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Court of Appeals
Division III
State of Washington

NO. 31298-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ERIK RAMOS CARRASCO, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>ARGUMENT</u>	
GANG EVIDENCE	6
GANG AGGRAVATORS.....	10
SUFFICIENCY OF EVIDENCE.....	14
IV. <u>CONCLUSION</u>	17

TABLE OF AUTHORITIES

Cases

State v. Bluehorse, 159 Wn. App. 410, 429, 248 P.3d 537 (2011).....10

State v. Boot, 89 Wn. App. 780, 788-90, 950 P.2d 964 (1998).....6,7

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....14

State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995)6,7

State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990).....6

State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).....14

State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303,
review denied 119 Wn.2d 1003, 832 P.2d 487 (1992)15

State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).....6

State v. Moreno, 173 Wn. App. 479, 495, 294 P.3d 812 (2013)10,11

State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).....7

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)14

State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).....14

State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).....14

State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009).....6,7

Statutes

RCW 9.94A.535(3)(aa).....11,13

RCW 9.94A.535(3)(s).....11,12

Rules

ER 4016

ER 404(b).....6,8,17

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit gang-related evidence?
2. Did the trial court properly impose an exceptional sentence?
3. Was the evidence sufficient to support the conviction of second degree murder?
4. Was the evidence sufficient to support the convictions of first degree assault?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court properly admitted gang-related evidence. The decision was not manifestly unreasonable or based on untenable grounds.
2. The trial court properly imposed an exceptional sentence based on aggravating factors that were supported by substantial evidence.
3. The evidence was sufficient to support the conviction of second degree murder.
4. The evidence was sufficient to support the convictions of first degree assault.

II. STATEMENT OF THE CASE

Prior to trial, and outside the presence of the jury, the State made a lengthy and detailed offer of proof that consisted of both a verbal and written offer of proof. The State made a verbal offer of proof on the record, (2 RP 92-94), and in the State's Supplemental Motions in Limine; Trial Memorandum, (CP 121-148). The written offer of proof including the following testimony from witness Ricardo Vasquez:

Mr. Vasquez will testify that the Defendant bragged about earning his first stripe because of this shooting. Mr. Vasquez will testify that in the gang culture, a stripe earns someone great respect within the gang and

that shooting a rival gang member earns the highest form of respect within the gang. He will also testify that if a gang member is disrespected by a rival gang member, that he has to retaliate or his reputation will suffer within the gang.

(Id.). The State indicated that Detective Shaw would testify as a gang expert as well to those facts. (Id.).

In the written offer of proof, the State also outlined a list of additional facts that would be elicited at trial pertaining to the Defendant's gang-related motive to shoot at the Sureños:

1. Five documented VSL, Vario Sureño Loco, gang members/associates were driving around in rival territory in the victim vehicle. They were way out of their territory and Mr. Baldomero Camacho admitted to YPD Sgt. Cortez that they had driven into the area looking for trouble or problems. He and Mr. Lopez says that they even stopped at a market in the rival territory to take pictures of themselves in the rival territory. Baldomero stated that they yelled at several Norteños in the rival gang territory and there was an exchange of words just prior to a Norteño gang member brandishing a gun. Mr. Lopez also admitted that there was a verbal altercation with rival gang members immediately prior to the shooting.
2. Several subjects standing in front of a known Norteño gang house reported that the occupants of the victim vehicle yelled something about Sureños prior to the gun shots being heard. Subjects also reported a beer can being thrown out of the victim vehicle towards the Defendant.
3. The deceased victim went by "Baby Puppet" or "Plex" and the others vehicle

occupants went by the names of Lil' Spider, Downer, Casper, and Listo.

4. The Defendant is a documented and self-admitted La Raza gang member, a rival gang to the Sureño gang. His tag name is "Hate." He disposed of the gun with another La Raza gang member, "Lil' Silent." He confessed to a La Raza gang member, Mr. Vasquez.

