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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 285600

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JUAN ZEPEDA JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE F. JAMES GAVIN, JUDGE

BRIEF OF RESPONDENT

JAMES P. HAGARTY
Prosecuting Attorney

Kevin G. Eilmcs
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WSBA #18364
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in admitting gang-related evidence?
2. Whether the court erred in admitting, and publishing to the jury, Mr. Zepeda's taped interview with a detective?
3. Whether the court erred in failing to give a unanimity instruction as the alternative means of committing the offense of intimidating a witness, and whether sufficient evidence supported each of the alternative means submitted to the jury?
4. Whether the court erred in adding a 36-month firearm enhancement to the sentence on one count of unlawful possession of a firearm?
5. Whether the court erred in not finding that second-degree assault and intimidating a witness constituted the same criminal conduct?
6. Whether Mr. Zepeda was denied effective assistance of counsel?
7. Whether the cumulative error doctrine entitles Mr. Zepeda to a new trial?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Zepeda's claim of error as to gang-related evidence may not be raised for the first time on appeal under RAP 2.5(a)(3), and the evidence would have been properly admitted under ER 404(b) in any event.
2. Zepeda's statement was freely given, and was thus properly admitted pursuant to CrR 3.
3. Substantial evidence supported the two alternative means of committing the offense of intimidating a witness on which the jury was instructed.
4. There is clear authority for the trial court's order that a 36-month firearm enhancement be served consecutively to all other sentences.
5. The State concedes Zepeda's fifth assignment of error, and this matter should be remanded to the trial court to analyze whether, under the facts of this case, second degree assault and intimidating a witness constituted the same course of criminal conduct.
6. Mr. Zepeda has not overcome the strong presumption that his counsel's representation was effective.

7. As the trial court did not commit errors so numerous as to deprive Mr. Zepeda of a fair trial, the cumulative error doctrine does not apply.

II. STATEMENT OF THE CASE

Respondent State of Washington is satisfied with Zepeda's Statement of the Case, but will supplement it with references to the record herein. RAP 10.3(b).

III. STANDARD OF REVIEW

1. A trial court's evidentiary rulings are reviewed for an abuse of discretion. In re Detention of Duncan, 167 Wn.2d 398, 402-03, 219 P.3d 666 (2009).

2. Findings of fact following a CrR 3.5 hearing will be verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence. State v. Broadaway, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997).

3. Challenged jury instructions are reviewed *de novo*. State v. Bashaw, 169 Wn.2d 133, 140, 234 P.3d 195 (2010). 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).

4. Questions of law arising under the Sentencing Reform Act are reviewed *de novo*. State v. Miller, 156 Wn.2d 23, 27, 123 P.3d 827 (2005).

IV. ARGUMENT

1. Appellant's claim of error as to gang evidence fails, as the issue may not be raised for the first time on appeal, and the evidence would have been admissible anyway under the *res gestae* exception to ER 404(b).

As a general rule, appellate courts will not consider issues raised for the first time on appeal. An exception is applied, however, for claims of "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); *cited in* State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

However, an appellant must show actual prejudice in order to establish that the error is "manifest". State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). In meeting this burden, the appellant must identify a constitutional error, and show how the error actually affected his or her rights at trial. Scott, 110 Wn.2d at 688. Further, allowing every possible constitutional error to be raised for the first time on appeal,

“undermines the trial process, generates unnecessary appeals, creates undesirable retrial and is wasteful of the limited resources of prosecutors, public defenders and courts”. Lynn, 67 Wn. App at 344.

“If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333, *citing* State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). In a review of two consolidated cases, the Supreme Court in McFarland specifically addressed claims of error as to the failure of trial counsel to move for suppression of evidence. The court held that each of the defendants, in order to show actual prejudice, had to show that the trial court would have granted the motions if made. And in both instances, the court found that the record did not indicate whether the trial court would have granted the motions.

McFarland, 127 Wn.2d at 334.

Here, Zepeda cannot demonstrate actual prejudice by admission of the testimony referencing the NSVs and Brito Brothers/BGLs, as he has not shown that the court’s ruling under ER 404(b) would have dictated a different result.

