

COA No. 29291-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LARRY GLEN GATEWOOD, Appellant.

BRIEF OF APPELLANT

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

COA No. 29291-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LARRY GLEN GATEWOOD, 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. ASSIGNMENTS OF ERROR

A: The court erred by admitting gang evidence against Larry Gatewood.....1

B. The court erred by imposing an aggravated exceptional sentence.....1

Issues Pertaining to Assignments of Error

1. Did the court err by admitting gang evidence against Mr. Gatewood when there was no nexus between the offenses and gang activity? (Assignment of Error A).....1

2. Did the court err by imposing an aggravated exceptional sentence when its multiple offense policy/free crimes reason did not justify a departure from the standard range? (Assignment of Error B).....1

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

III. ARGUMENT.....6

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

B.. The court erred by imposing an aggravated exceptional sentence.....8

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

Table of Cases

State v. Alvarado, 164 Wn.2d 556, 192 P.3d 345 (2008).....9, 10

<i>State v. Asaeli</i> , 150 Wn.2d 543, 208 P.3d 1136, <i>Rev. denied</i> , 167 Wn.2d 1001 (2009).....	6, 7 ,8
<i>State v. Campbell</i> , 78 Wn. App. 813, 901 P.2d 1050, <i>rev. denied</i> , 128 Wn.2d 1004 (1995).....	6, 7
<i>State v. Law</i> , 154 Wn.2d 85, 110 P.3d 717 (2005).....	10, 11
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	8

Statutes

RCW 9..94A.510.....	9
RCW 9.94A.535(2)(c).....	9
RCW 9.94A.589(2)(a).....	10

I. ASSIGNMENTS OF ERROR

A. The court erred by admitting gang evidence against Larry Gatewood.

B. The court erred by imposing an aggravated exceptional sentence.

Issues Pertaining to Assignments of Error

1. Did the court err by admitting gang evidence against Mr. Gatewood when there was no nexus between the offenses and gang activity? (Assignment of Error A).

2. Did the court err by imposing an aggravated exceptional sentence when its multiple offense policy/free crimes reason did not justify a departure from the standard range? (Assignment of Error B).

II. STATEMENT OF THE CASE

Mr. Gatewood was charged by amended information with count I: harassing phone calls, count II: felony harassment of I.J.P., count III: intimidating a witness (Toni J. Tusken); count IV: felony harassment of I.J.P., and count V: felony harassment of Ms. Tusken. (CP 33-34; 7/22/10 RP 18-19).

In pretrial motions, the defense moved to exclude any mention of gangs. The State argued the evidence should come in as it went to state of mind of the victim:

Throughout the history of the cases in which she is involved as a victim, her concern has been that he can reach out even from jail because of gang affiliation. (7/26/10 RP 9).

The defense claimed it was ER 404(b) evidence of prior bad acts. (7/26/10 RP 10-11). But the court characterized the evidence as more an association than a prior bad act:

Well, what we are talking about here is an Association rather than prior bad act. It seems to me that in the context of the particular charges that are referenced here, that it is allowable to have a basis for the fear on the part of the complainant to be explained. (7/26/10 RP 11).

The case proceeded to trial.

I.J.P. lived in Moses Lake, but was visiting his mother, Toni J. Tusken, in Spokane on February 26, 2010. (7/27/10 RP 22-23). He knew Mr. Gatewood, who had been married to Ms. Tusken, and earlier lived with them. (*Id.* at 23-24). That day, he took a phone call. (*Id.* at 24). I.J.P. recognized Mr. Gatewood's voice. (*Id.* at 25). When asked where his mother was, I.J.P. said she was not at home. (*Id.* at 26). Mr. Gatewood told him that when he got out, he was going to kill the whole family. (*Id.* at 27). I.J.P. was scared.

(*Id.*). He knew Mr. Gatewood was in jail, but was scared “because the people he knows.” (*Id.*). I.J.P. was afraid “he would send somebody to harm me or my family” and believed “he could carry out that threat.” (*Id.*). When asked why he was concerned about the people Mr. Gatewood knew, I.J.P. said, “Because, I mean, other incidents. It just makes me scared. Like, pretty much don’t want to underestimate anybody.” (*Id.*). He was concerned about his safety from Mr. Gatewood’s associates. (*Id.*).

