

FILED

JUN 26 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

30212-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACK M. HEWSON, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law, over counsel's objection, by excluding counsel's cross examination of Robert Delao regarding his gang affiliations and his consequent protection of the missing fourth member of the robbery team. See Error 4(a) for related factual errors in connection with this issue.
2. The trial court erred as a matter of law in curtailing, over counsel's objection, counsel's cross examination of key prosecution witness Robert Delao regarding his exposure to the severe sentencing consequences for his role in the armed home invasion.
3. The trial court erred as a matter of law in determining, over counsel's objection and without an evidentiary hearing, that State's witness James Crabtree did not have a basis to believe that he was going to have a "good word" put in for him in exchange for his cooperation in testifying against Hewson. See Error 4(b) for related factual errors in connection with this issue.
4. The trial court erred in finding the following facts during post trial motions based upon insufficiency of the evidence.
 - a. The basis for the bias attack on Robert Delao's gang membership did not involve only the matters cited by the

lower court in its oral or writing [sic] findings when it denied the defense motion for a new trial. The defense did not solely rely on the business animus for proffering Delao's gang affiliation.

- b. The certificates from prosecutor Cipolla and case agent Miya (CP 96-99) in response to the defense's post-trial allegation of a Brady violation do not support the court's finding "[t]hat the State proffered that no such promise was made." CP 127.

II.

STATEMENT OF THE CASE

The defendant was charged by information filed in Spokane County Superior Court with Conspiracy to Commit First Degree Robbery, First Degree Burglary and attached special verdicts for the possession of firearms during the commission of the crimes.

Mr. Robert Delao testified that he, the defendant and Andrew Oakes formed a group to rob a house near Barker Road. RP 45. The group also included Jeff Hoofman. RP 47. According to Mr. Delao, the weapons collection was divided up just before the robbery and the defendant selected a .32 caliber

automatic. According to the testimony, the defendant instructed Mr. Delao and Andrew Oakes to enter the target house from the rear. RP 48.

Mr. Delao claimed that he was armed with a framing hammer and Mr. Oakes was armed with a firearm. RP 50. The pair entered the garage area of the residence and saw a woman through a window in the door to the house. RP 50-51. Both Mr. Delao and Mr. Oakes allegedly became unnerved at this point and left the bldg. RP 51. When they went around to the North side of the house, Mr. Delao saw the defendant who was saying, "Hey, hold one. Hold on." RP 51.

According to Mr. Delao, police started appearing and he (along with Mr. Oakes and the defendant) hid under a boat. According to Mr. Delao, the police left after some searching of the area. RP 52-53. The defendant's were able to effect an escape. RP 53.

Ms. Jamie Robinson testified that she lived in Greenacres, Washington and that on November 21, 2007, two males wearing masks and armed with guns came to her back kitchen door. RP 272-73. Ms. Robinson testified that the two males were scared off when she put up her hands and said, "No guys. Just go." RP 274. Ms. Robinson testified that another male came to her back door a short time later holding a pistol which was held pointing in her direction. RP 278. Ms. Robinson was shown a photo montage and picked the defendant as the single male with the pistol. RP 277. In court, she identified the defendant as the person she had seen outside her door holding a pistol. RP 277. She called 911. RP 278.

James Crabtree testified he had been a friend of Ms. Robinson since high school. RP 211. Mr. Crabtree testified that he met the defendant when they were both incarcerated at Coyote Ridge. RP 212. Mr. Crabtree stated that he met Delao in prison. RP 212.

Mr. Joseph Hoofman testified that he was introduced to Mr. Delao and Mr. Andrew Oakes through the defendant. RP 234. Mr. Hoofman recalled that on the day of the incident, Mr. Hoofman was visiting at a friend's home and the defendant knocked on the door. RP 235. After an hour, the defendant stated that he had to go to the valley ... "to do this deal." RP 236. According to Mr. Hoofman, the defendant was intoxicated so Mr. Hoofman offered to drive. RP 235-36. Mr. Hoofman testified that despite his offer to drive, the defendant drove the car to Barker road in the valley. RP 236-37.