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).

Zepeda's 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, even though there was testimony in the present case that Zepeda was not currently recognized as

a gang member, other family members present for Mrs. Flores' funeral were currently members, and a dispute arose between the NSVs and the BGLs, resulting in Zepeda being shot by one of the Brito brothers. The testimony was thus clearly admissible under the *res gestae* exception to ER 404(b), as it was necessary "to complete the story of the crime on trial by proving its immediate context of happening near in time and place." State v. Tharp, 27 Wn. App. 198, 209, 616 P.2d 693 (1980), *aff'd* 96 Wn.2d 591, 637 P.2d 961 (1981), *quoted in* Boot, 89 Wn.App. at 790. Under the exception, each act must be a piece necessarily admitted to ensure the jury has the complete picture. Powell, 126 Wn.2d at 263.

Indeed, the gang rivalry between NSV and BGL was so intertwined with the facts of this case, that the references during trial were inevitable, as acknowledged by Zepeda's counsel. (9-08-09 RP 170) Without knowledge of the conflict, a trier of fact could not have understood how it was that Zepeda came to be shot in the first place. No prejudice is manifest from the record, and the court would not have abused its discretion in admitting the testimony.

2. Zepeda's statement was admissible under CrR 3.5.

Zepeda's reliance on the cited authorities on the second issue raised on appeal is misplaced. The issue is not whether a prior

inconsistent statement was improperly placed into evidence before a witness testified, but whether Zepeda, as the defendant, waived his right to remain silent in making a statement to the police, with knowledge that that statement would be used against him in court. CrR 3.5.

The State may introduce evidence of any custodial statement, or statement given to a state actor, after a hearing to determine if the statement was freely given. Jackson v. Denno, 378 U.S. 368, 12 L. Ed. 2d 908, 84 S. Ct. 1774 (1964). The burden is on the State to prove voluntariness by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 162, 509 P.2d 742 (1973). A trial court's finding of voluntariness is binding on appeal where the record contains substantial evidence supporting that conclusion. State v. Ng, 110 Wn.2d 32, 38, 750 P.2d 632 (1988); State v. Wolfer, 39 Wn. App. 287, 290, 693 P.2d 154 (1984), *review denied*, 103 Wn.2d 1028 (1985). 'Substantial evidence' is evidence that is sufficient to persuade a fair-minded person. State v. Cyrus, 66 Wn. App. 502, 506, 832 P.2d 142 (1992), *review denied* 120 Wn.2d 1031 (1993).

The trial court here conducted a 3.5 hearing, in which Zepeda participated, and ultimately concluded that the statement was voluntarily given. **(9-8-09 RP 46-122)** The Appellant has not assigned error to the

court's findings or conclusions entered after the 3.5 hearing; the court did not err in admitting the statement.

3. The jury was instructed on only two alternative means of committing the offense of intimidating a witness, and substantial evidence supported each alternative.

Zepeda is correct that intimidating a witness is an alternative means statute. When the State does not elect between alternative means, a unanimity instruction is required, unless substantial evidence supports each alternative presented to the jury. State v. Boiko, 131 Wn. App. 595, 599, 128 P.3d 143 (2006), *citing* State v. Chino, 117 Wn. App. 531, 539, 72 P.3d 256 (2003); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The Boiko court stated that “[u]nder RCW 9A.72.110(1), a person may commit the crime of witness intimidation by using a threat against a current or prospective witness in order to accomplish any one of four different goals. Id. Indeed, RCW 9A.72.110(1) provides that:

A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:

- (a) Influence the testimony of that person;
- (b) Induce that person to elude legal process summoning him or her to testify;
- (c) Induce that person to absent himself or herself from such proceedings; or

- (d) Induce that person not to report the information relevant to a criminal investigation or the abuse or neglect of a minor child, not to have the crime or the abuse or neglect of a minor child prosecuted, or not to give truthful or complete information relevant to a criminal investigation or the abuse or neglect of a minor child.

