that has now, based on DeLeon, been determined to be error, the State shall not repeat below.

The testimony of Angel Arredondo was that he was at a small family barbeque. He testified that he was leaving to find his phone when he saw his cousin/friend Mario Cervantes in an Escalade SUV. (RP 459-

60, 477) Mr. Cervantes agreed to give Mr. Arredondo a ride home to get his cell phone. (RP 460, 476) They had driven a very short distance when Mr. Arredondo heard a vehicle speed up, he testified that the engine was roaring and then he glanced and then heard pop, pop, pop and “everyone just kind of hid...” RP 460-61 He testified that he was “scared for his life” and had seen a hand sticking out of the passenger side of a silver-ish car. RP 461-2, 478. He testified there were two or three people in the car. RP 463, 478. He stated there were shots fired as the car passed and as the car was in front of the Escalade, estimating that four or five shots were fired when the vehicle carrying the defendant was in front of the SUV. He testified that after the shots were fired his buddy, Mr. Cervantes, stated “I’m hit, I’m hit” RP 463.

Mr. Arredondo testified that the silver Nissan stopped in front of the Escalade and just sat there. Arredondo observed that Mr. Cervantes was bleeding after being shot. RP 464. Mr. Cervantes then “slammed on the gas...and he hit them right in the rear...in the trunk...(the) trunk opened, glass broke and as it hit them they slid onto the property of a house. RP 465. He testified that the SUV driven by victim Cervantes then went through the hospital parking lot (the hospital was right next to the scene) and “trying to t-bone them...he rams in again for the second time and hits them right on the driver door. RP 465 The SUV hit the

shooters car so hard that “the vehicle went completely inside a house.”
RP 466. Mr. Arredondo jumped out of the car and fled the scene with
Mr. Cervantes towards the hospital. He testified that “I was scared. I was
(sic) feared for my life. I was just terrified.” RP 466-7 He testified that
he did not look at the shooters because “[t]hey’re trying to , you know,
murder me or, or maybe not me but my friend...” RP 468.

Mr. Cervantes was treated for the gunshot wound to his side at the
hospital next to the crime scene, Toppenish Community Hospital. (RP
672, 674-75) Mr. Cervantes was released from the hospital on the same
day as the shooting. (RP 678)

Mrs. Kroes, the owner of the home where the Nissan was smashed
into testified. She stated that she was home a time of the incident and
observed the initial crash and the second hit by the Cadillac. RP 485-6
Mrs. Kroes testified that she “...peaked... and here there was someone
lying in the back of the little gray car...” RP 487. The person she saw
“was pinned in ...(he) was lying in the floorboard of this little gray car
behind the seat...he was in the back floorboard behind the driver.” RP
488 Mrs. Kroes did not see anyone else at or in the car. RP 488. She did
see someone running through her back gate and someone crossing over
her neighbors fence. RP 489. She testified that there were three or four
people “affiliated” with the crime. RP 489, 498.

Mr. Cervantes, the father of the victim testified that his son was a Norteno, affiliated with the color red. RP 528. He also stated that he knew one of the people he observed fleeing from the scene as “Jesse Reynosa” RP 537-8 Mr. Cervantes testified that he saw the injuries of his son while at the hospital and that his son had a bullet hole on the right side that exited a little higher than where it had gone in. RP 542.

The first officer to arrive was Officer Derrick Perez, he arrived at the scene moments after the collision occurred. (RP 566, 571) He saw an individual later identified as Mr. Rodriguez trapped under the small car that had been smashed into Mrs. Kroes home. RP 573, 575, 577) Officer Perez testified that the defendant appeared to be trying to crawl out from under the car. RP 576.

