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Division III
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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

BRIEF OF APPELLANT

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A. INTRODUCTION

Police decided to stake out Mr. Rodrigues at a Motel 6 after learning that he had outstanding warrants at a regional gang intelligence meeting. After a man matching Mr. Rodrigues' description got in a car at the Motel 6 and left the parking lot, police attempted to pull the car over. However, the driver failed to comply and led police on a high-speed car chase. Police eventually lost sight of the car. Mr. Rodrigues was arrested a short time later while walking down the street and charged with attempting to elude a police vehicle.

At trial, the State was permitted to elicit testimony that police learned about Mr. Rodrigues' outstanding warrants at the regional gang intelligence meeting. However, there was no evidence presented that Mr. Rodrigues was in a gang or that the charged crime was gang-related. The defense made an objection, and the court ruled that the prosecutor should ask leading questions to cure any implication of gang affiliation. However, the prosecutor's questions only strengthened the implication of gang affiliation.

Because irrelevant propensity evidence was admitted that prejudiced Mr. Rodrigues, this Court should reverse and remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting irrelevant and prejudicial propensity evidence suggesting Mr. Rodrigues was affiliated with a gang.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence of a crime, wrong, or other act is not admissible to prove a person's propensity for criminal conduct. Here, evidence that Mr. Rodrigues' photo and name were circulated at a "regional gang intelligence meeting" was admitted at trial. However, there was no evidence that Mr. Rodrigues was in a gang or that the crime he was charged with was gang-related. Was evidence about this meeting inadmissible propensity evidence that should have been excluded?

D. STATEMENT OF THE CASE

Richland law enforcement learned at a "regional gang intelligence meeting" that Mr. Rodrigues had several warrants for his arrest. RP 167–68. His name was brought up at the meeting as a "wanted subject," and his photograph was passed around. RP 169. Richland police decided to surveil Mr. Rodrigues at a local Motel 6. CP 3; RP 169.

While conducting surveillance, one officer saw a man matching Mr. Rodrigues' description go back and forth between one of the rooms at the Motel 6 and a red Tiburon Hyundai. RP 172, 175–78. The man was wearing a flannel shirt, jeans, and a cowboy hat. RP 172, 174. When the

man got into the Tiburon and left the Motel 6 parking lot, the surveilling officer alerted other police units in the vicinity. RP 179.

Another officer spotted a red Tiburon, turned on his emergency lights, and attempted a stop. CP 3; RP 132–34. When the car pulled into a parking lot, the officer got out of the car and yelled at the driver to turn off the vehicle and place the keys outside the vehicle. CP 3; RP 134–36. Other police vehicles also surrounded the Tiburon in the parking lot. CP 205–206. The driver of the car took off, and a multi-police-car chase ensued. CP 3–4; RP 98, 136–38, 208–211. The car drove into the wrong lane as well as exceeded the speed limit. RP 106, 113, 208. Police eventually lost sight of the vehicle. CP 4; RP 118, 139, 211, 229–30.

Mr. Rodrigues was walking down the street shortly after when he was stopped by an officer. CP 4; RP 79–80. He was wearing pants and a white sweater. RP 80. The red Tiburon was found approximately 230 feet away. RP 80–81; 212–213. A plaid shirt and a cowboy hat were found close by. RP 82–83. The officer who had initially seen a man matching Mr. Rodrigues' description get into the red Tiburon at the Motel 6 was called to the scene and identified Mr. Rodrigues as the same person he had seen earlier. RP 180. A letter addressed to “Rogelio Delgado” was found

in the trunk of the car. RP 198, 200. Mr. Rodrigues was not the registered owner of the car. RP 151.

Mr. Rodrigues was charged with one count of attempting to elude a pursuing police vehicle. CP 1. At his jury trial, one officer testified that Mr. Rodrigues had been discussed at the “regional gang intelligence meeting” as a “wanted subject.” RP 167, 169. Mr. Rodrigues argued he was arrested based on mistaken identity, but was ultimately convicted. RP 266; CP 59. He was sentenced to 20 months, the middle of the standard range. CP 61–62.

E. ARGUMENT

1. The State presented irrelevant and prejudicial evidence suggesting that Mr. Rodrigues was affiliated with a gang, requiring reversal.

- a. The State offered prejudicial evidence that police learned about Mr. Rodrigues’ outstanding warrants at a regional gang intelligence meeting.

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b). This prohibition encompasses not only prior bad acts, but also character evidence offered to show the defendant acted in conformity with that character. *State v. Foxhoven*, 16 Wn.2d 168, 175, 163 P.3d 786 (2007). The State bears a “substantial burden” to justify the

admissibility of such propensity evidence. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003).

Before admitting evidence under an exception to ER 404(b), the trial court 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.” *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014) (internal citations and quotation marks omitted); *accord State v. Fuller*, 169 Wn. App. 797, 828–29, 282 P.3d 126 (2012). “This analysis must be conducted on the record,” and the court must give a limiting instruction to the jury if the evidence is admitted. *Gunderson*, 181 Wn.2d at 923 (quoting *Foxhoven*, 161 Wn.2d at 175). The evidence should be excluded if there is any doubt as to its admissibility. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

“Evidence of gang affiliation is considered prejudicial” and is thus subject to an ER 404(b) analysis. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing *State v. Asaeli*, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009)). Evidence of gang affiliation may be relevant to show motive, identity, or intent. *State v. Yarbrough*, 151 Wn. App. 66, 81, P.3d 1029 (2009); ER 404(b). However, in order to admit evidence of a gang

affiliation, “there must be a nexus between the crime and gang membership.” *Scott*, 151 Wn. App. at 526. The trial court must also conduct an on-the-record balancing of the four *Gunderson* factors prior to admitting the evidence. *See Gunderson*, 181 Wn.2d at 923; *Yarbrough*, 151 Wn. App. at 81–82 (four-factor analysis is required prior to the admission of gang affiliation).

