No. 296571

(Consolidated with 296792 and 296911)

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

OCTAVIO ROBLEDO,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE DAVID A. ELOFSON, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in admitting Mr. Robledo's statements to a jail booking officer, as well as a jail booking form, containing admissions as to gang affiliation?
2. Whether the court erred in admitting prior bad acts testimony from a gang expert as to the significance of Mr. Robledo's bird tattoo?
3. Whether the trial court erred in admitting post-arrest statements of two codefendants who did not testify at trial, in violation of the Confrontation Clause?
4. Whether the court erred in imposing an exceptional sentence based on a jury finding that Mr. Robledo was motivated by an interest in benefiting a criminal street gang?
5. Whether the court erred in denying a mistrial based upon a juror's use of Twitter during the trial?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The statements to the jail officer were properly admitted, as they were made after a voluntary waiver of Mr. Robledo's right to remain silent.

2. The testimony about the bird tattoo was properly admitted as evidence of gang involvement, and did not violate ER 404(b).

3. The statements of the codefendants were properly admitted, as they did not violate the Confrontation Clause; the statements did not incriminate Mr. Robledo.

4. Sufficient evidence supported imposition of the exceptional sentence, which was based upon a finding that Robledo intended to directly or indirectly cause any benefit to a criminal street gang.

5. The court did not err in denying the motion for a mistrial, as it was well within the court's discretion to do so.

II. STATEMENT OF FACTS

The State supplements Mr. Robledo's Statement of the Case with the following.

The victim, Mr. Cardenas, as well as Miguel Acevedo, are members of the LVL gang in Sunnyside. The gang claims the color blue. **(10/11/10 RP 1358, 1438-39; 10/12/10 RP 1608; 10/15/10 RP 1801)**

At trial, the jury was instructed that they were to consider the respective counts and defendants separately. **(CP 185)**

III. ARGUMENT

1. **Admission of Robledo's statements did not violate the Fifth Amendment, as he waived his right to remain silent, and made voluntary statements to the jail booking officer.**

It is well-established that both the Fifth Amendment and Art. I, s. 9 of the Washington State Constitution protect a suspect from being compelled to give evidence against himself. State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991); Miranda v. Arizona, 384 U.S. 436, 16 L. Ed.2d 694, 86 S. Ct. 1602 (1966).

In determining whether custodial statements were voluntarily given, a court engages in an examination of the totality of the circumstances surrounding the giving of the statement. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008).

A statement may be found to be involuntary if law enforcement officers exert coercive pressure upon a defendant in order to obtain a confession. Id., at 101, *citing* Withrow v. Williams, 507 U.S. 680, 693-94, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993). Coercion may be by means of an express or implied promises or by the exertion of improper influence. Id., *citing* State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Arizona v. Fulminante, 499 U.S. 279, 285, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

If a promise has been made by law enforcement, the test is not merely whether that promise had been made, but whether the defendant's will was overborne by the promise, or in other words, whether there is a direct causal relationship between the promise and the confession. Broadaway, 133 Wn.2d at 132; United States v. Walton, 10 F.3d 1024, 1029 (3d Cir. 1993).

A police officer is not precluded from employing psychological ploys or playing on the defendant's sympathies in the interrogation of a suspect, but the officer's statements may not be so "manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess." Miller v. Fenton, 796 F.2d 598, 605 (3d Cir. 1986).

Relying upon Fulminate and Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed.2d 975 (1958), Robledo argues that his statement to the jail booking officer were coerced and involuntary, as he was essentially promised protection from other inmates if he provided information as to gang affiliation. His reliance upon those cases is misplaced.

In Fulminate, law enforcement used knowledge that an accused child murderer faced credible threats by other inmates in offering protection in exchange for a confession to the murder. The Supreme Court

affirmed the state court in holding that such a promise was coercive, and the confession was involuntary. Fulminate, 299 U.S. at 286.

The Supreme Court likewise held that a confession was coerced when an interrogator told the suspect that "30 or 40 people" would coming to "get him", and that he would be protected if he would tell the truth. Payne , 356 U.S. at 561, 567.