Deputy Reyna arrive and pointed out a bullet hole in the larger car, and Officer Perez saw the barrel of a handgun that was sticking out from under Rodriguez’s leg. (RP 576-77) Officer Perez positively identified the Appellant as the person in the car at the scene. RP 577. Officer Perez testified that neither the driver’s side doors on the Nissan were able to be opened. RP 580-1. After Officer Perez saw the gun under the defendant he ordered the defendant to not move or he would be shot. RP 583, 590. Officer Perez testified that it appeared to him that Rodriguez was attempting to cover up the weapon, that he was actively positioning

himself on top of the silver revolver. RP 592-4. Officer Perez testified that he went to the hospital and observed the gunshot wound sustained by Mr. Cervantes. RP 585-6

Detective Brownell testified he seized the firearm, a silver revolver, that was found in the Nissan and the weapon was located in an open area by the passenger door between the Nissan and the house. RP 635. Detective Brownell testified that pictures found on a cell phone found in Nissan where photographs of Mr. Reynoso throwing gang signs. (RP 629, 646-7) 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. These items had been worn by the defendant. (RP 691, 696) Detective Brownell testified that he located a holster for a revolver on the rear seat of the Nissan. RP 649. And that he observed there or four bullet holes in the car and later was made aware and observed additional bullet damage to the front of the Escalade. RP 652-3. Det. Brownell testified that the silver .357 revolver that was taken from under the defendant contained six spent rounds. RP 657-62.

Officer Dean testified these blue items had been taken from Mr. Rodriguez in the emergency room shortly after the collision. (RP 745-46)

Heather Pyles, an expert on DNA from the Washington State Patrol Crime laboratory, 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 DNA on the revolver matched that of Rodriguez, Reynoso was excluded as a contributor. She testified that “So for the match between the revolver and Mr. Rodriguez, the statistic was that the estimated probability of selecting an unrelated individual at random from the US population with a matching profile is 1 in 1.8 quintillion.” RP 904. Ms. Pyles testified that;

...if you have an item that you’re handling all the time and it’s yours and you’re carrying with it (sic) and you’re coming in contact with it a lot, I would expect to find enough of your DNA to, to produce a strong DNA profile.

Q: Okay. And was this profile in this case a strong DNA profile?

A: Yes, there was substantial DNA on the gun and that allowed me to produce a very good profile. RP 928.

The defendant’s testimony was that he has just by happenstance run into Mr. Reynosa as he, Rodriguez, was with his girlfriend and he child. He testified that when he entered the car there was a person in the backseat whom he did not know. RP 1148-9. He thought that this person “had white skin.” RP 1150. He testified that the two people in the car were saying loud words in English but were not speaking to him. RP 1151 He testified that he heard gunshots and then they got impacted and that was pretty much all that he remembered. RP 1153-4. He testified that he was not a gang member, had never been a gang member and that

the blue items he had been wearing were gifts or items that he had had for a long time. He also denied telling the jail staff that he would feel safer with certain people in the jail. RP 1154-5

The defendant testified that the reason that he had made the phone calls regarding the victim/witness was that he was “frustrated.” RP 1174. That his statement on the phone “If they show up things will get stirred up,” was not a threat or when the person to whom he was talking stated “or give a beating” that too was not part of a threat to the victim. RP 1176-7. In the words of the Appellant “[i]t’s nothing.” RP 1177.

D. ARGUMENT

- 1. DeLeon makes it clear that this type of error will not be fatal to a conviction if the evidence presented at trial was sufficient to allow the reviewing court to determine that any error alleged was harmless. In this case the independent evidence presented was clearly overwhelming and as such the error arising from the introduction of the booking information was harmless.**

DeLeon, supra, “We apply a harmless error standard to constitutional errors such as this. See, e.g., State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). “Under that standard, we will vacate a conviction unless it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict.” Id. More specifically, to find such a constitutional error harmless, we must find-beyond a reasonable doubt-that “*any reasonable jury* would have reached the same result,

despite the error." State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995) (emphasis added). The State bears the burden of showing that the constitutional error was harmless. Monday, 171 Wn.2d at 680.”
Id at 487-8

As is clear from the facts set forth above this was not a criminal act that was prosecuted against this defendant based on scant evidence. On more than one occasion during the work up to this trial and in the trial counsel for Rodriguez stated that it was his opinion that the State had a strong case that would be difficult to defend against without any gang information to include the booking information. This case was set twice for trial on the first occasion there was discussion regarding the fact that the State’s primary witness, Mario Cervantes, was missing and the State had had to issue a material witness warrant in an attempt to locate him. Defense counsel for Rodriguez stated the following regarding the strength of the State’s case even without this one witness who was the victim/driver of the vehicle hit by the bullets, initially stated to officers that he had seen gang hand signs “thrown” and was actually shot in during the commission of the crime:

It’s not, the gang evidence is not relevant for the State to prove their case. They don’t, you know, need it. They have eyewitnesses to say that someone in a Nissan Sentra shot into this Escalade and Mario Cervantes will be here to say

he's the one that got shot. He'll say that he then got behind the car rammed it, crashed it into a yard, did a lap through the hospital parking lot, rammed it again totally both vehicles and ran away. Police officers and first responders get there. My client, Mr. Rodriguez has...

THE COURT: Kind of pinned at this...

MR. SILVERTHORN: Yeah.

THE COURT: ...car.

MR. SILVERTHORN: Pinned in the car. He's got head wounds. Okay. So he's there, right. His presence is there. He's tied to the car. His DNA is found on the gun. Okay. So they don't, they don't need any 404(b) evidence to prove his identity. They don't need it to prove his opportunity. They don't need it to prove his intent. They have other, they have other issues there. Motive is not an element of the crime though the State can choose to introduce it if it wishes to do so but you then have the balancing test okay for this 404(b) evidence. So first of all it's not completely relevant. RP 17-18

There was a call. We went to the scene. We saw two broken cars. We took pictures. They took a ton of pictures. We interviewed the people that were standing around and alarmed, you know, we inter, we went to the hospital. We got records. They got records for Mr. Rodriguez. They got records for Mr. Cervantes. All of those things can come in. We got pictures of, of, of the blood in the car. They got pictures of bullet holes in the car. They got pictures of the firearm .357 Magnum lying outside of the Nissan. They got a holster in the backseat of the Nissan and they got Mr. Rodriguez's DNA on the pistol. They got a police officer who's gonna come in and say as, as Mr. Rodriguez was trying to get from underneath this car and this wreck that he seemed to be

reaching for this gun. So, you got nexus from the defendant to the car, nexus from the defendant to the gun. Scientific evidence connecting him to the gun and you got pictures of the aftermath all that information and they don't need their witness for any of that. RP 76

Where are they ham, (sic) they're, you know, they're, the difficulty that they have is that there's no one to take the stand and say, you know, a white Nissan pulled up on us and someone in the back started shooting at us. So yeah, it's, it's a big hole that I can exploit. I, but honestly, I can't. The case is difficult to defend even without the, the victim witnesses...(RP 75-77)

Because of the decision in DeLeon the question of the sufficiency of the evidence presented once again becomes an issue.

Here the defendant was charged with several counts; attempted first degree murder and two counts of assault in the first degree.

Attempted first degree murder, and two counts of first degree assault. To convict Rodriguez of attempted first degree murder, RCW 9A.32.030(1)(a) and 9A.28.020, the state had to prove that acting as the principle or an accomplice, Rodriguez did with intent to commit first degree murder and with premeditated intent to cause the death of another person took a substantial step towards committing the crime of first degree murder. In this case by shooting the victim and thereby attempting to cause the death of the victim.

A person is guilty of first degree assault if, with intent to inflict

great bodily harm, he assaults another with a firearm. RCW 9A.36.01
1(1)(a). These two counts were also charged out as principle or
accomplice. A person acts with intent when he acts with the objective or
purpose to accomplish a result constituting a crime. RCW
9A.08.010(1)(a). CP 129-30, 141-57

Case law is regarding the method to prove specific intent cannot be
presumed, but can be inferred as a logical probability from all the facts
and circumstances. State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320
(1994) Once again as set forth above the facts in this case were
overwhelming. This is not a case where Rodriguez was in the area of the
criminal act and because he was wearing some blue clothing and jewelry
he was arrested and convicted. The facts speak for themselves. The error
that occurred in this case was more than overborne by the facts.

The Appellant did not and does not dispute that shots were fired
into the Escalade nor that Rodriguez was in the vehicle at the time of the
shooting. The defense was that Rodriguez just happened to run into the
driver and the unknown third person just before the shooting and that he
was in the front seat of the car at the time of the shooting and that
someone, presumably the unknown white man in the back seat was the
actual shooter.