Prior to trial, Mr. Rodrigues filed a motion in limine specifically targeted at excluding evidence suggesting he was engaged in organized crime or a gang. RP 11–12, 16. Specifically, Mr. Rodrigues sought to exclude any evidence there were “lookouts” watching for police on his behalf around the Motel 6. RP 11–12. Mr. Rodrigues argued this evidence was “[s]ubstantially more prejudicial than probative” because “a person who needs lookouts is a criminal type or involved in criminal activity.” RP 12. He also noted, “[m]ost ordinary citizens don’t have lookouts, and I think there’s a pretty strong inference that you have a criminal-like organization helping you out, maybe gangs, drug activity.” CP 16. The court reserved ruling on the issue until trial. RP 17.

The State did not present evidence about the lookouts at trial. However, the prosecutor *did* elicit testimony from the officer conducting surveillance at the Motel 6 that he had learned about Mr. Rodrigues’ outstanding warrants from “a regional gang intelligence meeting.” RP

167. Defense counsel immediately objected, requested a sidebar, and stated concerns “about where this is going as far as [Mr. Rodrigues’] gang membership.” RP 167. The prosecutor offered to “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 instructed the prosecutor to ask a leading question “so that we can get over this hump,” but did not order the testimony stricken. RP 168. The following exchange then occurred:

Q. Now, you indicated that was—the name of the group is just that’s the type of the—the name of the meeting?

A. That’s the name.

Q. The regional gang investigation¹ meeting, just a meeting about various ongoing investigations, topics, correct?

A. Yes.

Q. What did you learn—how did you become familiar with Mr. Rodrigues?

A. So, at the meeting his name was brought up as a wanted subject. We passed his photo around. The Pasco Street Crimes Unit, who was also there, had brought that up. They had information that he was at the Richland Motel 6 with his suspected girlfriend, and that they were in a black Toyota Camry.

RP 168–69.

Far from curing any potential implication that Mr. Rodrigues was in a gang, the prosecutor’s leading line of questioning and the officer’s responses clearly insinuated that Mr. Rodrigues was a known gang

¹ The prosecutor likely meant to say “intelligence” instead of “investigation,” as the officer previously testified. *See* RP 167.

member. In fact, the testimony suggested that Mr. Rodrigues was a prominent member of a gang, as his name had come up as a “wanted subject” at a regional law enforcement meeting focused on “gang intelligence,” and that law enforcement had circulated his photograph at that meeting. RP 167–69.

This evidence was irrelevant, as there was no evidence presented that Mr. Rodrigues was affiliated with a gang, nor was there any nexus demonstrated between the charged crime and gang membership. *See Scott*, 151 Wn. App. at 521, 526. Further, the trial court failed to apply the *Gunderson* factors on the record before permitting the evidence to be admitted through testimony. *Gunderson*, 181 Wn.2d at 923. Had the court applied these factors, it would have found: (1) that there was no evidence introduced that Mr. Rodrigues was affiliated with a gang; (2) that the only purpose in introducing evidence of the “regional gang intelligence meeting” was to suggest that Mr. Rodrigues was, in fact, affiliated with a gang; (3) that the evidence was irrelevant to the crime charged; and (4) that the evidence had absolutely no probative value, but was highly prejudicial. *See id.* Pursuant to these factors, the evidence should have been excluded as irrelevant propensity evidence.

b. The evidence about the regional gang intelligence meeting was prejudicial.

Evidentiary error is reversible if it is prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if it “materially affected” the outcome of trial “within reasonable probabilities.” *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), *as amended* (Jul. 19, 2002) (internal citations and quotation marks omitted).

Mistaken identity was a key issue in this case, and any suggestion that Mr. Rodrigues was a known, gang-associated criminal was therefore prejudicial. *See* RP 266 (defense arguing in closing that the key issue in the case was “identity.”) This evidence served to bolster the surveilling officer’s testimony that the man he saw get into the car at the Motel 6 was Mr. Rodrigues. RP 180. The evidence offered also unfairly suggested that Mr. Rodrigues had a motive to flee.

Compounding the prejudice, the prosecutor referenced the regional gang intelligence meeting in his closing argument, stating the surveilling officer “first became aware of the defendant’s outstanding warrants in a meeting he was having with other law enforcement over in Pasco.” RP 254. Referencing this meeting created a “cumulative effect” in the jurors’

minds that Mr. Rodrigues was an important gang affiliate known to police.

See State v. Allen, 182 Wn.2d 364, 376, 341 P.3d 268 (2015).

Because the evidence about Mr. Rodrigues' being a "wanted subject" at a "regional gang intelligence meeting" was prejudicial and there was a reasonable probability this materially affected the jury's view of the evidence, reversal is warranted.

F. CONCLUSION

Because prejudicial propensity evidence was improperly admitted at trial, this Court should reverse the conviction and remand for a new trial.

DATED this 12th day of June, 2020.

Respectfully submitted,

/s Jessica Wolfe

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ROGELIO RODRIGUES,)	
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APPELLANT.)	

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