The facts here are quite different. As Robledo notes in his opening brief, he was advised of his Miranda rights, and he waived those rights. **(RP 1905)** The form is used to protect inmates:

> Q. That wouldn't necessarily indicate that he was in a gang at the present time, would it?
> A. It would not, but many of these individuals wear tattoos and, as you know, tattoos are permanent, and if they walk into a cell and they have that one four and they're not active any more, that's not going to matter to the inmate.
> Q. I understand. And in fact, that's why this form was created, right, to protect the inmates?
> A. Yes, Sir.
>
> **(RP 1221)**

Officer Saenz did not offer to protect Mr. Robledo, provide any consideration not available to any other inmate, or employ any coercion at all, to obtain the answers to the jail booking form. Robledo was going to be booked into the jail with other inmates; it was necessary to determine

where and with whom he would be incarcerated with an eye to the safety of the inmates. Fulminate and Payne are not on point.

It should be noted that while the trial court here did say that the statements of Robledo and the codefendants were "coerced", it is clear from the context of the court's findings that it was not convinced that the statements were involuntary as result of misconduct on the part of the Sunnyside Police Department, but rather that since the defendants were in custody, and were being interrogated, it was necessary for them to be advised of their Miranda rights. **(9-28-10 RP 93-94)** No written findings were filed.

The court did not err in finding that the statements were voluntarily given and thus admissible.

2. The expert testimony was properly admitted as to the bird tattoo, and it did not violate ER 404(b).

The admissibility of evidence is within the discretion of the trial court, and a reviewing court will reverse only when the trial court abuses its discretion. State v. Atsbeha, 142 Wn.2d 904, 913, 16 P.3d 626 (2001); State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007).

It is true that evidence of other crimes, wrongs or acts is not admissible to prove character or conformity with it, but only may be admissible for other purposes such as motive, opportunity, intent,

preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

Robledo maintains that the admission of the testimony as to the tattoo was improperly admitted, since the only purpose of the testimony was to indicate he had a propensity to commit a crime, or had indeed committed a serious crime. This is incorrect.

As indicated in Robledo's opening brief, the trial court determined that gang evidence would be admissible in advance of the trial. **(Anderson Pretrial RP 220; RP 576-582)** In reaching that decision, the trial court properly weighed the purposes for which the evidence would be admitted, and further, determined that any prejudicial effect of the evidence was outweighed by its probative value. **(RP 576)**

The Huelga bird tattoo was just such evidence. As Detective Ortiz explained at trial, it was indicative of gang members adopting mainstream symbols that might not draw the attention of lay persons. **(RP 1955)**

It is vital to note that this testimony was in the context of Detective Ortiz' explanation of the gang significance of items of clothing worn by the defendants, red bandanas found in the car in question, as well as other tattoos observed on Mr. Robledo. **(RP 1948-57)**

Indeed, Mr. Robledo also had an "NSV" tattoo on his hand, indicative of affiliation of with North Side Varrio. **(RP 1956)**

In this context, it is clear that Detective Ortiz was not introducing information as to other prior crimes that may have been committed by Mr. Robledo, only what the Huelga bird has signified by other gang-affiliated individuals either in prison or on the streets, and its relevance to gang affiliation. **(RP 1955)**

In any event, the gang evidence was properly admitted under ER 404(b). Courts may admit gang affiliation evidence to establish the motive for a crime or to show that defendants acted in concert. State v. Scott, 151 Wn. App. 520, 527, 213 P.3d 71 (2009), *review denied* 168 Wn.2d 1004 (2010); State v. Embry, ___ Wn. App. ___, 287 P.3d 648 (2012).

A trial court must engage in the process of (1) finding that misconduct occurred; (2) identifying 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 of the evidence. State v. Yarbrough, 151 Wn. App. 66, 81-82, 210 P.3d 1029 (2009).

The trial court here engaged in just that process required by case law, and did not err.

3. The court did not err in admitting the codefendants' statements.

The Sixth Amendment to the United States Constitution grants defendants the right to be "confronted with the witnesses against him." In Crawford v. Washington, 541 U.S. 36, 60-61, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the Supreme Court held that the Confrontation Clause applies to witnesses against the accused, thus the State can present prior testimonial statements of an absent witness only if the witness is unavailable to testify and the defendant has had a prior opportunity for cross-examination. Id., at 68.

