

COA No. 29144-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION III
1000 WEST MAIN STREET
SPokane, WA 99201
509.328.4000
www.courtsof.wa.gov

STATE OF WASHINGTON, Respondent,

v.

ERNESTO CERVANTES, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

COA No. 29144-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON



STATE OF WASHINGTON, Respondent,

v.

ERNESTO CERVANTES, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR

A. The court erred by admitting gang evidence against Ernesto Cervantes..... 1

Issue Pertaining to Assignment of Error

1. Did the court err by admitting gang evidence against Mr. Cervantes when there was no nexus between the offense and gang activity?.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT..... 6

A. The court erred by admitting gang evidence against Mr. Cervantes..... 6

IV. CONCLUSION.....9

TABLE OF AUTHORITIES

Table of Cases

State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, rev. denied, 167 Wn.2d 1001 (2009).....6, 7, 8, 9

State v. Campbell, 78 Wn. App. 813, 901 P.2d 1050, rev. denied, 128 Wn.2d 1004 (1995)..... 6, 8

State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995).....9

State v. Pugh, 167 Wn.2d 825, 225 P.3d 892 (2009).....8

Kelley v. Centennial Contractors Entrs., Inc., 169 Wn.2d 381, 236 P.3d 197 (2010).....8

I. ASSIGNMENT OF ERROR

A. The court erred by admitting gang evidence against Ernesto Cervantes.

Issue Pertaining to Assignment of Error

1. Did the court err by admitting gang evidence against Mr. Cervantes when there was no nexus between the offense and gang activity?

II. STATEMENT OF THE CASE

Ernesto Cervantes was charged by information with one count of first degree robbery with a deadly weapon. (CP 3). He was later charged by amended information with the same offense, but adding another alternate means of committing first degree robbery, *i.e.*, by injuring the victim. (CP 49).

The defense made a motion to exclude gang evidence:

Uh, just to put the Court on notice that I would, this case is a robbery case. The uh alleged victim and the police reports talk a lot about gang and gang involvement of my client, which is not true, but I would caution that and I would object to any testimony relating or referring to gangs. This is a robbery one, it's not a drive-by shooting or anything involved with, involving gangs, Your Honor. It would be highly prejudicial to my client and I think the State should know, advise the witnesses about that, Your Honor. (8/18/09 RP 100).

The State argued the evidence should come in because everything was intertwined and for identity purposes since the victim knew Mr. Cervantes as "Smurf." (8/18/09 RP 100-101). Moreover, when an officer contacted Mr. Cervantes, he was wearing blue shoes and a blue web belt with mushrooms on the buckle, similar to the Smurf motif. (*Id.* at 101).

The court allowed gang evidence based on *res gestae*:

Okay. Well, it appears to me from, and assuming that the testimony will be in the same nature as the probable cause, what was related in the probable cause statement, is that the, as I recall from reading it, is that uh there was a question put to the alleged victim as in, what do you claim or whatever, red or blue, and whatnot, so I think it's part of the *res gestae* so I will allow um, you know, it's hand in hand with the incident, so. (8/18/09 RP 101).

When defense counsel told the judge he respected his decision, but disagreed strongly as the evidence would be highly prejudicial, the court further stated:

Right. No, I recognize, but I think it's part of the *res gestae* . . . and uh for that reason if it was otherwise you know if the state wished to simply introduce gang membership evidence simply because, for no reason at all, I would agree that it shouldn't be admissible. But it's part of the *res gestae*, it's part of the actual event as I read it and, and as long as the testimony is uh related solely to, to the actual alleged robbery, then um, then I think it comes in. Good, bad or indifferent, it comes in. It's part of the, part of the *res gestae*, so alright, anything else? (8/18/09 RP 101).

The case proceeded to jury trial.

At about 3 p.m. on December 31, 2009, in Toppenish, Gilbert Zuniga rode his bike across town to hang out at a friend's house. (8/19/09 RP 3). He went there to celebrate New Year's Eve. (*Id.* at 4). Mr. Zuniga was on probation for third degree theft at the time. (8/18/09 RP 145). He stayed there for about twelve hours and decided to go home around 3:40 a.m. on January 1, 2010. (8/19/09 RP 3). Because of his probation, he was supposed to be at home from 5 p.m. to 6 a.m. (*Id.* at 5).