Mr. Hoofman saw Mr. Delao's truck arrive at the gas station to which he and the defendant had driven. RP 237. The defendant got out of the car and went over to Mr. Delao's truck. RP 237. The defendant told Mr. Hoofman to remain in the car. RP 237. The defendant then phoned Mr. Hoofman and told him to follow Mr. Delao's truck. RP 237-38.

The defense called Ms. Destanee Yarnell who attempted to establish an "alibi" defense. RP 307-11.

The next defense witness was Denise LaCount with whom the defendant had an intimate relationship and the couple had known each other for many years. RP 314, 315-16. Ms. LaCount was Ms. Yarnell's mother. RP 314. The gist of Ms. LaCount's testimony was that Mr. Hoofman stole her vehicle on the evening of the incident. RP 321-25.

The defense called Mr. Mark Lang, and Mr. Richard Broderhausen apparently to reinforce the defendant's theories that the four ex-cons had undertaken a roofing business and this business did not succeed, leaving bad feelings amongst some of the persons involved. RP 336-51.

The defendant continued discussing the performance of various individuals for "Progressive" roofing during his direct testimony. RP 364-97.

The jury found the defendant guilty as charged in the information and guilty on the special verdict of being armed with a firearm at the time of the commission of the crime. RP 515. The jury found that Andrew Oakes was armed with a firearm at the time of the commission of the crime in Count I. RP 515.

The jury found the defendant guilty of First Degree Burglary with special verdicts of the defendant being personally armed at the time of the crime as well as Andrew Oakes. RP 516.

III.

ARGUMENT

A. THE TRIAL COURT LIMITED THE DEFENDANT'S ATTEMPTS TO ELICIT GANG MEMBERSHIP INFORMATION FROM A STATE'S WITNESS.

The defendant resorts to alleged confrontation clause violations to attack the trial court's restriction of the defendant's attempts to inquire of Mr. Delao's alleged gang membership. The defense in this case actually presented little in the way of facts to contradict the State's case. The defense case was a legal "carpet bombing" of the State's witnesses on the issues of bias.

Mr. Delao testified that Mr. Hewson designed the crime in order to keep Mr. Hewson's house from being foreclosed. RP 45. Mr. Delao saw the victim in the window of the door during the crime. RP 50.

The defendant attempted to admit testimony regarding Mr. Delao's alleged membership in a gang and drug involvement. RP 63. What the defendant does not explain, and there is no apparent nexus for, a connection between any evidence of a gang affiliation/drugs and the robbery which forms the basis of this crime. The defendant's arguments appear to be nothing more than pettifogging with nothing but a chimera of wishful thinking to support the defendant's case.

There was no logical connection between the substance of Mr. Delao's testimony and the defense desired by the defendant. While the defendant cites several reasons for eliciting gang testimony, one of the stranger reasons was the desire to use gang testimony to support a defense theory that there was an unnamed fourth person in the conspiracy. This claim is utterly without a basis in reality. The State submits that no trial judge in this State would have allowed the defendant free reign to impugn Mr. Delao with alleged gang connections when the defense proffered no experts on gang behavior. The defendant also did not proffer any evidence that all the co-conspirators were in the same gang. The defendant did not proffer even a scintilla of evidence regarding what the tenets of the alleged gang(s) might have been.

The defendant does not correctly relay to this court exactly how and when gang activity was mentioned in front of the jury. The defendant argues that the State introduced gang testimony in the deposition of Mr. Oakes. Mr. Oakes was taken into custody by the Federal authorities, so a video deposition was obtained.

The only mention of gang membership was from Mr. Oakes during the deposition just mentioned. The defendant wished to use Mr. Delao's testimony to establish gang connections to whatever extent possible. During Mr. Oakes deposition, *the defense counsel inquired* regarding gang membership. CP 35. Mr. Oakes' response was "true." CP 36. From this single, fleeting reference, the defendant wanted to open the entire issue of gang connections. It is interesting

that defense counsel would ask those questions during a deposition after being put on notice by the trial court that gang membership was going to be a problem. CP 35.

Secondly, the defendant is incorrect on the “instructive” nature of *U.S. v. Abel*. The *Abel* case involved witnesses belonging to a gang whose members accepted lying and protection of other members as fundamental premises. *U.S. v. Abel*, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984). There is no such information in this case.