Rodriguez claimed that he never saw the gun when it was being

fired and the claim, the intimation, throughout the trial was that the DNA that was found on the weapon was transferred there as the defendant was laying on the gun in after the crash.

The standard for this type of error is set out by our Supreme court in DeLeon. It is stated in State v. Thompson, 151 Wn.2d 793, 92 P.3d 228 (Wash. 2004);

Thompson's conviction was based, at least in part, on evidence found within the trailer--evidence we here conclude is inadmissible. This constitutional error may be considered harmless if we are convinced beyond a reasonable doubt that any reasonable trier of fact would have reached the same result despite the error. State v. Brown, 140 Wn.2d 456, 468-69, 998 P.2d 321 (2000). To make this determination, we utilize the "overwhelming untainted evidence" test. State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). Under this test, we consider the untainted evidence *admitted at trial* to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* (Emphasis in original.)

State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1046-7 (2008) "In evaluating whether the error is harmless, this court applies the "overwhelming untainted evidence" test. State v. Davis, 154 Wn.2d 291, 305, 111 P.3d 844 (2005) (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)), *aff'd* on other grounds by 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.*

It clear that even Rodriguez's own trial attorney believed the evidence was sufficient to convict Rodriguez. This court must, when reviewing a challenge to the sufficiency of the evidence, view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)).

While there has not been a direct challenge to the sufficiency because Rodriguez has requested a reversal based on DeLeon this must be addressed. A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One type of evidence is no less valuable than the other, there is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. See also, State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136

Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

This test was summed up in State v. Bucknell, 183 P.3d 1078, 1080 (2008);

In reviewing a sufficiency of the evidence challenge, the test is whether, after viewing the evidence in a light most favorable to the jury's verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 16 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The elements of a crime may be established by either direct or circumstantial evidence, and one type is no more valuable than the other. State v. Thompson, 88 Wn.2d 13, 16, 558 P.2d 202, *appeal dismissed*, 434 U.S. 898 (1977). "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). (Emphasis mine.)

Because these crimes were charged out in the alternative, the

defendant acted as the principle or as an accomplice, this court must adhere to that test set forth in cases such as State v. McChristian, 158 Wn.App. 392, 400-01, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003, 249 P.3d 182 (2011) is applicable:

Washington's complicity statute, RCW 9A.08.020, provides that a person is guilty of a crime if he is an accomplice of the person that committed the crime. A person is an accomplice under the statute if, with knowledge that it will promote or facilitate the commission of the crime, he aids another person in committing it. RCW 9A.08.020. General knowledge by an accomplice that a principal intends to commit "a crime" does not impose strict liability for any and all offenses that follow. State v. Roberts, 142 Wash.2d 471, 513, 14 P.3d 713 (2000). Our Supreme Court has made clear, however, that an accomplice need not have knowledge of each element of the principal's crime to be convicted under RCW 9A.08.020; general knowledge of "the crime" is sufficient. Roberts, 142 Wn.2d at 513, 14 P.3d 713 (citing State v. Rice, 102 Wn.2d 120, 683 P.2d 199 (1984); State v. Davis, 101 Wn.2d 654, 682 P.2d 883 (1984)). "[A]n accomplice, having agreed to participate in a criminal act, runs the risk of having the primary actor exceed the scope of the preplanned illegality." Davis, 101 Wn.2d at 658, 682 P.2d 883. In other words, "an accused who is charged with assault in the first or second degree as an accomplice must have known generally that he was facilitating an assault, even if only a simple, misdemeanor level assault, and need not have known that the principal was going to use deadly force or that the principal was armed." In re Pers. Restraint of Sarausad, 109 Wn.App. 824, 836, 39 P.3d 308 (2001).

While there is no doubt that the ruling in DeLeon applies to this case it is equally clear that the court in DeLeon left intact the legal

standard regarding harmless error. As stated above the facts here and as stated by trial counsel for Rodriguez the facts here supported the convictions even with the booking information having been introduced.