While riding home, Mr. Zuniga saw a dark car coming towards him. (8/18/09 RP 145). Thinking it was the cops and he would get in trouble for curfew, he took a right. (*Id.*). He heard the car accelerating so he looked back. (*Id.*). The bumper of the car almost touched the back of his bike tire. (*Id.*). Mr. Zuniga realized it was not a cop and pulled to the side. (*Id.*). As he looked back, he got twisted around his bike and fell to the ground. (*Id.* at 145-146).

When he fell, Mr. Zuniga saw someone he knew, Mr. Cervantes, get out of the front passenger seat. (8/18/09 RP 146). Mr. Cervantes asked him what do you bang? (*Id.*). Mr. Zuniga said he did not bang anything. (*Id.*). His understanding was that Mr.

Cervantes was asking him what gang he was from. (*Id.* at 148). By saying he did not bang anything, Mr. Zuniga meant he was not affiliated with any gang. (*Id.*).

Mr. Zuniga saw a large serrated blade in Mr. Cervantes' hand. (8/18/09 RP 148). He estimated the knife's blade was 5 ½ inches long. (*Id.* at 156). Mr. Cervantes was coming at him. (*Id.* at 149). Mr. Zuniga thought he was going to die. (*Id.*). He saw a girl driving the car and three heads in the back. (*Id.* at 150). One person from the back right of the car got out. (*Id.*). Mr. Cervantes ended up in front of Mr. Zuniga and held the knife to his abdomen. (*Id.* at 151). He asked him for all his money. (*Id.*). Mr. Zuniga told him he would give him whatever he had because he had no money. (*Id.*). He gave Mr. Cervantes a blue Sanyo digital camera and fireworks. (*Id.*). Mr. Cervantes told him to hurry up. (*Id.* at 152). He reached into Mr. Zuniga's pocket and yanked out his keys and an I-pod with earphones. (*Id.*). The I-pod disconnected from the earphones and flew to the ground. (*Id.*).

The person from the back of the car was behind Mr. Zuniga and said this guy has nothing. (8/18/09 RP 152.). Mr. Zuniga thought they would do something to him because he did not have anything. (*Id.*). He asked if they wanted to search him. (*Id.*). As

he was getting up, Mr. Zuniga's head struck the knife in Mr. Cervantes' hand. (*Id.* at 153). When he got up, Mr. Cervantes punched him on the right side of his forehead. (*Id.*). Mr. Zuniga took the chance to run and headed for the police station. (*Id.* at 154).

He saw another vehicle coming at him so he ran to it. (8/18/09 RP 154). Saying they were going to kill him when they caught him, Mr. Cervantes and the man took chase and stopped when they saw the other car coming toward Mr. Zuniga. (*Id.*). It turned out he knew the driver of the other vehicle because it was his neighbor, Nellie. (*Id.* at 155). She took Mr. Zuniga to the police station. (*Id.*). He identified Mr. Cervantes as the robber. (*Id.* at 158).

Toppenish police officer Dustin Dunn had contact with Mr. Zuniga at the police station the early morning hours of January 1, 2010. (8/18/09 RP 118-119). The officer saw he was pale, bleeding from the head, and had swelling on the right side of his head. (*Id.* at 121, 123). Mr. Zuniga's hands were shaking; he was frightened. (*Id.* at 123, 125). He said he had been robbed and cut with a knife. (*Id.* at 126). Aid units arrived and attended to Mr. Zuniga, after which his mother came down to take him to the

hospital. (*Id.* at 126, 131). He gave police the robber's supposed gang moniker, Smurf, and then gave his real name. (*Id.* at 139).

The defense had no witnesses. No exceptions were taken to the court's instructions. (8/19/09 RP 49). The jury found Mr. Cervantes guilty of first degree robbery and returned a special verdict finding he was armed with a deadly weapon. (CP 73, 74). The court sentenced him to 99 months, including the 24-month deadly weapon enhancement. (CP 76-84). He appeals. (CP 88).

