

FILED

JUL 08 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291448

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ERNESTO CERVANTES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE MICHAEL McCARTHY, JUDGE

BRIEF OF RESPONDENT

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Rules

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RAP 10.3(b) 1

I. ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY THE ASSIGNMENT OF ERROR.

Whether the trial court erred by admitting ER 404(b) evidence pertaining to gang involvement on the part of the defendant, Ernesto Cervantes?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

The court did not abuse its discretion in admitting the evidence, as it was probative of Cervantes' identity, as well as the *res gestae* of the crime. Further, the evidence was not unduly prejudicial to Cervantes.

II. STATEMENT OF THE CASE

The Respondent does not dispute the Appellant's Statement of the Case, but will supplement that narrative herein. RAP 10.3(b)

III. ARGUMENT

1. The court properly admitted Cervantes' question of the victim regarding his gang affiliation, as well as the detective's testimony pertaining to Cervantes' gang-related clothing.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b)

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 four-step analysis: (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify 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 of the evidence against its prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995), *collateral relief granted on other grounds*, Pirtle v. Morgan, 313 F.3d 1160 (9th Cir. 2002), *cited in* State v. Asaeli, 150 Wn. App. 543, 576, 208 P.3d 1136 (2009). *See, also*, State v. Campbell, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995); 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., State v. Walker, 75 Wn. App. 101, 108, 879 P.2d 957 (1994), *review denied*, 125 Wn.2d 1015, 890 P.2d 20 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004), *quoting* State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). On appeal, the appellant bears the burden of

proving abuse of discretion. State v. Wade, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

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). In Boot, the trial court admitted evidence of the defendant's gang affiliation on several grounds, which included the *res gestae* exception to ER 404(b). The *res gestae* exception admits evidence of other bad acts "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." State v. Tharp, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), (*quoting* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE s. 190, at 448 (2d ed. 1972)), *aff'd* 96 Wn.2d 591, 637 P.2d 961 (1981), *cited in* Boot, 89 Wn. App. at 790.

Stated another way, under the *res gestae* exception, each act must be a piece necessarily admitted to ensure the jury has the complete picture. State v. Powell, 126 Wn.2d 244, 263, 893 P.2d 615 (1995).

Here, Cervantes maintains on appeal that there was no nexus shown between his gang affiliation and the crime with which he was charged. His reliance upon the cited authorities is misplaced, however.

It was Cervantes who first approached the victim, Mr. Zuniga, and asked him, “what do you bang?” **(8-18-09 RP 146)** This occurred just as Cervantes approached Zuniga with a large serrated knife. The question as to gang affiliation was a piece of the complete picture which the jury needed in order to fully understand the context of the robbery. It did not occur in a vacuum; Cervantes’ reason for confronting, threatening and robbing Zuniga, as evidenced by his question, could be understood to be at least partly motivated by the chance Zuniga belonged to a rival gang.

Further, an additional basis for admission of Cervantes’ gang affiliation was identity. As pointed out in Cervantes’ opening brief, Sgt. Logan testified that a blue web belt, as worn by Cervantes, was consistent with those worn by members of the south side gang members in Toppenish. **(8-18-09 RP 161-63)** The State argued at trial that the fact that the victim knew Cervantes as “Smurf”, a gang moniker, and that Cervantes wore blue shoes and the blue belt, was probative of identity. **(8-18-09 RP 100)**

If the record shows that the trial court “adopted one of the parties’ express arguments as to the purpose of the evidence and that party’s

weighing of probative and prejudicial value, then the trial court's failure to conduct its full analysis on the record is not reversible error." Pirtle, 127 Wn.2d 650-51.

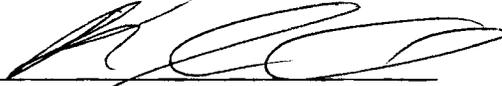
The trial court had sufficient information before it that Cervantes associated with the south side gangs, and that a possible gang affiliation of Zuniga was part and parcel of the robbery. The court did not err.

Additionally, even if the court erred in admitting the 404(b) evidence, there is no showing that it was unfairly prejudicial to Cervantes. Evidentiary error is only grounds for reversal if the error is prejudicial. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), *quoting* State v. Smith, 106 Wn.2d 772, 780 725 P.2d 951 (1986). Here, there was ample evidence of the robbery: Cervantes held a knife to Zuniga's abdomen, demanded all of his money, then punched him in the head. The outcome of the trial would have been the same absent the 404(b) evidence.

IV. CONCLUSION

Based upon the foregoing argument, this Court should affirm the conviction.

Respectfully submitted this 7th day of July, 2011.



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