Response to first issue of original brief – The court did not err when it allowed the limited testimony of Det. Brownell who testified in his capacity as an expert on gangs.

Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." ER 403. Gang evidence is so prejudicial that there must be a nexus between the gang evidence and the charged crimes before the gang evidence is admitted. State v. Embry, 171 Wn.App. 714, 772, 287 P.3d 648 (2012), *review denied*, 177 Wn.2d 1005 (2013). There was a nexus here because the State had charged and was required to present gang evidence to support gang-related aggravating factors. The fact is that although even the residents of Yakima County who are unfortunately very familiar with gang violence that does not mean that a lay person will know that very specific information relating to things that seem very foreign such as "claiming a color" or "doing work" or that a gang member can actually increase his status in the gang by committing crimes and acts of violence. This court will review evidentiary rulings for abuse of discretion. State v. Morales, 154 Wn.App. 26, 37, 225 P.3d 311, *affirmed in part, reversed in part*, 173 Wn.2d 560 (2012). This court will not disturb a trial court's ER

404(b) ruling absent a manifest abuse of discretion such that no reasonable trial judge would have ruled as the trial court did. State v. Yarbrough, 151 Wn.App. 66, 81, 210 P.3d 1029 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. Lord, 161 Wn.2d at 284.

Gang evidence falls within the scope of ER 404(b). Yarbrough, 151 Wn.App. at 81. A trial court may admit gang evidence offered for proof of motive, intent, or identity. Yarbrough, 151 Wn.App. at 81. But, before the court may admit such evidence, it 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 against the prejudicial effect. Yarbrough, 151 Wn.App. at 81-82.

To determine whether misconduct occurred, the trial court need only hear testimony when it cannot fairly decide—based upon the proponent's offer of proof—that the ER 404(b) incident probably

occurred. State v. Kilgore, 107 Wn.App. 160, 190, 26 P.3d 308 (2001), *affirmed*, 147 Wn.2d 288 (2002). A court should hear this offer of proof for admissibility of evidence outside the presence of the jury. Kilgore, 107 Wn.App. at 190.

Here, prior to trial, the defendant raised the issue in a motion in limine and extensive discussion between the trial court and the parties. The trial court ruled twice that gang related information was more probative than prejudicial. RP 6-48, 979-81. The State made an offer of proof in opposition to defendant's motion to prohibit introduction of gang affiliation evidence. The court's findings satisfy the four Yarbrough elements. The court: (1) indicated that it found by a preponderance of the evidence that the shooting had occurred; (2) identified that the State would introduce the evidence of gang affiliation to show motive; (3) determined that the evidence was relevant to prove an element of the crime charged; and (4) weighed the probative value against prejudicial effects. The court limited the evidence that the State would be allowed to present the jury to include additional pictures of the driver of the Nissan was a gang member. The court limited the testimony stating;

THE COURT: All right. Well, you know, the, the gang evidence in this case is not nearly as strong as it, as it typically is I guess in, in these cases but there is, there is some and that the evidence of that, that the Nissan was occupied by, you know, some evidence that the Nissan was

occupied by Surenos and the Escalade by Nortenos provides some context in understanding for the trier of fact as to why it is that all of the sudden the, an occupant of the Nissan would be shooting at the occupants of the Cadillac. Otherwise it's just like why, why is this, you know, extremely vio, violent event taking place at all. Well, the, the, the gang aspect of things does provide context for that and because it shows what the, the motive is assuming that there will be testimony from somebody that, about the animosity between the two, the two gang types if you will.

The, and, and I'm really focusing I guess on the, on the particular events the, the shooting, the things immediately that, immediately or immediately preceding the shooting to show that, that context.

So, first off assuming that Officer Hartley can testify, you know, and I'm not ruling on the issue of, of the admissibility of Corporal Hartley's testimony given the, the, you know, and I read the fairly recent but unpublished case on the issue but I'm not ruling on the, on the issue of, of whether that information was garnered contrary to the Fifth Amendment. I think whoever is going to make that decision is gonna have to have to hear from Corporal Hartley as to the exact circumstances of the interview although we can kind of guess what that circumstance is. So, but assuming that that is found to be admissible then I am saying that Officer, Corporal Hartley can testify regarding the defendant's responses or verbalization regarding his affiliation if you would.