After hanging up, I.J.P. called his mother. (7/27/10 RP 28). She told him to call Lori Miller, the crime victim advocate from the last time they were supposed to go to court. (*Id.*). She advised him to call crime check and make a report. (*Id.*). Although knowing Mr. Gatewood had been sentenced to 18 years, I.J.P. was still concerned he could carry out his threat. (*Id.*). I.J.P. waited for his mother to come home and left for Moses Lake the next day. (*Id.* at 29).

Almost two years earlier on August 25, 2008, Ms. Tusken got a protection order against Mr. Gatewood. (7/27/10 RP 31). But before February 2010, I.J.P. was not aware of any threats by Mr. Gatewood or anyone else to kill him or somebody in the family. (*Id.* at 34-35).

On February 26, 2010, Ms. Tusken was living in Spokane at 1017 E. Ermina. (7/27/10 RP 38). She was married to Mr. Gatewood for about 9 months in 2008. (*Id.*). When the marriage broke up, she asked him to get out of the house. (*Id.* at 39). Since he would not leave, she got a no-contact order and had the police remove him. (*Id.*).

There had since been other incidents involving Mr. Gatewood. (*Id.*). She reported them to the police and charges were filed. (*Id.* at 40). On February 24, 2010, Mr. Gatewood was sentenced to 18 years. (*Id.* at 40). After the conviction, Ms. Tusken was scared for her safety. (*Id.*). She was going to be a witness at that trial and was interviewed by Mr. Gatewood's attorney. (*Id.* at 41).

Ms. Tusken was at work on February 26, 2010, when she got a call from I.J.P. (7/27/10 RP 41). When told of the threat, she was scared. (*Id.* at 42). She was concerned for her safety because Mr. Gatewood was a gang member. (*Id.* at 42).

The deputy prosecutor asked an investigating officer, Detective Scott Anderson, if he had taken any gang training. (7/27/10 RP 67). He had. (*Id.*). The prosecution asked if he was

familiar with the Insane Crips gang, whereupon the defense objected:

Your Honor, I object. This is not a gang case. It is not a fundamental part of the crime charged. (*Id.* at 67).

The court overruled the objection. (*Id.*). Over further defense objection, Detective Anderson testified it was typical for gang member to help other gang members, even going so far as to kill someone. (*Id.* at 67-68).

No exceptions or objections were taken to the court's instructions. (7/27/10 RP 72). The limiting instruction related only to prior convictions and charges. (CP 89). The State moved to dismiss count II: felony harassment of I.J.P. and it was not submitted to the jury. (*Id.* at 72).

The jury could not reach a verdict on count I so the court declared a hung jury and mistrial on that count. (7/28/10 RP 112-114). The jury convicted Mr. Gatewood on counts III, IV, and V. It imposed an exceptional sentence of 162 months with the standard range sentences for counts III and V running consecutively as "[n]ot to do so would amount to a free crime based upon the offender score." (CP 137-138). This appeal follows. (CP 139).

III. ARGUMENT

A. The court erred by admitting gang evidence against Larry Gatewood.

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, as here, 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.

The offenses here arose from domestic violence and were personal affairs between I.J.P., Ms. Tusken, and Mr. Gatewood. Gang affiliation had nothing to do with anything. The court allowed gang evidence to show a basis for the fear the "complainants" felt. (7/26/10 RP 11). But the record belies the court's reasoning. Indeed, the prosecution got into evidence the context for the fear felt by I.J.P. without once mentioning gangs. (7/27/10 RP 27-28).

The point was made by I.J.P.'s testimony that he was scared because of the people he knew and his associates. (*Id.*). The State's own circumspect questioning avoided the gang evidence issue. Because there was no reason to allow such prejudicial evidence, the court erred by admitting it. *Asaeli*, 150 Wn. App. at 577.

By the same token, the State could have used the same line of questioning on Ms. Tusken. She volunteered the gang affiliation evidence when it was unnecessary to do so. Again, the point could have been made, as it was with I.J.P., without any mention of gangs whatsoever. This was prejudicial error. *Asaeli*, 150 Wn. App. at 577. The error is particularly egregious because the State went on to emphasize the gang evidence through Detective Anderson's testimony even though there was no nexus at all between any supposed gang affiliation and the offenses. *Campbell*, 78 Wn. App. at 823.