5. At the time of the shooting, witnesses described the Defendant as wearing a red belt or bandana, a Norteño color.

6. The Defendant in his verbal interview with police, is asked "Why did you shoot?" and eventually admits that he felt a threat. The Defendant's explanation for why he shot has to do with the fact that the victims were Sureños. He said that they "drove by and threatened us with that they were gonna shoot 'em them at us." When asked what they (the victims) say, he replies, "Oh, they're like Sureños, VSL gang. I'm like what the fuck? Last time you guys ducked and that's when the fires, that's when the guns went off and..."

7. A search of the Defendant's room revealed gang-related letters.

8. Expert gang testimony will be relevant to explain why witnesses are not cooperating, are minimizing, or recanting. The no-snitch policy is highly relevant to explain witness behavior in this case.

9. Expert gang testimony will be relevant to explain territories and to explain when gang members retaliate and why.

10. Expert gang testimony will explain the principle of respect and what constitutes disrespect to a gang member.

11. Expert gang testimony will explain the significance of colors to the gang, and explain the significance of a red belt or bandana.

12. Expert gang testimony will be relevant to explain the term "Green light" which was used by the Defendant in a jail phone call.

13. The Defendant signed his letter to Eva Montes de Oca under the words “Ene Soldado” which means “Northern Soldier” in English. This letter contains a confession to the crime. Expert testimony will explain that by signing his name under Ene Soldado, he is pledging himself to being a Norteño gang member. (Id.).

In deciding whether a nexus exists between the crime alleged and gang affiliations, the trial court also considered the transcript of the Defendant’s verbal interview with police, Exhibit 22, and the Defendant’s written statement that he gave to Detective Shaw, Exhibit 24. (1 RP 87).

The Defendant brought up the issue of gang affiliation in his own written statement to Detective Shaw where he said he saw a car drive past him with 2 people in it and said that they looked like “rival gang members.” (Exhibit 24). He said, “so with this, it got me a little more cautious.” (Id.). In his interview with the detective, he initially denied firing any shots at the Sureños. But later on, when the detective asked him what they (the persons in the other car) said to him, he replied:

“Oh, they’re like Sureños, VSL gang. I’m like what the fuck. Last time you guys ducked and that’s when the fires, that’s when the guns went off and.” (CP 121-148)

After considering the State’s offer of proof and the Defendant’s verbal and written statements, the trial court found that the State’s proposed gang evidence was relevant to motive and intent. In fact, the trial court stated that the evidence is “critical, essential and undeniably probative on the issues of motive and intent.” (2 RP 95). The court found

that “you can’t excise the gang evidence and testimony from the circumstances of this particular homicide.” (Id.). The homicide was “motivated by the animosity between the two” gangs. (Id.).

A weighing was done on the record of the probative versus the prejudicial effect of the evidence. The trial court noted that the evidence “has some obviously prejudicial effect” because of the strong probative value of the evidence and the fact that it “permeates this particular event.” (Id.). The court found that the “probative value *significantly* outweighs any prejudicial effect.” (Id.) (emphasis added).

Trial commenced and witnesses testified that after an exchange of words between the Defendant and a group of five Sureño gang members, the Defendant ran down the street and opened fire at the Sureños as they drove away from him. One male was hit in the back of the head and killed and another was hit in the arm. Afterwards, the Defendant bragged to an associate that he was happy about earning his first stripe by killing a Sureño. (3 RP 195, 198).

At trial, the Defendant claimed self-defense but the jury rejected that claim and he was found guilty of second degree murder, four counts of first degree assault (counts 2-5), and unlawful possession of a firearm in the second degree. (CP 311-321). The jury also returned special verdicts for counts 1-5 for being armed with a firearm along with special verdicts for counts 1-6 for two gang-related aggravating factors. (CP 322-338).

III. ARGUMENT

GANG EVIDENCE

Evidence of gang affiliation is admissible as evidence of other crimes or bad acts under ER 404(b) as proof of motive and intent. See State v. Yarbrough, 151 Wn. App. 66, 210 P.3d 1029 (2009) (gang evidence admissible as to motive); State v. Boot, 89 Wn. App. 780, 788-90, 950 P.2d 964 (1998) (admissible as to motive, premeditation); State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995) (premeditation, motive, and intent).