The defendant alluded to an un-named fourth participant in the crime who was a “stronger” member of the same gang as the other members of the conspiracy. The defense theory was that the named co-conspirators pinned the crime on the defendant in order to protect this unnamed fourth person. The defense never produced this person.

Stripped of all the defense generated smoke, both at trial and on appeal, the reality appears to be that the defense theory was to prove that the State’s witnesses were lying and unreliable. What the defendant did not completely explain or support at the trial level is who the unnamed fourth person was and how the proposed defense data connected together.

Gang membership is not admissible to prove abstract beliefs and associations in part because it is protected by the constitutional rights of freedom of speech and freedom of association. *Dawson v. Delaware*, 503 U.S. 159, 165, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).

The general rules of evidence mostly cover the issues raised by the defendant both at trial and on appeal.

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 402.

To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality). 5 K. Tegland, Wash. Prac. § 82, at 168 (2d ed. 1982); *Davidson v. Metropolitan Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986), *review denied*, 106 Wn.2d 1009 (1986). The relevancy of evidence will

depend upon the circumstances of each case and the relationship of the facts to the ultimate issue. *Chase v. Beard*, 55 Wn.2d 58, 61, 346 P.2d 315 (1959), *overruled on other grounds*, 100 Wn.2d 729, 675 P.2d 1207 (1984). Relevant evidence encompasses facts that present both direct and circumstantial evidence of any element of a claim or defense. Teglund § 83, at 171. Facts tending to establish a party's theory of the case will generally be found to be relevant. *State v. Mak*, 105 Wn.2d 692, 703, 718 P.2d 407, *cert. denied*, -- U.S. --, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986).

Exclusion of Relevant Evidence ER 403 controls the exclusion of relevant evidence:

EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403 contemplates a balancing process. The balance may be tipped toward admissibility if the evidence is highly probative or if the undesirable characteristics of the evidence are minimal. Conversely, the balance may be tipped towards exclusion if the evidence is of minimal probative value or if the undesirable characteristics of the evidence are very pronounced. By the very nature of the rule, each case must be decided on the basis of its own facts and circumstances.

Teglund § 105, at 248.

While the defendant is correct on the issue of a defendant's constitutional right to cross-examine a witness for bias, the defendant is not correct that he has

an unlimited right to impeach the State's witnesses using the issue of gang membership. Where the right is not altogether denied, the scope or extent of cross-examination for the purpose of showing bias rests in the sound discretion of the trial court. *State v. Robbins*, 35 Wn.2d 389, 396, 213 P.2d 310, 315 (1950).

In a "confrontation limitation" argument the court in *Guizzotti*, stated: "A trial court may, however, refuse to permit cross examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative." *State v. Guizzotti*, 60 Wn. App. 289, 293, 803 P.2d 808, 811 (1991) (citing *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980)).

The fact that the defendant simply wanted to go on a nuclear fishing expedition is easily shown by the defendant's approach to gang testimony. The defendant vociferously argued that he should be permitted to pursue gang membership with State's witnesses. However, the defendant did not proffer an expert who would testify as to the nature of alleged gangs, expert testimony as to the tenets of the alleged gangs, nor even *if* a witness was in a gang, were other witnesses in the same gang(s). Again, the sole references to gang or gangs was a cross-examination response in a video deposition.

The defendant simply wanted to continue on his campaign to attack the State's witnesses. Perhaps the most interesting aspect of the entire defense is that if stripped of the efforts to obliterate the credibility of State's witnesses, the case

boils down to Ms. Robinson seeing (and identifying) the armed defendant in a glass panel in her door.

Mr. Oakes, Mr. Crabtree, Mr. Hoofman and Mr. Delao certainly assisted the State in supporting the defendant's involvement in the case but none of these witnesses carried the same power as did Ms. Robinson.

