

FILED

NOV 30 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B)

84949-8

No. 276830

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent/ Cross Appellant,

vs.

JORGE SAENZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL E. SCHWAB, JUDGE

BRIEF OF RESPONDENT/CROSS APPELLANT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court abused its discretion in admitting evidence of the defendant's gang affiliation and witness intimidation, pursuant to ER 404(b)?
2. Whether there was sufficient evidence to support the convictions?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The court did not abuse its discretion in admitting testimony about gang activity and affiliations, and Mr. Saenz' affiliation with a gang, as the court carefully addressed how such testimony would be helpful to the trier of fact pursuant to the requirements of ER 404(b). The court also carefully and properly weighed the probative value of the evidence against any prejudicial impact.
2. There was sufficient evidence to support the convictions, and a rational trier of fact could have found Saenz guilty based upon the testimony and evidence presented at trial.

II. ASSIGNMENT OF ERROR ON CROSS REVIEW.

A. ASSIGNMENT OF ERROR.

1. The trial court erred in denying the State's motion to find

that Saenz was a Persistent Offender.

B. ISSUE PRESENTED BY ASSIGNMENT OF ERROR.

1. Whether the trial court erred in finding that a prior conviction for second degree assault did not count as a prior most serious offense under the Persistent Offender Accountability Act, where Saenz had waived his right, in writing, to a declination hearing in the prior proceeding, and pled guilty in adult court?

III. STATEMENT OF THE CASE

The Statement of Facts contained in Saenz' opening brief is generally accurate, and is adopted pursuant to RAP 10.3(b), though the State submits the following supplement of that narrative.

Prior to sentencing in this matter, the trial court issued a memorandum decision finding that there was not a sufficient basis on which to find that Mr. Saenz was a persistent offender, as proceedings pertaining to a prior conviction for second degree assault, entered in adult court in Lewis County when Saenz was fifteen years of age, did not conform to constitutional requirements of due process. **(CP 69-73)** At sentencing, the court denied the State's request for reconsideration. **(12-15-08 RP 1036-38)** Subsequently, the court entered formal findings of fact and conclusions of law consistent with its prior decision, concluding

that while Saenz had prior convictions for first degree assault and second degree assault which qualified as most serious offenses, the second conviction for second degree assault did not qualify, as there was no record of an express waiver of juvenile court jurisdiction, nor were there express findings entered by the Lewis County court regarding declination of juvenile court jurisdiction. **(CP 23-25)**

In the Lewis County proceedings, cause number 01-8-00067-5, Saenz was before the court on February 22, 2001 to waive his right to have a declination hearing within 14 days as required by statute. Saenz was represented by counsel, who related to the court that she needed more time to discuss with her client whether there would be a stipulation to declination, or a hearing. Saenz expressly waived his right in writing and in a colloquy with the court. **(CP 100; CP 105-07)**

On February 27, 2001, Saenz was back before the court, and while there is no direct colloquy with the court, his counsel related that she had had two conversations with Saenz, one at length, that he understood the implications of having his case heard in adult court, and that it was his desire to stipulate to a remand to adult court. **(CP 116-17)**

The stipulation itself was in writing, signed by Saenz and counsel, specifically waiving the requirement of a declination hearing as required

by RCW 13.40.110, and agreeing to entry of an order declining juvenile jurisdiction and remanding to adult court. (CP 110-11)

As a result of the stipulation, the juvenile case was dismissed, which consisted of some seven counts. (CP 113; CP 94) Mr. Saenz then entered a plea of guilty to a single count of second degree assault, and one count of custodial assault, in adult court. Paragraph k of the plea statement contained the notification that the offense was a most serious offense, and that two prior convictions for most serious offenses would carry a mandatory sentence of life imprisonment without possibility of parole. (CP 123) Mr. Saenz signed the statement, and the court indicated that Saenz had asserted that his attorney had read the statement to him, and that he understood it. (CP 125)

IV. ARGUMENT.

1. The court did not abuse its discretion in admitting the 404(b) evidence.

Evidence of gang affiliation is admissible as evidence of other crimes or bad acts under ER 404(b) as proof of premeditation, intent, motive and opportunity. In applying ER 404(b), a trial court is required to engage in a three-step analysis: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence; (3) balance on the record the probative value of the evidence against the

prejudicial effect. State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995), *citing* State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). An appellate court will review a trial court's ER 404(b) for abuse of discretion. Id. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In Campbell, the Court of Appeals affirmed the trial court's conclusion that gang evidence was highly probative of the State's theory, namely that Campbell was a gang member who responded with violence to challenges to his status. Campbell, 78 Wn. App. at 822. Admission of gang evidence that was probative of motive, premeditation, as well as *res gestae*, was likewise held to be no abuse of discretion in State v. Boot, 89 Wn. App. 780, 789-90, 950 P.2d 964 (1998).

Admission of gang-related evidence was affirmed, as well, in State v. Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009), where the evidence was relevant to prove the defendant's motive and mental state with respect to a charge of first degree murder.

Saenz' reliance on State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1155 (2009), is misplaced, as the reviewing court there found error in that the record was not adequate to support a finding that the group in question was even a gang. Id., at 577-78. By contrast, in this matter three

detectives from the Sunnyside Police Department testified outside the presence of the jury, after which the court entering detailed findings as to their knowledge of gang structure, formation and affiliations in the Sunnyside area. As the various individuals involved were affiliated with rival gangs, the court's findings that the gang evidence would be probative of motive, opportunity, intent, preparation, plan, knowledge, identity and absence of mistake or accident were well-reasoned and well within the court's discretion. (CP 19-22)

Further, the court engaged in the critical weighing of the prejudicial impact of the evidence, against the probative value. (CP 21-22) The court complied with the requisite three-step analysis.

The same is true of the court's admission of evidence of witness intimidation. The court found, after testimony taken outside the presence of the jury, that Saenz sent messages to David Guillen while both were in the county jail, threatening him if he did not comply with Saenz' request to take responsibility for the pending charges. The evidence was admissible to show knowledge of guilt on the part of Saenz, and once again, the court carefully weighed the prejudicial impact against the probative value. The court clearly did not abuse its discretion. (CP 26-29)

2. Sufficient evidence supports the convictions.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

Here, the jury was able to hear and observe each of the witnesses as they testified. David Guillen testified that he was driving his Dodge

Dakota truck, when Saenz exited and began firing at the victims. (9-15-08 RP 486-88) The jury also heard that Mr. Guillen had accepted a plea bargain in exchange for his testimony, with a credit for time served sentence. (9-15-08 482)

Significantly, one of the victims testified that he had had a confrontation with Saenz just prior to the shooting. The victim claimed the LVL gang, Saenz was BGL and wore blue. (9-10-08 RP 78, 9-11-08 RP 190) The fact that it was Saenz who argued with the victim was clearly probative of a motive to shoot at him later. There was more than a sufficient factual basis for the jury's verdicts.

3. **Saenz is a persistent offender, and should be sentenced to life imprisonment without possibility of parole.**

A sentencing court is required to sentence a persistent offender to life in prison without possibility of parole. RCW 9.94A.570. A persistent offender is a defendant who, at sentencing for a most serious offense conviction, has on two previous occasions been convicted of other most serious offenses. RCW 9.94A.030(37). Interpretation of the Persistent Offender Accountability Act is reviewed *de novo*. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

The State bears the burden of proving by a preponderance of the evidence the existence of prior convictions, including those used as

predicate strike offenses for the purposes of the Persistent Offender Accountability Act. In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005), *citing* State v. Ford, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999). The State's "burden is related to but distinct from an affirmative duty to prove the constitutional validity of prior convictions." State v. Knippling, 166 Wn.2d 93, 103-04, 206 P.3d 332 (2009).

A person who is under the age of 18 years is an offender if the juvenile court has declined jurisdiction over that person pursuant to the procedure dictated by RCW 13.40.110, or the crime falls automatically under the jurisdiction of superior court pursuant to RCW 13.04.030. Id., at 99-100. The right to a declination hearing may be waived, if it is an express waiver intelligently made by a juvenile defendant after being fully informed. RCW 13.40.140(9). The right to a declination hearing may be waived even where the declination proceeding itself is discretionary. State v. Ramos, ___ Wn. App. ___, 217 P.3d 384, 388, (2009).

Here, the court concluded that the second degree assault conviction in Lewis County would not count as a prior "strike", as the court there had not entered any findings regarding declination or the waiver entered by Saenz. However, the fact of an express waiver is demonstrated both by the prior colloquy with the court where Saenz acknowledged his right to a

hearing within 14 days, as well as the written waiver itself. Counsel had spoken at length with her client, and that he agreed to the waiver.

The key issue on review is the trial court's misplaced reliance on Knippling. In that case, the State asserted that a prior conviction had been proven on the basis of the judgment and sentence alone, with nothing more from the record to indicate why the then-sixteen year old had been before the superior court instead of juvenile court. Knippling, 166 Wn.2d at 102.

Here, there is documentation of the record from Lewis County, beyond the mere existence of the judgment and sentence. Unlike the defendant in Knippling, it can be demonstrated that the juvenile court declined jurisdiction upon the agreement and request of the defendant who waived his right to a hearing in writing. While it would admittedly have been preferable for the Lewis County Court Commissioner to engage in additional colloquy with Saenz about the waiver, or find on the record that the waiver was voluntary, Knippling does not mandate such scrutiny. The basis of jurisdiction in superior court was an agreed declination, and the conviction should be accorded the same status as any other prior conviction for a most serious offense.

V. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions, but remand for resentencing of Mr. Saenz as a persistent offender .

Respectfully submitted this 23rd day of November, 2009.


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