That the plaintiff additionally can produce evidence through presumably police officer regarding the animosity between the two gangs, gang types I guess as I said and obviously if, if, if the younger Mr. Cervantes cares to he can testify regarding the throwing of gang signs from one car to the other. I presume it was mutual but and, and in any event it appears to me that that because it shows the level of animosity and it clearly shows the motive, if you would, for the, for the gun, for the gunfire. It, it, it is admissible assuming the sto, the State can figure out some way to get it admitted.

If he isn't, if he's suffering from amnesia or continues to and I'm also ordering that, that the, that a limiting

instruction and both parties are directed to if you can't agree provide proposed limiting instructions for the Court to read to the jury before any testimony is offered regarding the issue of, of gang affiliation or motivation.

It does appear to me that, that the prior instances where Mr. Rodriguez was found in the company of people believe to be gang members is inappropriate and, and has, is prejudicial without probative value.

Also pictures of other occupants of the vehicle Mr. Reynosa or anybody else with, with tattoos and, and the SKS and whatnot again are, the probative value is, is outweighed by the prejudicial effect particularly because Mr. Rodriguez is not, I'm told, is not portrayed in any, any of the photographs and so you're, you're painting him with a brush that's Mr. Reynosa's brush and not Mr. Rodriguez's brush.

RP 38-40

The issue was raised again later in the trial and the court once again found that there was a basis for the admission of the expert testimony. There the court ruled;

THE COURT: I, I -- You know, obviously Mr. Cervantes, Jr., hasn't appeared to testify about the, the throwing the gang signs, but the -- I think looking at the ruling on the motions in limine filed on -- back on July 8th that, that some gang evidence is appropriate to put in context why one car full of people would be shooting at another car full of people and will -- the State will be allowed to present evidence of animosity between Sureno and Norteno gang members, so I think those are still operative.

MR. SILVERTHORN: Okay.

THE COURT: Why, why somebody would just all of the sudden try to shoot other people.

Alright, are we ready to get started? Okay.

MR. HINTZE: Yes.

MR. SILVERTHORN: Yes.

RP 980-1

Det. Brownell was the officer who testified in the “expert” capacity in this trial. This testimony was both in the preliminary hearings as well as the trial itself. His testimony was limited per the rulings of the court. Prior to testifying the detective had demonstrated his qualifications based upon his knowledge and experience and hands-on training and involvement in gang activities, that he is an expert in this particular area. In addition to his knowledge, he also has an educational background. RP 214, 1012-22 There had been some discussion that an “outside” gang expert would be called, this did not occur which helped to deemphasize the testimony. Clearly Det. Brownell testimony flowed from one topic to the next and therefore there was no particular emphasis on this “expert” testimony as would be the case if an outsider has been used. RP 6-8

In trial Detective Brownell explained to the jury that there were two major gangs in the Toppenish area, 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. He then testified that you start adding different things, “identifiers” such as associates, tattoos, music. RP 1014-15 He testified similarly regarding the “identifiable markers” for Sureno’s, such as blue jewelry and bandanas. (RP 1015)

Det. Brownell was specific that just wearing something like a pair

of blue jeans would not usually raise his suspicions. With regard to other items from this crime scene he testified that the Chicago Bulls jersey worn by Mr. Cervantes was red and black and the possible connections the specific jersey with those colors and the city of Los Angeles and Sureno's. (RP 1017-8)

His testimony regarding the blue items taken from Rodriguez, the blue bracelet and necklaces, rosary, taken from Mr. Rodriguez, together with the blue jersey, "...it's just -- again, looking for the totality of, of all the evidence there, I, I would suspect more of a, a gang incident." RP 1019-20. Additionally, he testified about more general gang on gang animosity. He testified that these two gangs express this animosity through violence against one another, that the members get "street cred" for acts. That there is respect that is garnered from this work that the gang members do and this work can be committing violence. RP 1021-2

The trial court does an excellent job of balancing that which the State would clearly like to present to the jury and that which the court has considered and weighed and determined was probative and prejudicial and where the prejudicial outweighs the probative value.