The confrontation clause establishes a defendant's right to cross-examination: "All the confrontation clause guarantees is an opportunity for effective cross examination." *State v. Dukes*, 56 Wn. App. 660, 663, 784 P.2d 584 (1990). The trial court's exercise of its discretion in determining the scope of cross examination does not offend confrontation clause guarantees. *State v. Benn*, 120 Wn.2d 631, 651, 845 P.2d 289 (1993). Consistent with the Sixth Amendment, a trial court may "refuse to permit cross examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative." *State v. Guizzotti*, 60 Wn. App. at 293. While the defense is entitled to considerable latitude in cross-examination of the State's witnesses, the court may properly limit questioning that does not have a "substantial bearing upon the witness' credibility." *State v. York*, 28 Wn. App. 33, 37, 621 P.2d 784 (1980).

The Washington State Supreme Court has said:

Although the law allows cross-examination into matters which will affect the credibility of a witness by showing bias, ill will, interest or corruption (3 Wigmore on Evidence, §943 et seq. (3d ed. 1940)), the evidence sought to be elicited must be material and relevant to the matters sought to be proved and specific enough to be free from vagueness; otherwise, all manner of argumentative and speculative evidence will be adduced.

State v. Jones, 67 Wn.2d 506, 408 P.2d 247 (1965).

Confrontation clause issues are reviewed *de novo*. *State v. Medina*, 112 Wn. App. 40, 48, 48 P.3d 1005 (2002).

The trial court's rulings are reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Abuse occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *Id.* at 619. The State submits that it was not an abuse of discretion to restrict the defendant's attempts to open up entire areas that would amount to mini-trials. The basic case was a straightforward attempted robbery. Had the trial court not contained the non-relevant and barely relevant excursions, the case would eventually have become a farce.

The relevancy of evidence is a consideration within the discretion of the trial court. *Lamborn v. Phillips Pacific Chemical Co.*, 89 Wn.2d 701, 706, 575 P.2d 215 (1978). The trial judge has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact. *State v. Hughes*, 106 Wn.2d 176, 201, 721 P.2d 902 (1986).

The court's decision on the relevance and prejudicial effect of the evidence may only be reversed upon a manifest abuse of discretion. *State v. Rupe*, 101 Wn.2d 664, 686, 683 P.2d 571 (1984); *State v. Kitchen*, 46 Wn. App. 232, 239, 730 P.2d 103 (1986). Abuse of discretion is "discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Tharp*, 27 Wn. App. 198, 206, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

The defendant grounds his fundamental arguments on *State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002) and *United States v. Abel*, 469 U.S. 45, 48, 54, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

Spencer's rather freewheeling approach to the use of witnesses to impeach other witnesses by way of bias, conflicts with the earlier case of *State v. Guizzotti*, *supra*, also from Division II.

Abel is not on all fours with this case as the court in *Abel* was discussing a situation in which issue was prison gang to which the witness and the defendant both belonged. The prison gang required members to lie to protect each other. None of that is present in this case.

B. THERE WAS NO AGREEMENT WITH THE STATE
PROSECUTOR REGARDING ROBERT DELAO.

The defendant completely misstates the situation regarding a “plea bargain” for Robert Delao. The defendant notes that under the original State charges, Mr. Delao could have been looking at 26 years of prison. Brf. of Def. 41. According to the defendant, Mr. Delao received a sentence under five years. The defendant misstates the record and leaves out crucial data.

The Federal Prosecutor took control of Mr. Delao. At that point, the State no longer had any practical control over Mr. Delao’s future. RP 201-02. There was no “plea bargain” between the State and Mr. Delao. Any arrangements along those lines would have been under the auspices of the Federal system.

Contrary to what the defendant argues on appeal, the jury was *not* led to a false set of conclusions regarding Mr. Delao. Mr. Delao was, as of the time the Federals assumed control, no longer subject to the State charges. All the existing charges were dismissed. They had to be. Double jeopardy, if nothing else, would have prevented the State from pursuing charges being handled by the Federal authorities.

If the jury became confused, the State submits such confusion was caused by the continued hammering of Mr. Delao’s criminal situation by the defense.

C. THE TRIAL COURT CORRECTLY DETERMINED THAT THERE WAS NO *BRADY* ISSUE.

The defendant presents a disjointed argument regarding some sort of connection between the prosecutor promising a “good word” in an unrelated case in exchange for Mr. Crabtree’s testimony. The defendant converts this allegation into a claim that the State never told the defendant about the “promise” and thus a *Brady* violation was formed.

