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S. Ct. No. 91185-1
COA No. 29657-1-III (consolidated with
Nos. 29679-2-III, 29691-1-III)

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RICARDO DELEON, ANTHONY DELEON, AND
OCTAVIO ROBLEDO, Petitioners.

n

ANSWER TO PETITIONS FOR REVIEW

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 ORIGINAL

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue is the Court of Appeals decision filed on December 23, 2014 in Division Three of the Court of Appeals, State v. Deleon, 185 Wn. App. 171, 314 P.3d 315 (2014).

C. ISSUES PRESENTED FOR REVIEW

OCTAVIO ROBLEDO

1. Does the Court's decision that admission of Robledo's booking statements was harmless error conflict with another appellate decision?
2. Does the Court's decision that admission of evidence of Robledo's tattoo was harmless error conflict with another appellate decision?
3. Does the Court's decision that there was sufficient evidence to support the aggravating factor conflict with another appellate decision?

RICARDO DELEON

1. Does the Court's decision affirming the denial of Ricardo's motion for mistrial conflict with another appellate decision?

ANTHONY DELEON

1. Should his petition for review be denied as it does not comply with RAP 13.4(b) and (c)?

D. STATEMENT OF THE CASE

The State incorporates by this reference the statement of the case in State's Petition for Review. The State also supplements that with the following facts:

At around 11 P.M. on May 9, 2009, Ignacio Cardenas and Miguel Acevedo were standing outside of Acevedo's home waiting to get passes to a quinceañera from two cousins and a friend. RP 1769-72.¹ Cardenas and Acevedo were LVL gang members who claim blue. RP 1782-4. Miguel Acevedo saw a Taurus pass by and he flashed an LVL sign, mistakenly thinking it was to someone he knew. RP 1773. An LVL sign, however, is a sign of disrespect to a rival gang and might cause a shooting. (RP 1784-5).

The driver of the car, Anthony Deleon, who was in rival gang territory, did a U-turn and that is when the sole rear passenger told the victims, "we're going to shoot you." RP 1774, 1785, 1796. Ricardo Deleon admitted that he was seated in the back seat. RP 1904. Octavio Robledo was the front seat passenger. RP 876-7, 1009-10. The car did a second U-turn, slowed down, and multiple shots were fired. RP 1774-7. It was estimated that nine gunshots were fired from the passenger side.

¹ The record contains 3 reports of proceedings. RP will be used to refer to the 16-volume consecutively paginated transcript. The 5-volume report is cited as Pretrial RP. A smaller single-volume transcript is cited as Supp. RP.

RP 1005, 1571, 1776. One man who witnessed the shooting, Jose Barajas, saw two different sparks coming from the vehicle during the shooting. RP 1571. He described sparks coming “from the front and then from the front driver’s spot and then the back passenger’s.” RP 1571. Another witness reported that the occupants of the Taurus were wearing red bandanas at the time. RP 1385. Cardenas suffered a near-fatal bullet wound and lost a kidney as a result of the shooting. Bullet holes were found in a vehicle outside Acevedo’s home and the holes appeared to be from two different caliber weapons. See RP 1613-1638.

The driver of the Taurus led police officers on a high speed chase. RP 718-20. During the chase, officers saw two objects being thrown out the passenger side of the car at two different locations. RP 720, 1097-8. At one location, the object sparked when it hit a bridge. RP 1097. The car was eventually slowed down by spike strips and the three occupants, Octavio Robledo, Ricardo Deleon, and Anthony Deleon, were arrested.² A plethora of gang paraphernalia was found in the car. See RP 1663, 1687, 1692-3, 1708, 2106-7, 2109. All three defendants were charged with three counts of first degree assault while armed with a firearm and a sentencing aggravator under RCW 9.94A.535(3)(aa). CP Deleon 225-6.

² Anthony and Ricardo Deleon are brothers and will be referred to by their first names to avoid confusion.

Anthon Deleon was also charged with attempting to elude a pursuing police vehicle. The jury found all three guilty as charged and answered the special verdicts in the affirmative.

Octavio Robledo:

During pre-trial hearings on September 10, 2010, the State argued for the admission of evidence of a new gang tattoo that Robledo got after incarcerated on the charges at hand. Pretrial RP 214. The tattoo was photographed. Id. at 293. That tattoo was not present at the time Robledo was booked into the jail. Id. at 282. The tattoo was of a Huelga bird with the word “warrior.” Id. The tattoo is earned by committing an act of violence. Id. The State argued that it was a self-admission. Id.