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). Here, the gang evidence had nothing to do with anything. In the context of the charged offenses, it had no probative value and improperly allowed, if not urged, the jury to infer Mr. Gatewood's guilt by association with the Insane Crips. Had this error not occurred, the outcome of the trial would have been materially affected. This is reversible error. *Asaeli*, 150 Wn. App. at 579.

B. The court erred by imposing an aggravated exceptional sentence.

At sentencing, the court gave Mr. Gatewood an exceptional sentence:

The sentence of the court will be as follows: On Count III, it will be 102 months. On Counts IV and V, those being the same course of conduct, those will be 60 months.

These sentences run consecutively to the sentence from the earlier case. Based upon a finding that they would result in, essentially, three crimes under the strictures of the SRA, the multiple offense policy is a situation where, essentially, there would be no punishment for the additional offenses. Therefore, the Court will impose an exceptional sentence and indicate that those sentences will run consecutively. (8/6/10 RP 7).

The court subsequently entered findings and conclusions as to the exceptional sentence on August 10, 2010. (CP 136).

Mr. Gatewood does not challenge the findings. Rather, he challenges the court's conclusion 4 in support of the exceptional sentence:

That the court finds aggravating circumstances in the matter before it and sentences the counts 3 and 5 consecutively. Not to do so would amount to a free crime based upon the offender score. (CP 138-139).

Mr. Gatewood's offender score was 17 for each of the counts and the two felony harassment counts merged for purposes of sentencing. (CP 137). A defendant's standard range sentence reaches the maximum limit when the offender score is nine. RCW 9.94A.510.

RCW 9.94A.535(2)(c) states the trial court may impose, without findings of fact by a jury, an aggravated exceptional sentence if the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished. This is what the court found here. See *State v. Alvarado*, 164 Wn.2d 556, 567, 192 P.3d 345 (2008).

The appellate court reviews the propriety of an exceptional sentence by asking: (1) Are the reasons given by the sentencing judge supported by the record under the clearly erroneous standard? (2) Do the reasons justify a departure from the standard range under the de novo standard of review? and (3) Is the sentence clearly too excessive or too lenient under the abuse of discretion standard? *State v. Law*, 154 Wn.2d 85, 93, 110 P.3d 717 (2005).

The court's reason is an aggravating factor per se. *Alvarado*, 164 Wn.2d at 567. The issue, however, is whether that reason justifies a departure from the standard range under the de novo standard. *Law*, 154 Wn.2d at 93.

Under the circumstances here, the multiple offense policy/free crimes reason does not justify an exceptional sentence because Mr. Gatewood not only was serving 18 years, but also the 162 months imposed in this case ran consecutively to his 18-year sentence pursuant to RCW 9.94A.589(2)(a). Because the sentences had to run consecutively, the additional crimes did not thus go unpunished as stated by the court. This factor was necessarily considered by the Legislature in establishing the

standard range and by running it consecutively by statute. *Law*, 154 Wn.2d at 95. The court erred as a matter of law.

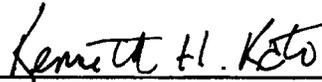
Indeed, contrary to the trial court's finding, there were no free crimes. The 60-month sentence for count IV ran concurrently with the 102-month sentence on count III. The 60-month sentence for count V ran consecutively to the sentences for counts III and V. But, as found by the trial court, counts IV and V merged and properly counted as one in the offender score. Accordingly, there were no free crimes as a matter of law. The asserted aggravating factor was not sufficiently substantial and compelling to distinguish the crime in question from others in the same category. *Law*, 154 Wn.2d at 95. Under the de novo standard, the court's reason does not justify a departure from the standard range. *Id.* at 93. The exceptional sentence must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Gatewood respectfully urges this Court to reverse his convictions and remand for new trial or reverse his exceptional sentence and remand for sentencing within the standard range.

DATED this 30th day of March, 2011.

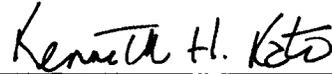
Respectfully submitted,



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 March 30, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on Mark E. Lindsey, Spokane County Prosecutor's Office, 1100 W. Mallon, Spokane, WA 99260-2043; and Larry G. Gatewood, #791845, Airway Heights C.C., PO Box 2049, Airway Heights, WA 99001.



Kenneth H. Kato
Kenneth H. Kato