Expert testimony is admissible under ER 702 and is within the trial court's discretion. State v. Cheatam, 150 Wn.2d 626, 645, 81 P.3d 830 (2003), *citing* State v. Kalakosky, 121 Wn.2d 525, 541, 852 P.2d 1064

(1993). State v. Simon, 64 Wn. App. 948, 963, 831 P.2d 139 (1991):

Expert testimony is admissible under ER 702 if the witness qualified as an expert and if the expert testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." ER 702. The decision to admit expert testimony will be reversed only for an abuse of discretion. "If the reasons for admitting or excluding the opinion evidence are 'fairly debatable', the trial court's exercise of discretion will not be reversed on appeal."(Citations omitted.)

The trial court as quoted above, considered this question and ruled that the gang information would be helpful to the jury.

The state has addressed this issue before in other cases before this court. The public in Yakima County has a general familiarity from its regular exposure through the media to the acts of gangs in the community. The actual inner workings of those gangs and the mentality of those in gangs cannot be said to be common knowledge. There is no indication in voir dire that these ordinary jurors would not know that the reason for this shooting. Or that such a shooting could occur just because a person or group "claimed" a specific number, color and geographic area. Or that such a horrific accident in town, in broad daylight, right next to the hospital would and could happen for any of the reason set forth by the detective. Such violent actions at that time and location are easily unfathomable to a lay juror. The job in a trial is not to just present the facts in tick off the box fashion but to present them in a manner,

sanctioned by the law, that allows the jury to make an educated, reasoned decision.

The idea that a person can be killed for wearing the wrong color or being in a specific section of a town or moving his hands in a specific manner is something that no lay juror would likely know of or fully understand. The State needed to present the jury with this other-worldly conscription of colors, numbers and streets and signs.

Court cost.

An appellate court may refuse to review any claim of error which was not raised in the trial court, RAP 2.5(a). Because of the nature of this allegation it is discretionary whether this court accepts review of claimed error, this claim is not appealable as a matter of right. In State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015)

This court should decline to address this issue for the first time on appeal. Appellant testified at his trial that he had been steadily employed for five years at Washington Beef, and thereafter at Amtech. Part of the defense in this case was to portray Rodriguez as a good worker who had recently been recommended to work at Amtech and that he was just a hardworking man who had no affiliation with gangs. RP 20, 88, 1145-6, 1159-61

The trial court while not asking the defendant whether he was going to work after he was released from prison stated:

THE COURT: The DNA collection, the service fee and the jury fee, 250, so it's a total \$1,060.00, the costs of incarceration will be capped at \$500.00.

I do believe that Mr. Rodriguez has some ability to pay, he's, he's healthy, he was working at the time of his arrest, his prospects for the next several years obviously are not very good, but he can always earn some minimal wage while he's, while he's incarcerated. RP 1329

While not a direct conversation with the defendant about his present and future ability to pay these costs the record supports the imposition of all the costs and this court should at this time decline to consider this allegation for the first time on appeal.

E. CONCLUSION

The determination of the jury should not be disturbed. While DeLeon clearly is applicable to this case, it is as equally clear that the Washington State Supreme Court set forth an analysis that was to be used in this type of case to determine whether, taking into account the error, there was still sufficient untainted evidence such that any rational jury would still have found the defendants guilty absent the introduction of that tainted evidence. The evidence presented here was overwhelming.

The limited information that the trial court allowed to be presented to the jury through Det. Brownell, as a gang expert, was necessary to

educate this jury into the unfamiliar nature of gangs. The court reviewed all that was offered and severely restricted what was allowed to be presented.

Finally, the record is sufficient to indicate that this defendant was and is an able bodied individual who will be able to pay for the coast incurred in this case. This court should decline to address this issue.

This appeal should be denied and dismissed.

Respectfully submitted this 16th day of November, 2016.

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry state that on November 16, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief, to: Ms. Janet Gemberling as admin@gemberlaw.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of November, 2016 at Spokane, Washington.

s/ David B. Trefry

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