Further arguments were heard at pre-trial hearings on September 27, 2010. Id. at 277. At that time, Robledo argued that nobody could testify when the tattoo was obtained in jail. Id. at 276-7. The State indicated the tattoo was significant because the tattoo was not present at the time of the interview with the detective, id. at 281-2, 321, and that gang members get tattoos to memorialize or to show allegiance or membership to a gang, id. at 282. The State again argued that it was an admission by conduct. Id. at 288. In addition, the State argued that it showed that Robledo was a gang member. Id. at 321.

The trial court ruled that evidence of the new gang tattoo was admissible and that testimony about the significance of the tattoo would be appropriate. Id. at 325. The trial court limited the evidence to one photograph highlighting the bird tattoo, while everything else was excluded. Id. at 326.

Before opening statements, the photographs were discussed and the issue of the tattoo was raised again. RP 610. The defense objected again based on the relevance and argued the State couldn't prove when exactly Robledo got the tattoo. RP 611. The trial court maintained that the tattoo was admissible. Id.

In opening statements, the State told the jury that they would hear about the new tattoo and how it is earned by committing acts of violence. Id. at 659. During the course of the trial, the photograph was admitted through Sgt. Cunningham. RP 1681. Sgt. Cunningham described it as a tattoo on Robledo's hand with a Huelga bird and the word "warrior" on top of it. Id. In addition, Detective Ortiz testified about seeing the tattoo on Robledo's hand in court. RP 1906.

Detective Ortiz explained for the jury that the Huelga bird tattoo was indicative of gang members adopting mainstream symbols that might not draw the attention of lay persons. RP 1955. He testified that on the streets, the tattoo means that an individual has done a very serious crime,

particularly a drive-by or homicide. Id. This testimony was in the context of the detective explaining the significance of clothing items worn by the defendants, red bandanas found in their car, and other gang tattoos observed on Robledo. RP 1948-57.

Robledo did not object to the testimony of Detective Ortiz at the time. See id. He later moved for a mistrial, claiming that it went beyond what was needed to prove motive. RP 1994. The court denied the motion. RP 1998. The court pointed out that the evidence had been limited to only one photograph, and that the expert's role was to give the evidence that came in meaning and that is what he did. Id. at 1997-98.

The Court gave the following limiting instruction to the jury before closing arguments:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony and exhibits related to gang membership and gang association. This evidence may be considered by you only for the purpose of establishing a motive as to why the crime alleged was committed. You may not consider it for any other purpose. Any discussion of the evidence during the deliberations must be consistent with this limitation.

CP 619. During closing arguments, the State argued:

They've all got gang tattoos. And, in fact, Mr. Robledo subsequently has got the one

that means you've committed an act of violence after the fact of this event. Where do we know he's seated? In the front passenger seat. I guess that night he earned it.

RP 2335.

The Court of Appeals held that the detective's testimony went beyond finding motive, but that the real purpose to admit the testimony was as an admission.³ Deleon, 185 Wn. App. at 194. The Court of Appeals indicated that if there was any error, it was harmless. Id. at 195.

The State filed a petition for review, as well as all three defendants. This answer responds to the petitions filed by the defendants.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals decision does not conflict with other appellate decisions.

a. Octavio Robledo

Mr. Robledo takes issues with the Court of Appeals decision that certain errors were harmless. He point to two errors: 1) admission of testimony about a Huelga bird tattoo, and 2) admission of statements made

³ Under Evidence Rule 402, all relevant evidence is admissible. Conduct as well as words may be relevant to show consciousness of guilt.

to the jail booking officers.⁴ He claims that the court's decision was contrary to other appellate decisions. He also argues that the court erred in finding sufficient evidence to establish the aggravating factor.

i. Tattoo

Robledo claims that admission of testimony about the Huelga bird tattoo was not harmless error. An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. State v. Tharp, 96 Wash. 2d 591, 599, 637 P.2d 961 (1981). Detective Ortiz testified that the Huelga bird was a symbol used to show that someone has done a very serious crime such as a drive-by or a homicide. RP 1955. The State repeatedly argued that that was not only evidence of motive, but admission by conduct, as Robledo got the tattoo after being booked into the jail for the charges at hand. See RP 214, 282. Nonetheless, the trial court gave a limiting instruction that limited the evidence to showing motive and no other purpose. CP 619.

The Court of Appeals said the detective's testimony went beyond finding motive, but that the real purpose to admit the testimony was as an admission. Deleon, 185 Wn. App. at 194. This was a correct analysis and

⁴ The State has a pending petition for review in this case regarding the issue of statements made to the jail booking officers. The State maintains its position that there was no governmental coercion and that the statements were voluntarily made.

consistent with the State's pre-trial and closing arguments. The Court of Appeals further indicated that if there was any error, it was harmless. Id. at 186.

