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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

By 84949-8
NO. 276830

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JORGE ARIEL SAENZ

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY
Judge Hackett

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it erroneously admitted inflammatory evidence.

2. The State did not prove beyond a reasonable the defendant committed the crimes charged.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Evidence Rule (ER) 404 (b) prohibits the admission of evidence to show the character of a person in order to prove that the person acted in conformity with his character on a particular occasion.

Prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs any prejudicial effect. Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable.

The decision to admit evidence under ER 404 (b) falls within the trial court's discretion. That decision will be disturbed if the appellant can show the trial court abused its discretion. Here, the trial court admitted highly inflammatory gang evidence and evidence of uncharged acts. By so doing, did the trial court abuse its discretion and ultimately taint the proceeding?

2. In a criminal prosecution, due process requires the State to prove every element of the charged crime beyond a reasonable doubt. The test

for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.

When considering facts in a challenge to sufficiency of the evidence, courts will draw all inferences from the evidence in favor of the State and against the defendant. A reviewing court will reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt.

The expression reasonable doubt means a doubt founded on some good reason, and must not arise from sympathetic feelings, but must arise from the evidence or lack of evidence. A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt.

Here, the defendant was charged with First Degree Assault and Unlawful Possession of a Firearm. In order to convict, the State had to introduce evidence that proved beyond a reasonable doubt Mr. Saenz, with intent to inflict great bodily harm, assaulted another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.

Here, the State's evidence fell short of this burden of proof. In fact, the State's case was filled with evidence that raised reasonable doubt. Given the evidence presented, could any rational trier of fact have found the defendant guilty beyond a reasonable doubt?

C. STATEMENT OF THE CASE

a. Substantive Facts

i. Walmart

One evening, sometime after 5:00 pm, Jorge Ariel Saenz (Mr. Saenz) and his mother left home to shop for groceries at Walmart. 9/17/08 RP at 794; 9/17/08 RP at 803-804. While there, a young man confronted Mr. Saenz. 9/10/08 RP at 98. "I saw Jorge speaking with a person and I went over to where my son was." 9/17/08 RP at 795. "I could see that the argument was fairly heated." 9/17/08 RP at 795. "I asked my son what was happening. He said nothing." 9/17/08 RP at 795.

"Then, I saw the person with whom my son was speaking put his hands inside of his shirt. At that point, I thought that the young man, the boy, might have had a weapon." 9/17/08 RP at 796. "My son pulled his shirt up giving him to understand that he was not armed." 9/17/08 RP at 796. "I just pulled on the back part of my son's pants so that I could take him with me, and this bothered him. So he told me to release him." 9/17/08 RP at 796-797.

Mr. Saenz and his mother checked out and drove home. 9/17/08

RP at 797. Mr. Saenz spent most of the evening at home. 9/17/08 RP at 800. He left home around 11:00 pm. 9/17/08 RP at 800-801.

ii. The Shooting

Around 6:00 pm, a patron, at the bowling alley, a few buildings down from Walmart, noticed a Dodge Dakota pickup truck. 9/11/08 RP at 230-233. "There was a pickup that pulled up. And a guy got out and started yelling at 2 kids walking over towards Ace Hardware. Then I saw a gun come out and I just ducked behind a car and heard shots fired." 9/11/08 RP at 223-224. The shooter wore "a dark, puffy jacket and had a hood over his head." 9/11/08 RP at 232.

The 2 young men ran into Ace Hardware. 9/11/08 RP at 234. "One kid actually hit the exit door at first and broke that door out and then they came in the entrance door." 9/11/08 RP at 216. The other "kid came in holding like his rib area, saying he got shot. But when we actually sat him down, he was bleeding out of his back." 9/11/08 RP at 217.

iii. The Investigation

According to the nephew, his uncle confronted Mr. Saenz in Walmart. 9/11/08 RP at 202-205. "My uncle was like getting his stuff and his clothes, and then he seen him and I guess they started arguing." 9/10/08 RP at 77. "They were arguing like talking trash about each other's sets." 9/10/08 RP at 77.

The uncle and his nephew, members of the Lower Valley Locos or

LVL, a local street gang, identified Mr. Saenz as a member of the Bell Garden Locos or BGL. 8/13/08 RP at 31; 2/10/08 RP at 132; 9/11/08 RP at 190. Mr. Saenz "was dressed in blue" and that color signified "BGL, or Southsiders." 9/10/08 RP at 78.

The uncle told investigators he had never seen this man before. 9/11/08 RP at 203. The uncle also confirmed he could not say with absolute certainty the person he confronted in Walmart was the person who shot him. 9/11/08 RP at 203. Witnesses at the scene testified they too were unable to describe the shooter. 9/11/08 RP at 233.

Days later, a Sunnyside Police detective received a telephone call from a concerned citizen. The concerned citizen, a mother, had information about the shooting. The mother testified that when she visited her son at her sister's house she overheard David Guillen bragging about the shooting. 9/11/08 RP at 242.

