

29291-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY GLEN GATEWOOD, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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Mark E. Lindsey
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in admitting gang affiliation evidence against defendant.
2. The trial court erred in imposing an exceptional sentence based upon the multiple offense provisions of RCW 9.94A.535(2)(c).

II.

ISSUES PRESENTED

- A. Did the trial court abuse its discretion in admitting evidence of defendant's gang affiliation?
- B. Did the trial court abuse its discretion in imposing an exceptional sentence pursuant to RCW 9.94A.535(2)(c)?

III.

STATEMENT OF THE CASE

The respondent accepts the appellant's statement of the case for purposes of this appeal only.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EVIDENCE OF DEFENDANT'S GANG AFFILIATION.

The defendant asserts that the trial court should have excluded any reference of defendant's gang affiliation based on an ER 404(b) theory. There are essentially only two possible classifications available for the subject evidence. Either the statements were, or were not, ER404(b) material. The State will address both perspectives, beginning with the latter.

The State maintains that the contested evidence is not ER 404(b) material as properly found by the trial court. The State characterized the evidence that defendant had gang affiliations as evidence of the victim's state of mind vis-à-vis defendant. The defendant's criminal history involved the victimization of the same victim over a significant period of time. One of the victim's primary concerns during that period of victimization was that defendant's gang affiliation meant that he could reach out from jail to harm the victim and her family.

"Admissibility of evidence lies within the sound discretion of the trial court and the court's decision will not be reversed absent abuse of that discretion." *State v. Hamlet*, 133 Wn.2d 314, 324, 944 P.2d 1026 (1997).

Evidence is relevant if there is a logical nexus between the evidence and the fact to be proved. *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15, *review denied*, 138 Wn.2d 1014, 989 P.2d 1142 (1999). Relevant evidence is presumably admissible. ER 402; ER 403. The proposed evidence must have a probative value that outweighs its prejudicial effect. *Id.*

Here, defendant contends that the prejudicial component is that the defendant has gang affiliations, not that he is a gang member. The logical connection is that the defendant was trying to show that the victim was mistaken, remembering incorrectly, exaggerating, etcetera, by showing that the victims had no valid reason to consider his threats serious. The fact that the defendant had gang affiliations which were known to the victims makes the evidence germane to the *res gestae* of the charged crimes. The trial court ruled that the evidence of defendant's gang affiliations did not qualify as evidence subject to ER 404(b), rather that it was evidence of defendant's associations in the context of the charged crimes. Additionally, the trial court ruled that the affiliation evidence provided the basis, *res gestae*, for the charged crimes because it provided the jury with a logical basis from which the jury could weigh the credibility of the victim's fear. The victim's knowledge of defendant's affiliations with gangs provided a legitimate foundation for her fear of

defendant and, hence, relevant. The affiliation evidence made it more likely that the victim was not mis-interpreting, remembering incorrectly, etc. The defendant's gang affiliation permitted the State to produce witnesses to corroborate the defendant's affiliations.

The affiliation evidence was not subject to ER 404(b) restrictions, although the standard requirements for relevancy and lack of unfair prejudice present in the ER 401, ER 402 and ER 403 provide many safeguards that are similar to those imposed by ER 404(b). Here, there were no references to any specific prior bad acts by defendant vis-à-vis the victim cited to the trial court by defendant to invoke the provisions of ER 404(b).

The trial court did not err in admitting evidence of defendant's gang affiliations subject only to standard rules that all evidence must meet.

Assuming, arguendo, the statements were subject to ER 404(b) as urged by the defendant, the statements were still properly admitted.

ER 404(b) reads as follows:

Evidence of other crime, 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).

Gang affiliation evidence has repeatedly been admitted to establish motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *State v. Saenz*, 156 Wn. App. 866, 872, 234 P.3d 336 (2010). In this case, the evidence of defendant's gang affiliation certainly showed an absence of mistake. The fact that the defendant uttered death threats to the victims knowing how fearful they are of his gang affiliations tended to show that the State's witnesses were not mistaken in their fear. The State charged defendant with harassment and intimidating a witness, so the State had the burden of proving that defendant's threats were taken seriously by the victims. Consequently, the basis of the victims' fears that defendant's threats would be carried out required context. This became especially critical when evidence was introduced that defendant admitted he was serving an eighteen year sentence. The context and viability of defendant's threats were critical to the jury's completion of its task of weighing the credibility of the evidence and rendering a reasoned verdict as to innocence.

The State sought the admission of the subject evidence because it is prejudicial. The question is whether the evidence constituted *unfair* prejudice. There was no unfair prejudice.

The defendant sought to suppress the affiliation evidence because he believed that it prejudiced his case. The flaw in defendant's theory is

that defendant sought to exclude the affiliation evidence simply because he claimed it should be excluded. Following the defendant's logic, all gang evidence would automatically be excluded merely by the defendant raising the claim that the subject evidence qualified as gang affiliation evidence. The defendant cites no authority that calls for the exclusion of gang affiliation evidence simply because the defense attempts to attach an ER 404(b) label on the evidence.