It is significant that the court in Boiko was faced with a jury instruction which listed all of the alternative means provided by the statute. The Court of Appeals could not conclude that a rational trier of fact could have found each of the means of committing the crime of intimidating a witness beyond a reasonable doubt, and the conviction in that case was reversed. Boiko, 131 Wn. App. at 600-01.

By contrast, the instruction in the instant case only references two of the four alternatives: 9A.72.110(1)(a), attempting to influence the testimony of the person threatened, and 9A.72.110(1)(d), inducing the person not to report the information relevant to a criminal investigation or not to give truthful or complete information relevant to a criminal investigation. (CP 39) The same two alternatives contained in the elements instruction were charged in the amended information. (CP 94-95) As there was no unanimity instruction, the issue on appeal is whether substantial evidence supports each of these two alternatives. The State submits that that is the case.

First, as is apparent from the trial record, Brad Smith testified in part as to photographs he had taken of the events transpiring down the street from his house. **(1 RP 274-275)** By telling Mr. Smith to stop taking photos, and threatening to kill him, there is substantial evidence that Mr. Zepeda was attempting to influence Smith's potential testimony by eliminating or limiting the extent of photographic evidence about which Mr. Smith could testify.

Second, by means of that same threat, there is substantial evidence Mr. Zepeda was attempting to induce Mr. Smith not to report information relevant to a criminal investigation, or to give less than complete information relevant to that investigation, again, by minimizing the number and scope of the photographs which were in existence. There was no error in failing to give a unanimity instruction.

4. The court did not err in ordering that the firearm enhancement run consecutive to all other sentences.

Zepeda maintains that the court erred in adding a 36-month firearm enhancement consecutive to the sentence for unlawful possession of a firearm, and argues that this result is precluded by RCW 9.94A.533(3)(f). He is mistaken.

The Washington Supreme Court construed former RCW 9.94A.510(3), (now codified at RCW 9.94A.533(3)), holding that "all

firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements.” State v. DeSantiago, 149 Wn.2d 402, 416, 68 P.3d 1065 (2003). Former 9.94A.510(3) provided that if a court sentences an offender to more than one offense, “the firearm . . . enhancement . . . must be added to the total period of confinement for all offenses, *regardless of which underlying offense is subject to a firearm . . . enhancement.*” (Emphasis added.)

If a statute’s meaning is plain on its face, a court must give effect to that plain meaning as an expression of the legislative intent. State v. Callihan, 120 Wn. App. 620, 623-24, 85 P.3d 979 (2004), *quoting State v. Tarabochia*, 150 Wn.2d 59, 63, 74 P.3d 642 (2003). As applied here, the statute’s application is clear—the firearm enhancement runs consecutive to the terms of the concurrent sentences, regardless of whether the offense subject to the enhancement carries the shorter of the concurrent sentences.

The base sentences for all three counts are to run concurrently for a total of 36 months, which falls in the middle of the standard range for unlawful possession of a firearm. Mr. Zepeda suggests that the firearm enhancement should run consecutively only to the sentence for the second degree assault, but not to the sentence for unlawful possession of a firearm. This would lead to an absurd result, where the enhancement

would disappear altogether, having been subsumed by the longer sentence for the excluded offense. That is clearly not the legislative intent, and the issue has been decided by DeSantiago.

5. The State concedes error with respect to the fifth assignment of error, whether the second degree assault and intimidating a witness constituted the same course of criminal conduct.

The State has reviewed the trial court record, and relevant authorities, and is of the opinion that second degree assault and intimidating a witness, under the facts of this case, may have constituted the same course of criminal conduct under RCW 9.94A.589(1)(a); State v. French, 157 Wn.2d 593, 613, 141 P.3d 54 (2006). The sentencing court did not analyze whether the crimes had the same criminal intent, were committed at the same time and place, and involved the same victim. Thus, this matter should be remanded to the trial court for the court to make appropriate findings and resentence, if necessary.

6. There was no ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable

probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *citing* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel's representation was effective. In fact, the presumption "will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004).

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant also bears the burden of showing that, but for counsel's deficient representation, the result of the trial would have been different. Thomas, 109 Wn.2d 225-26. Zepeda has not met his burden, since the alleged errors actually constitute a valid exercise of trial strategy, and that even if there was deficiency, there has been no showing of prejudice.