"David was having a conversation with another kid." 9/11/08 RP at 243. He "was bragging saying he did the shooting." 9/11/08 RP at 243. "He just said that he had gotten off and starting shooting at some kid and he took off running toward Ace." 9/11/08 RP at 245. "He was having the conversation about how they messed up the truck color and how he got off and shot him and ran up to him and stuff." 9/11/08 RP at 243. "He was laughing about it." 9/11/08 RP at 243-244.

This mother also told the detective she had the gun used in the

shooting. She testified Guillen had given the gun to an unidentified young man. Guillen told this young man if anything happened he could keep the gun. 9/11/08 RP at 248-249. Somehow, the mother ended up with the gun. "I don't remember how I ended up getting it. I don't remember what I said or what he said. I honestly don't remember." 9/11/08 RP at 249.

Sunnyside Police detectives orchestrated a method by which this mother could deliver to them the gun. The gun "was placed in a garbage can in front of the community center in Sunnyside." 9/15/08 RP at 459. It was wrapped "in a white plastic bag." 9/15/08 RP at 464. Officers later retrieved the gun. 9/15/08 RP at 459-465.

After he was arrested, the State offered Guillen, whose father was a local pastor and whose uncle was a Sunnyside Police officer, a deal. 9/15/08 RP at 498; 9/15/08 RP at 481; 9/15/08 RP at 501. The deal required Guillen to testify against Mr. Saenz in exchange for a Second Degree Assault charge and time served within the standard range. 9/15/08 RP at 482.

According to Guillen, the evening of the shooting, Mr. Saenz telephoned him for a ride. 9/15/08 RP at 484. "I had a car, a Dodge Dakota, and he knew he could get a ride." 9/15/08 RP at 484-485. "He wanted a ride to his house, but first I told him I was going to get something to eat at Fiesta Foods." 9/15/08 RP at 485-486.

Guillen told detectives he picked up Mr. Saenz at his house.

9/15/08 RP at 503. However, after he agreed to testify against Mr. Saenz, Guillen changed his story and claimed to have picked up Mr. Saenz at Walmart. 9/15/08 RP at 502. Guillen went on to accuse Mr. Saenz of the shooting.

According to Guillen, Mr. Saenz saw 2 people walking. He said, "Hey, go this way so I can hit them up." 9/15/08 RP at 486. "Which is like ask them who are you or where are you from." 9/15/08 RP at 487. "They were across the street--they went behind the Eastway, which is right in front of the bowling alley and Ace Hardware." 9/15/08 RP at 487.

"I drove up and I stopped." 9/15/08 RP at 488. "When I stopped, he got out. I heard gunshots. I looked up and I seen people running." 9/15/08 RP at 488.

b. Procedural Facts

Mr. Saenz was arrested and charged with 2 counts First Degree Assault and Unlawful Possession of a Firearm¹. CP at 408-409; CP at 405-406. Mr. Saenz pleaded not guilty and a jury trial ensued. 2/8/08 RP at 5.

During pretrial, the State moved to present evidence under Evidence Rule 404 (b) about Mr. Saenz' gang affiliation. According to Sunnyside police detectives, the shooting "was purely motivated by gang rivalry." 8/13/08 RP at 22. The uncle and his nephew were identified as

¹ Mr. Saenz stipulated to a previous serious offense conviction, which was one

LVLs. 8/13/08 RP at 31. And Mr. Saenz was closely associated with a criminal street gang, the BGLs. 8/13/08 RP at 10. He had tattoos that were indicative of gang membership and the monitor, or street name, Spooky. 8/13/08 RP at 17. The two gangs were rivals. 9/2/08 RP at 31.

The State also moved to present testimony about how Mr. Saenz allegedly threatened Guillen in jail with sign language and how he allegedly orchestrated a jailhouse assault.

In order to communicate with others, people in jail learn how to sign. 9/15/08 RP at 590. "You sign out the A, B, C, D, E, F, like that, and do the alphabet with your fingers." 9/15/08 RP at 590. "If you get close to the glass, you can look through and you can see across." 9/15/08 RP at 590. According to Guillen, Mr. Saenz signed to him to "take a deal and pretty much take the blame so he could get off on it. Because of my record, I'm not looking at that much time." 9/15/08 RP at 590.

In May, Mr. Saenz was housed in B tank. 9/12/08 RP at 362. "B tank is IMU, which stands for Intensive Management Unit. Inmates housed in B tank have no access to other inmates, only to inmates housed in that unit. 9/12/08 RP at 361-362. Guillen was never housed in B tank. 9/12/08 RP at 362. Even when Mr. Saenz was released from B tank, he was housed in H tank and Guillen was housed in C tank. 9/12/08 RP at 362.

of the elements for Unlawful Possession of a Firearm. 9/10/08 RP at 57.