Gang affiliation evidence is admissible in a criminal trial where there is a nexus between the charged crime and gang affiliation. *State v. Scott*, 151 Wn. App. 520, 521, 213 P.3d 71 (2009). Here, the evidence established that the victims' knowledge of defendant's gang affiliations constituted a significant basis for their fear that defendant's threats would be carried out despite his being incarcerated for eighteen years for victimizing them previously. The victims' knowledge of defendant's gang affiliations instilled so much fear that Ms. Tusken had to be arrested pursuant to a material witness warrant before she agreed to testify against defendant at trial. The evidence established a sufficient nexus between the gang affiliation evidence and the charged crimes of harassing phone calls, harassment, and intimidating a witness that the trial court's admission of the evidence was not error.

B. THERE WAS NO ABUSE OF DISCRETION IN IMPOSING CONSECUTIVE SENTENCES TO THEREBY NOT ALLOW MULTIPLE CURRENT OFFENSES TO BE UNPUNISHED.

Defendant contends that the sentencing court erred in imposing consecutive sentences which were clearly excessive pursuant to RCW 9.94A.535(2)(c) of the Sentencing Reform Act of 1981 ("SRA").

The trial court did not abuse its discretion when it ensured defendant was punished for each convicted crime.

The standards of review for examining an exceptional sentence are clearly established. An exceptional sentence may be challenged on any or all of three bases: (1) the reasons given for the exceptional sentence are not supported by the record; (2) the reasons given do not justify an exceptional sentence; (3) the sentence is clearly too lenient or too excessive. RCW 9.94A.585(4); *State v. Nordby*, 106 Wn.2d 514, 517-518, 723 P.2d 1117 (1986).

Under *Nordby*, a trial court's factual findings will be upheld unless they are "clearly erroneous." *Id.* The legal sufficiency of the reasons for the exceptional sentence, the second *Nordby* factor, is reviewed as a "matter of law." *Id.* at 518. Whether a sentence is too lenient or too excessive is reviewed for abuse of discretion. *State v. Oxborrow*, 106 Wn.2d 525, 530-531, 723 P.2d 1123 (1986); *State v. Armstrong*,

106 Wn.2d 547, 551-552, 723 P.2d 1111 (1986). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The test also is sometimes viewed in a second way: whether any reasonable judge would rule as the trial judge did. *State v. Nelson*, 108 Wn.2d 491, 504-505, 740 P.2d 835 (1987).

Here, there can be no question that the trial judge had tenable grounds to impose the consecutive terms. Imposing concurrent sentences would result in some of the current offenses remaining unpunished because any concurrent term would not have been enhanced by the higher offender score resulting from the other current offenses. This is the trade-off at the heart of the multiple offense policy of the SRA. *State v. Batista*, 116 Wn.2d 777, 783, 808 P.2d 1141 (1991). The trade-off ceases to be effective when the offender score exceeds nine.

Many sentencing courts have imposed consecutive terms when facing an offender who would otherwise have committed “free crimes.” E.g., *State v. Kuhlman*, 135 Wn. App. 527, 144 P.3d 1214 (2006); *State v. Allen*, 127 Wn. App. 125, 110 P.3d 849 (2005); *State v. Garnica*, 105 Wn. App. 762, 20 P.3d 1069 (2001) (“free crime” resulting from same course of conduct analysis); *State v. Brown*, 91 Wn. App. 361, 957 P.2d 272 (1998), *review denied* 137 Wn.2d 1002 (1999) (“free crime”

resulting from scoring of unranked offenses). Certainly, it cannot be seriously argued that no other judge would impose the sentence imposed by Judge Cozza herein. Accordingly, there was no abuse of discretion.

The same result is reached under the more common “tenable grounds” test. Imposing a sentence within the standard range for each crime committed, as defendant was herein, is not “clearly excessive” simply because he committed additional crimes. If the defendant had committed harassment, been punished for it, and then committed another harassment and was also sentenced, he could not complain because the total punishment for the two crimes was different than what it might have been if he had committed the offenses at the same time. That is the essence of defendant’s argument here. Defendant was punished for each crime he committed within the standard range for someone with an offender score of 9, yet defendant’s offender score is actually “17.” The imposition of one of those sentences to be served consecutively to the other two does not render the sentence excessive simply because he committed multiple offenses close together in time. The cumulative punishment results from the number of crimes committed, not abuse of judicial discretion.

There was a tenable basis for running one of the sentences consecutive to the others – the crimes would otherwise go unpunished.

Accordingly, there was no abuse of discretion. The sentence was not excessive.

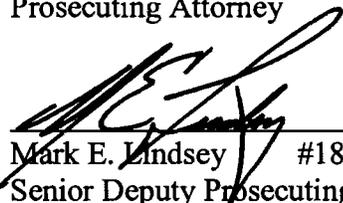
V.

CONCLUSION

The convictions and sentences should be affirmed.

Dated this 19th day of May, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29291-6-III
 v.)
)
LARRY GATEWOOD,)
)
 Appellant,) CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 19, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

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5/19/2011
(Date)

Spokane, WA
(Place)


(Signature)