In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Court recognized that admitting a non-testifying codefendant's confession that implicates the defendant may be so damaging that even instructing the jury to use the confession only against the codefendant is insufficient to cure the resulting prejudice. But, admitting a non-testifying codefendant's confession that is redacted to omit all references to the defendant, couple with an instruction that the jury can use the confession against only the codefendant, does not violate the Confrontation Clause. Richardson v. Marsh, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed.2d 176 (1987). This is true, even where the codefendant's confession, although not facially incriminating, becomes

incriminating when linked with other evidence introduced at trial. Id., at 208-09. Redaction of a codefendant's references to the defendant, coupled with an instruction, creates the same situation with respect to a non-testifying codefendant's confession. Id., at 211.

The Washington Court of Appeals has recently held that while Crawford heightened the standard under which a trial court can admit hearsay statements, it did not overrule Bruton and its progeny. In re Pers. Restraint of Hegney, 138 Wn. App. 511, 546, 158 P.3d 1193 (2007). The court recognized that Bruton answers the threshold question of whether one defendant can considered a witness against another in a joint trial, but if a statement is properly redacted and the jury is instructed not to use it against the defendant, the declarant is not a "witness against" the defendant, and admitting the codefendant's statement does not implicate the Confrontation Clause. Hegney, 138 Wn. App. at 547.

Here, the jury was properly instructed that that they were to consider the counts and defendants separately. The statements were not redacted, but they did not need to be, as each defendant's statement to the jail officer pertained only to that defendant's gang affiliation. No statement by a codefendant constituted testimony against Mr. Robledo. There was no error in admitting the statements at trial.

4. The court's aggravated sentence was supported by the evidence.

The Appellant argues that, aside from what he believes to be improperly admitted evidence, the record is devoid of any evidence to support the enhanced sentence. He is incorrect, and his reliance upon State v. Bluehorse, 159 Wn. App. 410, 428, 248 P.3d 537 (2011), is misplaced.

As noted previously, the shooting described in this case occurred after Mr. Acevedo flashed an "LVL" sign. There was an abundance of evi 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).

The gang aggravator at issue in Bluehorse was RCW 9.94A.535(3)(s), whether a defendant commits a crime in order "to obtain or maintain his or her membership or to advance his or her position" in a gang.

Here, in contrast, the jury answered in the affirmative that Mr. Robledo's behavior, as a principal or accomplice, showed an "intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang . . . its reputation, influence, or membership", pursuant to RCW 9.94A.535(3)(aa).

This aggravator, broader in scope than RCW 9.94A.535(3)(s), was added to the list of aggravating factors by the Legislature in 2008. *See,* Wash. E2SHB, 60th Leg., 2nd Sess., (June 12, 2008). The fact that NSV would gain some benefit by shooting at LVL members was explained by

Detective Ortiz. Sufficient evidence supported the jury's finding, and the court did not err in imposing the aggravated sentence.

5. The court did not abuse its discretion in denying the motion for a mistrial.

An appellate court reviews a trial court's investigation into juror misconduct for abuse of discretion. State v. Earl, 142 Wn. App. 768, 774, 177 P.3d 132 (2008), *citing* State v. Elmore, 155 Wn.2d 758, 761, 123 P.3d 72 (2005). The party alleging juror misconduct has the burden of showing that misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). A new trial is granted only where juror misconduct has prejudiced the defendant. State v. Boling, 131 Wn. App. 329, 332, 127 P.3d 740, *review denied* 158 Wn.2d 1011 (2006).

Even if the juror committed misconduct by violating the court's orders, there is no prejudice apparent from this record. The court and counsel learned of the Twitter posting just as a verdict was reached. It is apparent from counsel's comments at that time that it was not clear just who had posted the tweet, or whether it even disclosed the status of the deliberations. **(RP 2407-10)** It was not until some later that a motion for mistrial was made. **(1-20-11 RP 20-23)** The decision to proceed and accept the verdict was within the court's discretion.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions, as the issues raised on appeal are without merit

Respectfully submitted this 16th day of January, 2013

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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