

FILED  
Court of Appeals  
Division III  
State of Washington  
9/16/2020 4:13 PM

No. 37067-4-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

---

STATE OF WASHINGTON,

Respondent,

v.

ROGELIO DELGADO RODRIGUES

Appellant.

---

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

---

REPLY BRIEF OF APPELLANT

---

Jessica Wolfe  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ARGUMENT ..... 1

    1. Mr. Rodrigues properly and timely objected to the testimony about the “regional gang intelligence meeting.” ..... 1

    2. The testimony implied Mr. Rodrigues was associated with a gang and was thus highly and improperly prejudicial. .... 4

    3. The officer’s unfairly prejudicial testimony about the “regional gang intelligence meeting” was not harmless. .... 6

B. CONCLUSION ..... 7

**TABLE OF AUTHORITIES**

**Cases**

*State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 406 P.3d 658 (2017) ..... 5

*State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009) ..... 4, 5

*State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474 (2016)..... 3

*State v. Sullivan*, 69 Wn. App. 167, 847 P.2d 953 (1993) ..... 3

*United States v. Irvin*, 87 F.3d 860 (7th Cir. 1996) ..... 5

**Other Authorities**

Mitchell Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Discourse 2 (2014)..... 5

**Rules**

ER 402 ..... 5

A. ARGUMENT

At Rogelio Rodrigues' trial, the State was permitted to elicit testimony that police learned that Mr. Rodrigues was a "wanted subject" at a "regional gang intelligence meeting." However, there was no evidence presented that Mr. Rodrigues was associated with a gang or that the charged crime was gang-related. The defense objected, and at a sidebar outside the presence of the jury, the court ordered the prosecutor to ask a leading question to cure any implication of gang affiliation. However, the prosecutor's questions only strengthened the implication of gang affiliation. The admission of this improper and prejudicial evidence requires reversal.

**1. Mr. Rodrigues properly and timely objected to the testimony about the "regional gang intelligence meeting."**

Mr. Rodrigues repeatedly expressed concern regarding the admission of evidence regarding gang affiliation at trial. Prior to trial, he moved to exclude evidence there were "lookouts" around the Motel 6 the police were surveilling, arguing this evidence implied he was "a criminal type or involved in criminal activity . . . there's a pretty strong inference that you have a criminal-like organization helping you out, maybe gangs, drug activity." RP 12, 16.

At trial, Mr. Rodrigues objected to testimony that an officer conducting surveillance at the Motel 6 learned about Mr. Rodrigues at "a regional gang intelligence meeting." RP 167, 169–70. Mr. Rodrigues

objected, and at a sidebar outside the presence of the jury, asserted concerns “about where this is going as far as [Mr. Rodrigues’] gang membership.” RP 167. The prosecutor, acknowledging the issue, offered to ask questions that would cure the testimony, stating “I can even use my questioning to confirm that this was not a discussion about gang activity, but just a meeting – that is the name of the meeting.” RP 168. The court ordered the prosecutor to ask a leading question. RP 168. However, the prosecutor’s subsequent questioning only served to further entrench the implication that Mr. Rodrigues was associated with a gang, by eliciting testimony that stressed the name of the meeting and highlighted that Mr. Rodrigues’ photograph was passed around at this meeting as a “wanted subject.” RP 168–69.

Nonetheless, the State argues Mr. Rodrigues’ objection to this testimony was not preserved. Brief of Respondent at 5–7. The State is wrong.

The purpose of the rule that objections must first be asserted at trial is that it promotes “judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that

he had no opportunity to address.” *State v. Stoddard*, 192 Wn. App. 222, 227, 366 P.3d 474 (2016) (citations omitted). Accordingly, where “the litigants have advanced the issue below, given the trial court an opportunity to rule on relevant authority, and the court does so rule, it may not be necessary to object at the time of admission of the claimed erroneous evidence in order to preserve the issue for appeal.” *State v. Sullivan*, 69 Wn. App. 167, 170, 847 P.2d 953 (1993). There are “sound policy” reasons underlying this rule, including that a party “should not be required to *again* raise the issue in front of the jury at the risk of making comments prejudicial to his cause.” *Id.* at 171 (emphasis added).

Mr. Rodrigues objected to the officer’s testimony regarding the “regional gang intelligence meeting.” RP 167. Outside the presence of the jury, he expressed his concerns about the implications of gang membership, and the prosecutor acknowledged the name of the meeting implied it was solely focused on gang activity. RP 167–68. The court had an opportunity to rule, ordering a leading question was warranted, and the State was afforded the opportunity the address the error. RP 168; *Stoddard*, 192 Wn. App. at 227; *Sullivan*, 69 Wn. App. at 170. However, the State failed to do so. Mr. Rodrigues was not required to object a second time in front of the jury, and risk additional prejudice by drawing

unnecessary attention to the officer's testimony. *Sullivan*, 69 Wn. App. at 171. The issue is thus preserved for this Court's review.

**2. The testimony implied Mr. Rodrigues was associated with a gang and was thus highly and improperly prejudicial.**

The State next argues the officer's testimony was not objectionable, because "the evidence was that the regional gang intelligence meeting was not limited to gang topics. Other investigations, including individuals with warrants, were discussed." Brief of Respondent at 7. This misconstrues the testimony. The officer did not testify this meeting extended beyond gang-related topics. Rather, the officer testified the meeting was about "various ongoing investigations, topics," leading to the implication the investigations and topics were focused on gang-related activities. RP 168. The officer further testified that Mr. Rodrigues' name was brought up at this meeting and his photo passed around at this meeting as "a wanted subject." RP 169. The testimony that an individual was discussed as "wanted" at a "regional gang intelligence meeting" can only lead to one conclusion: that the person is associated with a gang.