III. ARGUMENT

A. The court erred by admitting gang evidence against Mr. Cervantes.

Evidence of gang affiliation is prejudicial. *State v. Asaeli*, 150 Wn. App. 543, 576-578, 208 P.3d 1136, *rev. denied*, 167 Wn.2d 1001 (2009). Due to the grave danger of unfair prejudice, such evidence is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. *State v. Campbell*, 78 Wn. App. 813, 823, 901 P.2d 1050, *rev. denied*, 128 Wn.2d 1004 (1995). When the preponderance of the evidence does not show a connection between a defendant's gang affiliation and the offenses, admission

of the gang evidence is prejudicial error. *Asaeli*, 150 Wn. App. at 577.

Here, the State showed no nexus between Mr. Cervantes' alleged gang affiliation and the robbery. The State did not even produce any evidence that he was an actual gang member. At best, the State had the testimony of Sergeant Paul Logan, who said Mr. Cervantes was wearing a blue web belt when he contacted him at 8 in the morning after the incident. (8/19/09 RP 161-163). According to Sergeant Logan, "the blue web belt is worn um by um most of our uh south side gang members, gang, gang members that claim uh um allegiance to um the south versus the north gangs that claim red." (*Id.* at 163). But such evidence does not prove by a scintilla, much less by a preponderance, that Mr. Cervantes was a gang member. And Mr. Zuniga, who somehow identified him as Smurf, had not seen Mr. Cervantes in 7 ½ years. (8/19/09 RP 23). Trained in gangs, Sergeant Logan nonetheless had to be informed that Smurf was supposedly the street or gang name for Mr. Cervantes. (*Id.* at 162). The State's failure to show he was a gang member makes the admission of gang evidence even more prejudicial and wrong.

The only reference to gangs was Mr. Cervantes asking Mr. Zuniga what do you bang? The robbery had nothing to do with gangs. It is undisputed that Mr. Zuniga was not affiliated with any gang. In these circumstances, there is no nexus between Mr. Cervantes' supposed gang affiliation and the crime charged. Because there was no reason to allow such prejudicial evidence, the court erred by admitting it. *Asaeli*, 150 Wn. App. at 577.

Moreover, the court erred by allowing the gang evidence on a res gestae theory. See *State v. Pugh*, 167 Wn.2d 825, 839, 225 P.3d 892 (2009) (res gestae doctrine evolved into several present day exceptions to the hearsay rule). Res gestae is simply not the proper inquiry in determining whether gang evidence should be admitted. *Campbell*, 78 Wn.2d at 823. The court thus abused its discretion in admitting such evidence because it applied the wrong legal standard and based its ruling on an erroneous view of the law. *Kelley v. Centennial Contractors Entrs., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010).

Improper admission of gang evidence is reversible error if, within reasonable probabilities, had the error not occurred, the trial's outcome would have been materially affected. *Asaeli*, 150 Wn. App. at 579. The danger of unfair prejudice exists when the

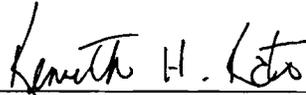
evidence is likely to stimulate an emotional response rather than a rational one. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). The gang evidence here had nothing to do with the crime charged, but the record is replete with the State's witnesses testifying about gangs. This unfair prejudice is exactly what the rule in *Campbell* was meant to control. In the context of the charged offense, this evidence had no probative value and improperly allowed, if not urged, the jury to infer Mr. Cervantes' guilt by his supposed gang affiliation and gang moniker of Smurf. Had this error not occurred, the outcome of the trial would have been materially affected. Mr. Cervantes was tried and convicted for being a gang member. This is reversible error. *Asaeli*, 150 Wn. App. at 579.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Cervantes respectfully urges this Court to reverse his conviction and remand for new trial.

DATED this 14th day of April, 2011.

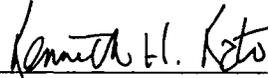
Respectfully submitted,



Kenneth H. Kato
Kenneth H. Kato, WSBA #6400
Attorney for Appellant
1020 N. Washington
(509) 220-2237

CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on April 14, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on James P. Hagarty, Yakima County Prosecutor's Office, 128 N. 2nd St – Rm 329, Yakima, WA 98901-2621; and Ernesto Cervantes #334023, Clallam Bay C.C., 1830 Eagle Crest Way, Clallam Bay, WA 98326.



Kenneth H. Kato
Kenneth H. Kato