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. Campbell, 78 Wn. App. at 821 (citing State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990)). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The trial court does not have to conduct a hearing to take testimony. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

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 State v. Campbell, 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. 78 Wn. App. at 822. Likewise, in State v. Boot, 89 Wn. App. 780, 789-90, the court held that the admission of gang evidence that was probative of motive was not an abuse of discretion. Admission of gang-related evidence was affirmed, as well, in State v. Yarbrough, 151 Wn. App. 66, 81, where the evidence was relevant to prove the defendant's motive and mental state with respect to a charge of first degree murder. As illustrated by these cases, courts have regularly admitted gang affiliation evidence to establish the motive for a crime. In each instance, there was a connection between the gang's purposes or values and the offense committed.

Here, there is a strong connection between the Defendant's gang affiliation and the offense, making gang-related evidence highly relevant to the case. It would be impossible to try this case without reference to the Defendant's gang, a Norteño gang, and the victims' gang, a Sureño gang. Carrasco claims that there was no nexus between his crimes and gang activity.

The State's theory at trial, however, was that the Defendant shot at the victims in this case because they were rival gang members in his territory—in essence, that Carrasco was defending his “turf.” The State's theory was supported by the proffer and the Defendant's very own statements. The victims were rival Sureño gang members or associates driving in a Norteño neighborhood. The Sureños exchanged words with the Norteños just prior to the shooting. (CP 121-148, SI 22).

In the Defendant's interview with Detective Shaw, he said prior to the shooting, that the car's occupants said, “Sureños, VSL gang.” (Id.). Based on the names being yelled out in rival territory, there was an undeniable gang-related motive for the Defendant to shoot at the victims in this case. He was disrespected by rival gang members who were in his territory looking for trouble. As a result of the disrespect, he had to retaliate in order to maintain his reputation with the gang. He retaliated by shooting them, which earned him his first “stripe,” a badge of honor within the gang that he was proud of and bragged about to his fellow gang member, Vasquez. (CP 121-148).

Given the law dealing with 404(b) gang evidence, this type of evidence was clearly admissible at trial. This evidence directly supported the State's case theory and was the basis for moving for the admission of this information. The State had the right and requirement to introduce information regarding Carrasco's motive and intent. This evidence also directly rebutted his self-defense claim.

Appellant claims he was convicted only of being a gang member. This ignores the statements made by Carrasco himself, and the eye-witnesses who testified about the shooting. These facts alone are overwhelming. The gang-related evidence, as indicated above, did not convict Carrasco, it did however allow the jury to consider the fact that this was not a crime of self-defense but a shooting motivated by the Defendant's gang affiliation and his need to protect his Norteño neighborhood from being "disrespected" by rival gang members. It was also motivated by his desire to earn his first "stripe," which allows him to move up in the gang.

The trial court did not allow nor did the State attempt to elicit some generalized information about gangs and the overall aspect of that subculture. The evidence admitted was narrowly tailored to the facts of the case. It was specific information that could only be explained to a lay jury through expert testimony and witnesses who could explain this culture and the actions that would motivate Carrasco to commit this crime.

This is not a case where the trial was replete with hours of extensive or duplicative testimony that this was a gang-motivated killing. It was a portion of the trial, however it was not the continuous theme of this trial. What was testified to by numerous witnesses is that this was a gang-motivated crime. There is no other way to describe what occurred. Carrasco's own statements acknowledged that this case was interwoven with gang motives. To present this case without the use of this gang

information would have been the equivalent of the parties presenting a lie to the jury. The reality is that in the gang culture, disrespect requires action or retaliation, often involving violent behavior. This is not a belief within the knowledge of your typical, law-abiding juror. To present this case without any information coming in about the gang affiliations and gang territories would be like trying to try a domestic violence case without explaining the “domestic” relationship between the parties.