This evidence was highly prejudicial. *See State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). "Admitting gang evidence risks a jury convicting a person solely on the basis of gang membership." *State v.*

*Rodriguez-Perez*, 1 Wn. App. 2d 448, 471, 406 P.3d 658 (2017); *United States v. Irvin*, 87 F.3d 860, 865 (7th Cir. 1996) (there is “always the possibility that a jury will attach a propensity for committing crimes to defendants who are affiliated with gangs or that a jury’s negative feelings toward gangs will influence its verdict.”); *see also* Mitchell Eisen, et al., *Probative or Prejudicial: Can Gang Evidence Trump Reasonable Doubt?*, 62 UCLA L. Rev. Discourse 2, 17 (2014) (study demonstrating “introducing gang evidence at trial can have a significant prejudicial effect on juror decisions as to the defendant’s guilt or innocence.”).

In addition to being prejudicial, the evidence was irrelevant. There was no evidence that established any nexus between any potential gang membership and Mr. Rodrigues’ charged crime. *Scott*, 151 Wn. App. at 521, 526. The State concedes this fact. Brief of Respondent at 7. This is the threshold test for admission of evidence of gang affiliation. *Scott*, 151 Wn. App. at 521, 526. Without this nexus, the evidence is irrelevant, and thus, inadmissible. ER 402 (“Evidence which is not relevant is not admissible.”).

In sum, the officer’s testimony that Mr. Rodrigues was discussed as a “wanted subject” at a “regional gang intelligence meeting” was irrelevant and improperly prejudicial propensity evidence.

**3. The officer's unfairly prejudicial testimony about the "regional gang intelligence meeting" was not harmless.**

The State claims any error was harmless because "[i]t is clear what happened," including that an officer "was surveilling [Mr. Rodrigues] and alerted a number of police officers when he saw the defendant leaving a Motel 6 in a red Hyundai Tiburon." Brief of Respondent at 8. However, the theory of the defense was there was reasonable doubt Mr. Rodrigues was, in fact, the man seen leaving the Motel 6 and entering the red Hyundai Tiburon. RP 266–68. This was supported by the fact Mr. Rodrigues was not arrested while driving the red Hyundai Tiburon, but while walking down the street *after* a high speed chase in which police lost sight of the car. CP 4; RP 79–80, 118, 139, 211, 229–30. Accordingly, whether Mr. Rodrigues was correctly identified by the surveilling officer at the Motel 6 was the key issue in the case. RP 266–68.

In light of this, any implication Mr. Rodrigues was a known gang member amongst regional police forces was unfairly prejudicial. This evidence gave credence to the officer's testimony that he correctly identified Mr. Rodrigues as he left the Motel 6. RP 169–77. It also unfairly suggested, without basis, that Mr. Rodrigues had a motive to flee police. Accordingly, the testimony that Mr. Rodrigues was discussed as a

“wanted subject” at a “regional gang intelligence meeting” cannot be held harmless. Reversal is required.

B. CONCLUSION

For the reasons stated above, this Court should reverse the conviction and remand for a new trial.

DATED this 16th day of September, 2020.

Respectfully submitted,

/s Jessica Wolfe

State Bar Number 52068

Washington Appellate Project (91052)

1511 Third Ave, Suite 610

Seattle, WA 98101

Telephone: (206) 587-2711

Fax: (206) 587-2711

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

---

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 37067-4-III
	)	
ROGELIO RODRIGUES,	)	
	)	
APPELLANT.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16<sup>TH</sup> DAY OF SEPTEMBER, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |  |               |   |
|--|---------------|---|
| <input checked="" type="checkbox"/> ANDREW MILLER<br>[andy.miller@co.benton.wa.us]<br>[prosecuting@co.benton.wa.us]<br>BENTON COUNTY PROSECUTOR'S OFFICE<br>7122 W OKANOGAN AVE<br>KENNEWICK WA 99336-2341 | (<br>(<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>E-SERVICE<br>VIA PORTAL |
| <input checked="" type="checkbox"/> ROGELIO RODRIGUES<br>345218<br>STAFFORD CREEK CORRECTIONS CENTER<br>191 CONSTANTINE WY<br>ABERDEEN, WA 98520-9504  | (X)<br>(<br>( | U.S. MAIL<br>HAND DELIVERY<br>_____                   |

**SIGNED** IN SEATTLE, WASHINGTON THIS 16<sup>TH</sup> DAY OF SEPTEMBER, 2020.



X \_\_\_\_\_

# WASHINGTON APPELLATE PROJECT

September 16, 2020 - 4:13 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 37067-4  
**Appellate Court Case Title:** State of Washington v. Rogelio Delgado Rodrigues  
**Superior Court Case Number:** 19-1-00766-8

### The following documents have been uploaded:

- 370674\_Briefs\_20200916161310D3619391\_5980.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was washapp.091620-10.pdf*

### A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- nancy@washapp.org
- prosecuting@co.benton.wa.us
- terry.bloor@co.benton.wa.us

### Comments:

---

Sender Name: MARIA RILEY - Email: maria@washapp.org

**Filing on Behalf of:** Jessica Constance Wolfe - Email: jessica@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:  
1511 3RD AVE STE 610  
SEATTLE, WA, 98101  
Phone: (206) 587-2711

**Note: The Filing Id is 20200916161310D3619391**