Robledo claims that the evidence materially affected the outcome of the trial. (Petition at 6). However, the tattoo was just one piece of evidence. As described by the Court:

The State's strongest evidence of the defendants' gang membership was arguably its evidence against Octavio Robledo, the front seat passenger in the Taurus. Monica testified that she had known him to be a Norteño associate in school. He admitted to Detective Ortiz following *Miranda* warnings that he was North Side Varrío, a Norteño gang. At the time of his arrest, he was wearing a red cloth belt with a star on the buckle, and white Nike shoes with a red "swoosh." He repeated during booking that he was North Side Varrío and that his moniker is "Fat Boy." Booking records noted the following tattoos: "F" on his right forearm, "B" on his left forearm, "N" on his neck, and "14" on his back. Testimony at trial established that the numbers 1, 4, and 14 are significant to Norteños because "N" is the 14th letter in the alphabet. By the time of trial, Mr. Robledo had an additional tattoo on his hand of a Huelga bird with "Warrior" on top of it, which Detective Ortiz testified was also a symbol of Norteño gang affiliation. A photograph of his hand revealed the Huelga bird and additional tattoos: four dots—one on each finger; the initials "NSV" on his ring finger; and the

numerals “XIV” near the web of his thumb and finger.

Id.

Given the other overwhelming evidence pertaining to Robledo’s gang membership, it can hardly be said that testimony regarding the bird tattoo materially affected the outcome of the case. Other evidence included: 1) the fact that the shooting took place because one of a rival gang member flashed a gang sign, 2) expert testimony elicited about the rivalry between the two gangs, 3) a witness who saw the occupants of the vehicle wearing red bandanas over their faces, 4) gang paraphernalia found in the car, 5) gang-related clothing items worn by the three defendants at the time of arrest, and 6) Robledo’s several other gang tattoos.

There was no argument made that the bird tattoo was indicative of *prior* criminal activity. In fact, during closing argument, the prosecutor argued that it was evidence of the crime charged, and nothing more. See RP 2335. In addition, a restrictive limiting instruction was given to the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony and exhibits related to gang membership and gang association. This evidence may be considered by you only for the purpose of

establishing a motive as to why the crime alleged was committed. You may not consider it for any other purpose. Any discussion of the evidence during the deliberations must be consistent with this limitation.

CP 619. Jurors are presumed to follow the court's instructions. See State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990). As such, any evidentiary error does not require reversal as there is no reasonable probability it materially affected the outcome of the trial.

ii. Booking Statements

In response to the jail booking questions, Octavio Robledo made statements about his gang affiliation (Norteño), gang name (North Side Varrio or NSV), moniker (Fat Boy), and tattoos (the letters F, B, N, and the number 14). RP 1155. The Court of Appeals held that the statements were involuntary and a product of police coercion.⁵ But the error was found to be harmless:

Given the other admissible evidence of...Mr. Robledo's gang affiliation, the information on their gang documentation forms was cumulative and can fairly be said to have been harmless for purposes of the jury's finding of the gang aggravator.

⁵ This is the subject of the State's pending Petition for Review.

Here, Robledo admitted to Detective Ortiz following Miranda warnings that he was North Side Varrio, a Norteño gang. Deleon, 185 Wn. App. 186-7. At the time of his arrest, he was wearing a red cloth belt with a Norteño star on the buckle, and white Nike shoes with a red “swoosh.” Id. After being taken into custody, he was seen with a Huelga bird tattoo observable in plain view on his hand. Id. Even disregarding the bird tattoo, it cannot be said that testimony regarding the booking statements materially affected the outcome of the case. In an interview outside the booking process, and after Miranda, Robledo admitted that he was North Side Varrio.

iii. Aggravating Factor

The jury answered in the affirmative as to the existence of the aggravating factor in RCW 9.94A.535(3)(aa). That aggravator is defined as follows:

The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

Robledo was convicted of three counts of first degree assault. It is important to note that the State does not have to prove that Robledo was even in a gang in order to find this aggravator. Even non-gang members

could act with the requisite intent. He only needs to act with the *intent* to directly or indirectly benefit a gang when he committed the offenses.

The Court of Appeals ruled that “...sufficient evidence was presented to persuade a rational trier of fact beyond a reasonable doubt that the gang aggravator applied.” Deleon, 185 Wn. App. at 212. Robledo argues that this decision is contrary to established law. He relies on State v. Campbell, 78 Wn. Ap. 813, 823, 901 P.2d 1050 (1995), and State v. Asaeli, 150 Wn.App. 543, 579, 208 P.3d 1138 (2009).

In State v. Campbell, the State presented evidence that the killings were the result of rival gang activity and that the victims showed disrespect to the defendant and had intruded their turf. 78 Wn. App. at 817-8. Testimony was elicited that in the gang culture, these are grounds for retaliation and murder. Id. at 822. An expert also explained the meaning of gang symbols. Id. at 823. The Court of Appeals affirmed the trial court’s conclusion that gang evidence was highly probative of the State’s theory and provided a motive for Campbell’s actions, namely that Campbell was a gang member who responded with violence to challenges to his status. Id. The Court of Appeals decision in the case at hand is consistent with Campbell. And like the trial court in Campbell, the evidence was carefully limited. See id. at 818. Robledo has not indicated how the Court of Appeal’s decision conflicts with Campbell.

In State v Asaeli, 150 Wn. App. 543, 208 P.3d 1136 (2009), the court decided the appeals of consolidated second degree felony murder cases involving three defendants. Defendant Asaeli's conviction was affirmed while Defendant William's was reversed and remanded. Erroneously admitted gang evidence was found to be prejudicial as to Williams but not to Asaeli.⁶ Id. at 540.

The expert at trial testified that he knew nothing about "Kushmen Blokk" operating as a gang in the Tacoma area and had no information connecting the three defendants to gang activity. Id. at 562. The Court of Appeals found that the State failed to establish by a preponderance of the evidence that "Kushmen Blokk" was a gang and therefore, it was an error to admit gang association evidence. Id. at 577. The Court of Appeals did not examine the purpose for which the evidence was introduced given its holding. Id. at n. 36.

In examining prejudice as to Williams, the Court noted that the gang association evidence was arguably strongest against him because of graffiti found in his jail cell. Id. at 579. The Court held that even without the gang evidence, there was sufficient evidence to convict Williams. Id. at n. 39. However, because there was a reasonable probability that the

⁶ Asaeli claimed self-defense and admitted to intentionally shooting into the car 7 to 10 times. 150 Wn. App. at 582.

result would have differed at trial had the evidence not been admitted, the case was remanded. Id. at 580.

In this case, the test is whether the exclusion of the gang evidence would have resulted in a different answer to the special verdicts. See State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985). Here, the shooting described in this case occurred after one of the victims flashed an “LVL” sign. RP 1773. The defendants were described as wearing red bandanas over their face, a color associated with Norteños. RP 1385, 1921. Robledo admitted that he was North Side Varrio, a Norteño gang. Deleon, 185 Wn. App. 186-7. At the time of his arrest, he was wearing a red cloth belt with a star on the buckle, and white Nike shoes with a red “swoosh.” Id. The star is a coveted Norteno symbol. RP 1949. The fact that NSV would gain some benefit by shooting at LVL members was explained by Detective Ortiz. Sufficient evidence, therefore, supported the jury’s finding, and the court did not err in imposing the aggravated sentence.

b. Ricardo Deleon

i. Mistrial Motion

Ricardo sets forth the correct standard for when review should be accepted under RAP 13.4(b). However, he fails to indicate how the court’s decision conflicts with another decision of the Supreme Court or Court of Appeals. He takes issue with the Court of Appeal’s decision that

the trial court's denial of a mistrial was not an abuse of discretion.

(Petition at 1).

In response to the routine jail booking questions, Ricardo Deleon made the following statements: 1) he was formerly a Norteño, 2) he did not have a moniker, and 3) he had a tattoo that was not gang-related. Deleon, 185 Wn. App. 188. The second and third statement were not incriminating, so the only issue is his statement that he was formerly a Norteño.

Ricardo argues that "the State's theory of the case was that the defendants were motivated to participate in a shooting at the home of Mr. Cardenas because he and they belonged to rival gangs and in the gang culture such rivalry can provide a motive for such a shooting." (Petition at 8). However, the petitioner forgets that this shooting stemmed not simply from the mere existence of a gang rivalry, but the fact that Acevedo flashed his "LVL" sign as the defendants drove by, a sign of disrespect to a rival gang member. Ricardo argues that other admissible evidence of his gang affiliation was scarce and therefore, any error was not harmless.

However, the remaining admissible evidence was substantial. At trial, it was established that Ricardo was the person who yelled out "you're going to get blasted" from the back seat of his car. (RP 1805, 2011). There was also testimony that sparks from gunfire were seen coming from not only the front driver's side, but from the the back

passenger's seat. (RP 1571). In addition, damage to a vehicle showed that two different caliber weapons were used. The reasonable inference is that Ricardo, the sole occupant of the backseat, was one of two shooters.

Furthermore, while in rival gang territory, Ricardo was completely decked out in red, the color of Norteños. He was wearing a solid red shirt and red sandals. (RP 1667-68; 1948-9; Ex. 4A-4D). His red shirt had "RIP" and a picture of Julian Flores, a NSV gang member on it. RP 1903. In the picture, Flores was wearing a New York Yankees hat that represents Yakima Norteños. RP 1948-9. Deleon's red sandals had a "North Star" on them, another symbol used by Norteños. RP 1949. A red bandana was found on the back seat that he occupied. RP 1664. His street name is "hitman." RP 2061. His brother Anthony is driving his car, and Anthony is also wearing clothing with Norteño gang identifiers ("N" on his belt for "Nuestra Familia" or "North Side," and red stars on his shoes). RP 1952.

The victims, on the other hand, are rival LVL gang members who claim blue. (RP 1782-4). Miguel Acevedo flashed an LVL sign, a sign of disrespect to a rival gang that might cause a shooting. (RP 1783-5). The driver, Anthony Deleon, who was in rival gang territory, did a U-turn and that is when the sole rear passenger told the victims, "we're going to shoot you." (RP 1774, 1785, 1796). Ricardo Deleon admitted that he was

seated in the back seat. (RP 1904). The car did a second U-turn, slowed down, and multiple shots were fired. (RP 1774-7).

As the Court of Appeals indicated, “The generalized evidence that exceeded appropriate limitations was less powerful than the direct evidence of the crime and the relevant (and prejudicial, but not unduly prejudicial) gang evidence that was legitimately admitted.” 185 Wn. App. at 197. As such, there was no abuse of discretion by the trial court.

Ricardo suggest that because the evidence was found to be insufficient to support the aggravator, that denial of the motion for a mistrial could only have been reversible error. However, the standard of review is different when reviewing a denial of a motion for a mistrial. An appellate court reviews the trial judge’s rulings on matters of evidence for abuse of discretion, including the court’s refusal to grant a mistrial. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). The decision is ultimately discretionary with the trial judge because the trial judge is in the courtroom and, therefore, is in the best position to assess the effect of the testimony. State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008).

Mistrial is appropriate only when the defendant has been so prejudiced that nothing short of a new trial will insure that the defendant

will be tried fairly. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). A decision denying a mistrial will only be reversed when there is a “substantial likelihood” the prejudice affected the jury’s verdict. State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002). Given the facts of this case, mistrial was not appropriate. A limiting instruction was given to limit the purpose that the evidence could be considered for. As such, the Court of Appeal’s decision does not conflict with another appellate decision in this regard.

c. Anthony Deleon

Under RAP 13.4(c), a petition for review should contain “A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b)...” RAP section 13.4(b) states as follows:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Here, Anthony has filed a 29-page petition for review. However, he has not argued why review should be accepted under one or more of the test established in section (b). Rather, he makes the same arguments that he made on direct appeal. As such, his petition should be denied.

In his petition, Robledo argues that State v. Elmi, 166 Wn.2d 209, 223, 207 P.3d 439 (2009), should be overturned. He states that “due to the rule that the Court of Appeals cannot disregard the controlling authority of the Supreme Court, it declined to overturn Elmi.” (Petition at 25). In an unpublished part of the opinion, the Court of Appeals stated that it could not disregard authority “in favor of a dissenting opinion that Deleon believes is better reasoned.” Robledo has not provided a compelling argument why Elmi should be overturned. Further, Robledo could have moved to transfer the case to the Supreme Court under RAP 4.4.

F. CONCLUSION

All three defendants have filed petitions for review. None of their petitions satisfy the requirements of RAP 13.4(b). As such, their petitions for review should be denied.

Respectfully submitted this 2nd day of July, 2015,


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Senior Deputy Prosecuting Attorney
Yakima County, Washington

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on July 2, 2015, by agreement of the parties, I emailed a copy of STATE'S ANSWER TO PETITIONS FOR REVIEW to Mr. Kenneth H. Kato at khkato@comcast.net, Ms. Janet Gemberling at admin@gemberlaw.com, and Mr. Dennis Morgan at nodblskp@rcabletv.com.

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

DATED this 2nd day of July, 2015 at Yakima, Washington.



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Subject: 91185-1

Attached for filing is State's Answer to Petitions for Review in No. 91185-1

Case Names (consolidated)
State v. Ricardo Deleon
State v. Anthony Deleon
State v. Octavio Robledo

Thank you,

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