Zepeda maintains that his counsel should have objected to Mr. Smith's testimony about his prior career, and involvement in community

gang prevention efforts. Rather than bolstering the credibility of the witness, this constitutes permissible background or introductory information. In the alternative, the testimony was also relevant under ER 401 as to why Mr. Smith would have knowledge of the activity occurring down the street from him. The facts present here are thus distinguishable from State v. Smith, 67 Wn. App. 838, 841 P.2d 76 (1992). A possible strategic reason for not objecting to this testimony is that do so early on in Mr. Smith's testimony would run the risk of casting his client in a negative light, or even highlight the occurrences of gang activity even further.

Appellant also claims ineffectiveness in counsel's failure to object to, or move to strike, Leticia Brito's testimony. Ms. Brito testified that the defendant was too far away to recognize. Unsolicited by any question from the prosecutor, Ms. Brito briefly mentioned seeing the defendant on the news before she was redirected by the prosecutor. **(1 RP 262-63)** Counsel's objection, or motion to strike, would have only emphasized the fact that his client was charged with a crime, and that that crime was newsworthy.

Ineffectiveness is also claimed as to the failure to object to Mr. Smith's testimony as to gang activity at 713 W. 5th Street, and that it was known for a lot of "Reds" activity. A review of the record reveals that Mr. Smith testified that there was activity at the location by a certain gang,

which “typically wear red”. **(1RP 275-76)** As argued above, gang activity, and the conflicts which were part and parcel of that activity, were part of the *res gestae* surrounding the events in question, necessary for the jury to understand those events. Also, because of his involvement in gang prevention, Mr. Smith was testifying as to his personal experience and knowledge as contemplated by ER 602. For the same reasons, the photographic and other visual evidence was both relevant and probative.

In response to a question from defense counsel about contact with Mr. Zepeda, Detective Abarca replied that he hadn't had much contact, as Mr. Zepeda had been in jail. **(1RP 400)** It is apparent from the record that counsel was attempting to distance his client from current gang activity by utilizing the detective's knowledge of, and familiarity with, known gang members in the community. The officer's answer was responsive in explaining why he wasn't as aware of Mr. Zepeda. Again, if counsel were to move to strike the mention of jail at that point in time, rather than moving on with cross-examination, the issue would have been highlighted even further in front of the jury. Zepeda has not shown ineffectiveness or prejudice.

Zepeda also claims that the prosecutor essentially called him a liar during closing argument, and that that constituted prosecutorial misconduct. A review of the record does not reveal an instance of the

prosecutor calling Mr. Zepeda a liar, or of the prosecutor stating a personal opinion as to the defendant's credibility. Instead, the prosecutor highlighted the differences between Zepeda's testimony and his statement to the police, asking the jury to infer that his testimony was not credible.

(1 RP 675-76)

A defendant claiming prosecutorial misconduct must show the prosecutor's improper conduct resulted in prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). During closing arguments, prosecutors are accorded wide latitude in making arguments and drawing reasonable inferences from the evidence. Fisher, 165 Wn.2d at 747. An appellate court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence address in the argument, and jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Further, a prosecutor does not commit misconduct by arguing that the evidence does not support the defense theory, or by arguing that the evidence indicates a witness' truthfulness. State v. Brown, 132 Wn.2d 529, 566, 940 P.2d 546 (1997); State v. Fiallo-Lopez, 78 Wn. App. 717, 730-31, 899 P.2d 1294 (1995). Here, the prosecutor's argument that the evidence did not support

Zepeda's theory or credibility did not constitute misconduct, and Zepeda has not met his burden.

7. The cumulative error doctrine does not apply, and a new trial is not warranted.

With the exception of the same course of criminal conduct issue addressed above, the issues raised by Zepeda on appeal are without merit, therefore the State disputes that there were errors so numerous that that cumulative effect was to deprive Zepeda of a fair trial. The cumulative error doctrine does not apply here. State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

V. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions.

Respectfully submitted this 13th day of October, 2010.


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Deputy Prosecuting Attorney
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