Carrasco now claims that his gang affiliation should not be used against him. The State’s lengthy proffer was considered, along with the Defendant’s own statements, thereby allowing the trial court to come to the correct decision that the testimony about gangs was admissible. The jury was then charged with listening and considering all of the evidence, direct and circumstantial, and handing down a just verdict based on the totality of that information. And that is precisely what they did in this case.

GANG AGGRAVATORS

Findings supporting an exceptional sentence are reviewed for substantial evidence. State v. Moreno, 173 Wn. App. 479, 495, 294 P.3d 812 (2013). Expert testimony about generalized gang motivations is insufficient. State v. Bluehorse, 159 Wn. App. 410, 429, 248 P.3d 537 (2011). Rather, there must be some evidence of the defendant’s actual gang-related motivation behind the crime charged. Id. at 428.

In Moreno, this court concluded that there was sufficient evidence

to support the aggravating factor when Moreno committed what appeared to be a random act of violence against a nongang member. Moreno, 173 Wn. App. at 495. An expert testified that the Norteños and Sureños were rivals, there was usually a specific reason for encroaching on rival territory, and gang members often commit random crimes as a way to maintain or improve their status within the gang. Id. at 497. Evidence also showed that Moreno had ties to the Norteños gang, he and his cohorts were in Sureños territory, and somebody in Moreno's car yelled out a gang-related phrase moments before the shooting. Id. at 496-97. That evidence, in connection with the expert testimony, was sufficient to support the inference that Moreno intended to advance his position in his gang by shooting at a pedestrian. Id. at 497.

Here, Carrasco claims that there was nothing to support the aggravating factors found in RCW 9.94A.535(3)(aa) or (s). RCW 9.94A.535(3)(aa) states that "the defendant committed the offense with the intent to directly or indirectly cause any benefit...gain...or other advantage to or for a criminal street gang...its reputation, influence, or membership." RCW 9.94A.535(3)(s) states that "the defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group."

The Defendant fails, however, to address a critical piece of evidence: his admission to fellow La Raza gang member Ricardo Vasquez that he earned his "first stripe" for committing this offense.

Specifically, Vasquez testified as follows:

“Well, he said he was happy about it because he earned his first stripe you know. So he was pretty happy about that, too, because in the eyes of anybody that’s in a gang, you know, if you kill somebody, you know, that’s just like the highest thing you can do in a gang, you know. That’s like the main goal in a gang, you know, is just to earn as much stripes as you can, you know. So to take out as much rival gang members as you can, it’s better for the gang because that’s less of them, you know.”

(3 RP 198).

Carrasco also admitted to this on the stand. (6 RP 537-8). When asked about the importance of the “stripe,” he indicated the following:

Q: What does a stripe mean?

A: It’s like—a stripe, the more you get, they’re like codes of honor, get them for respect, to get known by your people in the neighborhood and just to be known by your people in the neighborhood and just to be known by other people.

Q: If you get a stripe it helps your reputation, correct?

A: It does.

Q: It helps you move up within the gang?

A: It does.

Q: You look better to the OG’s?

A: You do.

(Id. at 537). Later on, he indicated that respect within the gang is “pretty important” and that when someone disrespects you, action needs to be taken. (Id. at 540-41).

Under RCW 9.94A.535(3)(s), there was sufficient evidence that Carrasco’s earning of his first stripe by killing a Sureño would advance his

position within his group, the La Raza gang. Vasquez testified that killing a Sureño gains you respect and authority within the gang. (3 RP 196). When questioned about how much respect you get from killing a rival, he said “It’s pretty high. That’s as high as you’re probably going to get it, you know.” (Id.) He said the goal is to get to the point of being an “older gangster” or “OG.” (Id. at 196-97). One way to get to be classified as an OG is by earning stripes. (Id. at 197). Vazques testified that “to really earn a stripe is to take someone’s life, to kill somebody, a rival gang member.” (Id. at 196). Carrasco even testified himself that earning a first stripe helps you move up within the gang. (6 RP 537).

There was also sufficient evidence that he committed the crime “with the intent to directly or indirectly cause any benefit...or other advantage to or for a criminal state gang,...its reputation, influence, or membership.” RCW 9.94A.535(3)(aa). Vasquez testified that killing a rival gang member benefits your own gang because there are then fewer rival gang members. (3 RP 198). Compared to the facts in Moreno, there is even stronger evidence for the jury to infer that Carrasco intended to indirectly cause a benefit or advantage to the membership of a criminal street gang.

At trial, the Defendant testified that the Sureños yelled out their gang name and “fuck you, fuck your hood.” (6 RP 538). He testified that this behavior is disrespectful to a Norteño gang member and would make a Norteño really angry. (Id.) He said that the Sureños knew what part of

Yakima they were in and what they were getting themselves into. (Id. at 540). Based on this testimony, a reasonable juror could infer that he shot at the Sureños to benefit his gang by defending Norteño territory and reducing the number of rival gang members. This would be a direct benefit to his gang's reputation and influence.

SUFFICIENCY OF EVIDENCE

A challenge to the sufficiency of the evidence is ordinarily reviewed for substantial evidence. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that a finding is true. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). In a review for substantial evidence, this court views all evidence and reasonable inferences in a light most favorable to the State. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (quoting State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court defers to the trier of fact on issues of conflicting testimony, witness credibility, and overall weight of the evidence. Id. at 874-75.

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. 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, there was substantial evidence to support all of the elements of the crimes charged. On appeal, Carrasco argues that the State did nothing to disprove self-defense beyond a reasonable doubt. As support for his self-defense argument, the Defendant's main claim is that he saw what he thought was a pistol prior to his shooting at the victims. However, on cross-examination, he fully admitted that he didn't know if what he saw was a gun (6 RP 546):

Q: You don't know if it was a gun, do you?

A: I don't know if it was a gun.

Q: What did you see exactly?

A: A shine

...

Q: So you had no idea whether this was a gun or not, did you?

A: I did not have no idea.

Q: So it could have been a beer can?

A: It could have been another beer can.

Later during cross-examination, the defendant was asked again about the gun and whether there were any threats made:

Q: On that date, no one ever pointed a gun at you, did they?

A: Not to my recollection.

Q: No one said they were going to kill you or made threats they were going to kill you, did they?

A: Nobody did.

(Id. at 549). And again, the Defendant admitted the following on re-cross:

Q: You had no reason to believe that the shiny object was a gun, did you?

A: No.

(Id. at 554-555).

Based on this evidence, the Defendant's testimony consists of him getting hit with a beer can by rival gang members, seeing a shiny object in the car, and then opening fire into the vehicle while chasing it down the road. Not a single witness saw a gun in the victim's vehicle. Even the Defendant's own gang associate, Ricardo Vasquez, testified that the Defendant shot into the car but that there was no weapon displayed by the victims. (3 RP 188-192). The Defendant's many conflicting versions of what happened, his fleeing the scene of the crime and disposing of the murder weapon, and his placing a "green light" on witnesses so they don't testify support the reasonable inference that this was not a case of self-defense.

While the jury was instructed on self-defense, there was very little to support a jury instruction on self-defense, given the Defendant's concessions on cross-examination. It was entirely proper for the jury to discount the Defendant's self-defense claim given his testimony and all of

the evidence to the contrary of his claim. As such, there was substantial evidence to support the jury's verdict.

IV. CONCLUSION

The actions of the trial court should be upheld, the conviction should stand, and this appeal should be dismissed.

The trial court made a well reasoned decision with regard to the 404(b) evidence and appellant has not demonstrated any basis for this court to find that the decision was manifestly unreasonable or based on untenable grounds or reasons. The record is clear that the trial court was well within its discretion when it made these rulings, and the facts and the law supports these decisions.

There was also sufficient evidence to support the crimes that the Defendant was convicted of and the aggravating factors that were found by the jury.

Respectfully submitted this 8th day of January 2014,

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