The defendant expounds on his *Brady* theories at great length. However, the defendant simply ignores the affidavits of the prosecutor and the detective that indicated no *Brady* material was extant. The defendant cannot provide authority for the idea that the State must provide material that does not exist. The prosecutor and the detective presented affidavits that there were no “good word” promises made by the prosecutor. CP 96-99.

Further, the purpose of the appellate argument becomes clear when it becomes known that Mr. Crabtree was originally a defense witness. CP 98-99. After it became apparent that Mr. Crabtree had material useful to the State, the State notified the defense of Mr. Crabtree’s status and offered to arrange an interview for defense counsel. The defense made no request to interview Mr. Crabtree. Since Mr. Crabtree was originally a defense witness, it seems rather odd that the defendant now claims he did not know about the alleged “promise.”

By the defendant's own arguments, before a *Brady* violation can lie, the evidence in question must have been suppressed by the State, willfully or inadvertently. According to the defendant's arguments, the State must have willfully or inadvertently suppressed a promise claimed by Mr. Crabtree. This series of arguments makes no sense as all Mr. Crabtree need do is to concoct a "promise" that he thought he got from the prosecutor. Despite two affidavits stating that no such promise was ever made, according to the defendant, the State may not refute Mr. Crabtree's claims. Brf. of App. 44. If the defendant's appellate argument is accepted, every case involving a witness will also have a *Brady* argument.

As part of a motion for a new trial, the trial court examined the affidavits submitted by the State and the detective as well as one from Mr. Crabtree. The trial court also reviewed its own notes, submitted memoranda and oral argument of the parties and concluded that no *Brady* violation occurred. CP 126-128.

The trial court found that there was no due process violation. CP 126-128. In *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 396, 972 P.2d 1250 (1999), the Washington State Supreme Court noted that due process requires the State to disclose evidence that is both favorable to the accused and material to either guilt or punishment. However, there is no *Brady* violation if the defendant, using reasonable diligence, could have obtained the information at issue. *Gentry*, 137 Wn.2d at 396 (quoting *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 916,

952 P.2d 116 (1998)). As noted earlier by the State, Mr. Crabtree was originally a defense witness.

The trial court held both orally and in its written finding of facts that gang affiliation information was highly prejudicial and of little import. CP 119, 126-128. Thus it seems unlikely that the trial court would have permitted the use of gang affiliation testimony. As mentioned previously, the defendant presented no definite offers of proof pertaining to the alleged gang information the defendant wanted to pursue. There was no data indicating that anyone was in the same gang, what the tenets of the alleged gang might have been, whether any of the alleged members adhered to any tenets, etc. No matter how much the defendant tried, it was apparent that he was simply “fishing.”

What the defendant does not explain is how the State can suppress a promise (in violation of *Brady*) that the State did not make. The affidavits of both the prosecutor and the detective, who was present during the interview with Mr. Crabtree, state in their certificates that no promises were made to Mr. Crabtree.

The trial court was correct, there was no *Brady* violation.

D. THERE WAS AMPLE EVIDENCE TO SUPPORT THE VERDICT.

The defense undertakes an argument that seems to try to pull together several disconnected concepts. Instead of arguing a lack of evidence, the defendant reprises his gang bias arguments, proffers different reasons to admit

gang evidence, attacks the State's certificates in support of denial of a new trial, (good word promise) and again attacking alleged malfeasance by the State in failing to provide "important bias evidence."

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). We give deference to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). "But we do not retry factual questions." *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997).

It is unclear exactly what the defendant is arguing as this section contains "...insufficient evidence..." language in the title and what appears to be sufficiency of the evidence legal underpinnings, but then departs into areas that have nothing whatever to do with sufficiency of the evidence. As noted by the defendant, this court will examine the facts of the case in a light most favorable to the State. The State cannot reconcile this basis with the remainder of the defendant's argument involving mistakes by the trial court, supposed ineffective certificates from the State, and the beliefs of Mr. Crabtree.

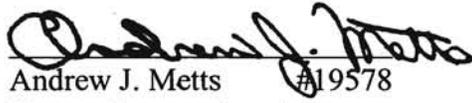
IV.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 26th day of June, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over a horizontal line. The signature is stylized and cursive.

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent