

28170-1-III
COURT OF APPEALS
DIVISION III

FILED
JAN 25 2001
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DIVISION III
STATE OF WASHINGTON
BY _____

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAVIER CALDERON, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

The trial court committed reversible error by allowing the introduction of evidence related to gang affiliation.

B. ISSUE

When the State fails to establish any nexus between the crime and gang affiliation, does the trial court commit reversible error by allowing introduction of the defendant's gang affiliation?

C. STATEMENT OF THE CASE

1. Facts at Trial

Javier Calderon, then 17 years old, was living with his parents in September 2008, when his friend Ivan Cruz came over with some beer. (RP 74-75) The two boys drank and listened to music for awhile in Mr. Calderon's bedroom. (RP 75) After about 45 minutes, Mr. Cruz began acting drunk, and Mr. Calderon grew concerned. He decided he needed to walk Mr. Cruz to another friend's house. (RP 76)

The boys set out on the walk. (RP 76) During the walk, Mr. Calderon had a small baseball bat with him that he used to swing at rocks. (RP 78) At some point, Mr. Cruz complained that he was very thirsty and he needed something to drink. (RP 76) Mr. Calderon wanted to get his

friend a drink, but he did not have any money. Mr. Calderon approached Hector Garcia-Reyes, who was on the side of the road in his truck, and asked if he would give Mr. Calderon two or three dollars. (RP 76-77)

Mr. Garcia-Reyes initially responded that he did not speak English, and Mr. Calderon tried to explain his need in Spanish. (RP 77) At that point, Mr. Garcia-Reyes said “yes, to hold off.” (RP 77) Mr. Calderon and Mr. Cruz waited. While they waited, Mr. Cruz pulled out a knife he had with him and started toward the car. Mr. Calderon pulled Mr. Cruz away, and told him to put the knife away. (RP 77-78) Mr. Garcia-Reyes gave them five dollars, and Mr. Calderon and Mr. Cruz ran to the friend’s house. (RP 78)

Mr. Garcia-Reyes called police, and followed the boys in his truck. (RP 42) He told the police that Mr. Calderon was wearing a black and white checkered hat bearing the word “Toker” and a blue jersey with the number 69. (RP 25) A short time later he saw Mr. Calderon walk out of a house, at the moment the police arrived. (RP 43)

Mr. Garcia-Reyes identified Mr. Calderon and police took him into custody. (RP 21) The police learned Mr. Cruz was inside the house. When they entered a bedroom, they found Mr. Cruz face-down on the bed, smelling of alcohol. (RP 24) Mr. Cruz’s speech was slurred, he ran into a window, and outside he fell down on the driveway. (RP 24)

Mr. Calderon was charged with first degree robbery. (CP 160) The State alleged Mr. Calderon acted as a principal or accomplice who displayed a deadly weapon, a knife and baseball bat, and therefore sought a deadly weapon enhancement. Additionally, the State alleged the robbery was gang-related and therefore sought a gang-related offense enhancement. (CP 160-161)

At trial, Mr. Garcia-Reyes's story was very different from Mr. Calderon's. Mr. Garcia-Reyes said he had pulled over to the side of the road to look for his cell phone under the seats in his truck. (RP 38) He said that the boys pulled at him to get his attention. (RP 38) He said they "pulled me" and they wanted money. (RP 38) Specifically, Mr. Garcia-Reyes said Mr. Calderon demanded the money. (RP 39)

Mr. Garcia-Reyes testified that he was not going to give them any money, because he did not have any. He asserted, "[t]hey showed me a bat." (RP 39) Mr. Garcia-Reyes testified that he moved toward his own bat in his truck, in case he needed to defend himself. He could tell the boys had been drinking. (RP 40) On his way to retrieve his own bat, Mr. Garcia-Reyes turned and saw a knife. He said it was in Mr. Calderon's hands. (RP 40) He gave the boys money from his shirt pocket. (RP 41) Mr. Garcia-Reyes remembered Mr. Calderon grabbing Mr. Cruz, and Mr.

Cruz falling to the ground. He testified that, immediately after he gave them the money, both boys ran. (RP 41)

2. Evidence Related to Gang Affiliation.

Prior to trial, Mr. Calderon objected to the introduction and use of gang-related evidence. (RP 4-6) The State informed the Court that it would present evidence that the robbery was gang-related based on three pieces of evidence: (1) Mr. Calderon was a member of a local gang; (2) Mr. Calderon carried a bat that had gang graffiti on it; and (3) Mr. Calderon wore “gang attire” during the robbery. (RP 4)

Mr. Calderon countered that, even if the State established the three facts, that evidence failed to contain the necessary nexus between gang activities and the crime, and therefore the gang affiliation was inadmissible. (RP 4-6) The court ruled the gang evidence was admissible. (RP 6) Mr. Calderon entered a standing objection to all evidence linking Mr. Calderon to gang activities. (RP 9)

Officer Anthony Aceves was asked what he did with a hat he found in the yard. The officer responded, “I collected it and showed it to Javier and asked him if it was his and he it was not, but upon reviewing the hat I saw it had the name of “Toker” on it.” Javier is a known MPS gang member and his moniker is “Toker.” (RP 26)

Officer Patrick Barnett described a photograph of a baseball bat he found lying near the sleeping Mr. Cruz: “It depicts the same baseball bat lying in the yellow chair. It has different monikers on it ‘Toker’ and other various gang symbols.” (RP 54)

3. Procedural Facts.

At the close of the evidence, Mr. Calderon moved for a mistrial. (RP 91) He argued that the State failed to establish a nexus between the gang affiliation and the robbery. (RP 91-92) The court summarily denied the motion. (RP 92)

Prior to jury deliberation, the State withdrew the gang enhancement. (RP 73)

The jury convicted Mr. Calderon of first degree robbery and found that he was armed with a deadly weapon at the time. (CP 58-59) He moved for a new trial based upon the improper admission of the gang affiliation testimony. (CP 43) The court denied the motion and sentenced Mr. Calderon to 55 months’ incarceration. (RP 5/21/09 4-5; CP 23) He appeals.

D. ARGUMENT

1. THE GANG ASSOCIATION EVIDENCE WAS INADMISSIBLE BECAUSE IT WAS IRRELEVANT, UNFAIRLY PREJUDICIAL AND IMPROPER PROPENSITY EVIDENCE UNDER ER 404(B).

The gang association evidence in this case was inadmissible because the State produced no evidence that (1) connected the robbery to gang activity; (2) that MPS was a gang; (3) that Mr. Cruz was involved in a gang; and (4) that Mr. Calderon was somehow attempting to heighten his gang status by robbing Mr. Garcia-Reyes.

The appellate court reviews trial court evidentiary decisions for abuse of discretion. *State v. Brown*, 132 Wn.2d 529, 578, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

“Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association.” *State v. Scott*, 151 Wn. App. 520, 213 P.3d 71 (2009), *citing Dawson v. Delaware*, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992). As a result, evidence of criminal street gang affiliation is inadmissible in a criminal trial when it

merely reflects a person's associations. *Delaware*, 503 U.S. at 166-167; *Scott* 151 Wn. App at 526. There must be a connection between the crime and the organization before the evidence becomes relevant. *Delaware*, 503 U.S. at 166, 168; *Scott*, 151 Wn. App. at 526.

Washington courts likewise have recognized the need for a nexus between the crime and the organization before admitting evidence of gang membership. *Scott*, 151 Wn. App. at 526; *State v. Johnson*, 124 Wn.2d 57, 67, 873 P.2d 514 (1994). Thus, a trial court may not admit gang affiliation evidence unless evidence exists of a nexus between the crime and gang membership. *Scott*, 151 Wn. App. at 526; *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995).

Evidence of gang affiliation is prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009). Admission of gang affiliation is measured under the standards of ER 404(b). *State v. Boot*, 89 Wn. App. 780, 788-790, 950 P.2d 964 (2009). Evidence of other crimes or bad acts is admissible under ER 404(b) as proof of premeditation, intent, motive, and opportunity. ER 404(b).

In applying ER 404(b), a trial court must engage in a three-step analysis: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence, *i.e.*, whether the purpose for which the evidence is offered is of consequence to the outcome of the

action and tends to make the existence of an identified fact more probable; and (3) balance the probative value of the evidence against its prejudicial effect. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). The balancing of these interests must be conducted on the record. *State v. Lane*, 125 Wn.2d 825, 832, 889 P.2d 929 (1995).

Washington Courts have admitted gang affiliation evidence to establish the motive for a crime or to show that defendants were acting in concert. For example, in *State v. Campbell, supra*, the court properly allowed testimony of gang affiliation where it was highly probative of the State's theory that the defendant was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory.

In *State v. Boot, supra*, evidence of the defendant's gang affiliation was admissible under ER 404(b) to prove motive because "[t]he testimony on gangs established that killing someone heightened a gang member's status" and "[t]he evidence show[ed] the context in which the murder was committed." *Boot*, 89 Wn. App. at 789.

In both these cases, a connection was established between the gang's purposes or values and the crime. By contrast, when no connection exists between a defendant's gang affiliation and the charged offense, admission of the gang evidence is prejudicial error. In *Scott*, Division

Three held that the record was “utterly silent” on whether any of the other participants were also gang members. *Id.* at 528. The court concluded that in the absence of this evidence, the evidence did not show that joint gang affiliation was a reason for the three men to attack the victim together, nor did the gang evidence connect to a motive. *Id.*

The *Scott* court held that the admission of the evidence was not harmless error because “without a connection of that status to the crimes, the only reasonable inference for the jury to draw from the testimony was that Mr. Scott was a bad person.” *Scott*, at 529.

ER 404(b) exists in part to combat the tendency to make such inferences. The *Scott* court found in that case that it was “very significant that the conviction for one of the assault charges was based on the theory of accomplice liability. Evidence of gang affiliation can be a basis for finding that multiple defendants were acting in concert.” *Scott*, at 529.

Division Three concluded that “[t]he failure to connect the gang evidence to support both the stated motive and as a basis for demonstrating concerted activity presents a significant probability that the error was not harmless. Most certainly it does not establish that the error most probably did not materially affect the verdict.” *Scott*, at 529-530.

This case is similar. Here, prior to admitting the gang affiliation evidence, the court failed to engage in the required ER 404(b) three-part

analysis, or any apparent analysis, on the record. It is not clear if the court conducted any weighing of the probative value versus the obvious prejudicial impact of this testimony. In the absence of any analysis of what the gang affiliation evidence would consist of, the purpose of its admission or its relevance, the admission of the gang evidence was in error.

Moreover, the gang affiliation evidence was not probative of, or even relevant to, the State's theory of the crime. No evidence was offered that somehow the robbery was gang-related, that Mr. Calderon sought to exact revenge, increase his standing in the gang, or any other factor related to membership with a gang. Nor was any evidence introduced that Mr. Cruz was a gang member.

Instead, the testimony was simply that Mr. Calderon was "a known gang member," he had a "gang moniker," and a small bat he carried had gang symbols on it. In short, this evidence simply established that Mr. Calderon was in a gang, and thus the jury was free to improperly conclude he was a bad person.

Additionally, the State failed to establish that "MPS" was in fact a gang. It is error to admit gang affiliation evidence when the State fails to establish the group is a gang. *State v. Ra*, 144 Wn. App. 688, 701-702, 175 P.3d 609 (2008).

Significantly, even the State implicitly acknowledged it had failed to introduce evidence establishing a nexus between this crime and the gang affiliation by voluntarily withdrawing the gang affiliation enhancement prior to jury deliberations.

In sum, the court's introduction of the highly prejudicial evidence that Mr. Calderon was a gang member was reversible error.

E. CONCLUSION

The State failed to introduce the necessary nexus evidence that would make Mr. Calderon's alleged gang affiliation relevant to this prosecution. In the absence of such evidence, the trial court's admission of the gang affiliation evidence was reversible error. Mr. Calderon should receive a new trial.

Dated this 25th day of January, 2010.

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