Moreover Guillen claimed when he refused Mr. Saenz' alleged proposition, some people from the tank entered his room and blindsided him. 9/12/08 RP at 592. Guillen claimed one of the assailants said, "Word was sent over." 9/15/08 RP at 592. Mr. Saenz denied having any involvement in the assault. Officers "told me if I gave information I would receive an extra tray or something, and I said I didn't know nothing about it." 9/12/08 RP at 361.

The trial court found the State established by a preponderance of the evidence that Mr. Saenz was a member of a gang, that he was known as Spooky on the street, and that he associated with fellow gang members. 9/10/08 RP at 67. The trial court reasoned this evidence was relevant to prove the elements of the shooting. 9/10/08 RP at 67.

The trial court also concluded "with regard to both the signing and the assault, this is admitted for the proper purpose by the State to show guilty knowledge and an admission by Mr. Saenz. These are elements of the offense or to rebut any possible defense that Mr. Saenz wasn't involved in this or that he had some kind of alibi." 9/15/08 RP at 565.

The jury found Mr. Saenz guilty on all counts. CP at 277-279. The jury also returned special verdicts. CP at 275-276. Mr. Saenz was sentenced to 47 years in prison.² CP at 49-57; CP at 40-48; 12/15/08 RP

² The State moved the trial court to sentence Mr. Saenz as a persistent offender. The State argued these charges would constitute a 3rd strike. The trial court denied the State's motion. It held there was doubt the Lewis County First Degree Assault charge

at 47; 12/19/08 RP at 4. This appeal followed. CP at 39-48.

D. ARGUMENT

I. ERRONEOUSLY ADMITTED EVIDENCE UNDER EVIDENCE RULE 404 (B) ONLY SERVED TO PREJUDICE THE JURY AND TO TAINT THE PROCEEDING.

a. Evidence of other bad acts is generally inadmissible. Evidence Rule 404 (b) prohibits the admission of evidence to show the character of a person in order to prove that the person acted in conformity with his character on a particular occasion. State v. Everybodytalksabout, 145 Wn.2d 466, 39 P.3d 294 (2002).

Prior bad acts are admissible only if the evidence is logically relevant to a material issue before the jury, and the probative value of the evidence outweighs any prejudicial effect. State v. Saltarelli, 98 Wn.2d 362, 655 P.2d 697 (1982). Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more probable. State v. Dennison, 115 Wn.2d 628, 801 P.2d 193 (1990).

The decision to admit evidence under ER 404 (b) falls within the trial court's discretion. State v. Walker, 75 Wn.App. 108, 879 P.2d 957 (1994), review denied, 125 Wn.2d 1015, 890 P.2d 20 (1995). An appellate court will disturb a trial court's decision upon a showing of abuse. State v. Stubsjoen, 48 Wn.App. 147, 738 P.2d 306, review denied,

would constitute a strike. CP at 40-48; CP at 49-57; 11/20/08 RP at 968; 12/15/08 RP at

108 Wn.2d 1033 (1987). Abuse occurs when the trial court's discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel Carroll v. Junker, 79 Wn.2d 26, 482 P.2d 775 (1971).

Here, the trial court abused its discretion when it admitted highly inflammatory gang affiliation evidence and unduly prejudicial evidence of uncharged acts.

i. Highly Inflammatory Gang Evidence. Like membership in a church, social club, or community organization, affiliation with a gang is protected by our First Amendment right of association. State v. Scott, 213 P.3d 75 (2009) citing Dawson v. Delaware, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations. Id. at 166-167, 112 S.Ct. 1093. There must be a connection between the crime and the organization before the evidence becomes relevant. Id. at 168, 112 S.Ct. 1093; State v. Scott, 213 P.3d 75 (2009).

Here, the trial court found evidence regarding Mr. Saenz' alleged gang affiliation relevant to prove elements of the shooting. 9/10/08 RP at 68. "You have to understand as part of that that not only did he pull the trigger but why would he do that. Was it an accident or did it involve

intent to inflict harm?” 9/10/08 RP at 67. “Most of the people in this room and that were called as jurors don’t live in a vacuum. They understand a lot of what goes in the community, and they understand how people congregate with each other and that includes gangs. The idea that somebody may be in a gang is something that they all expressed a commitment to be able to separate out.” 9/10/08 RP at 68.

Evidence of gang affiliation is considered prejudicial. State v. Asaeli, 150 Wn.App. 543, 208 P.3d 1155-1156 (2009). Therefore, even if gang evidence is relevant, it may still be inadmissible. Probative value is sometimes outweighed by the prejudice to the defendant, particularly where the evidence may be admitted on a tangential point. Burrell, Susan L., Gang Evidence: Issues for Criminal Defense, 30 Santa Clara Law Rev. 764 (1990). Moreover, the impact gang evidence may have on jurors may be more profound than trial courts expect.

The first major case to consider the impact of gang evidence on the trier of fact was People v. Zammora, arising out of the highly publicized Sleepy Lagoon murders of the early 1940’s. 66 Cal. App. 2d 166, 152 P.2d 180 (1944).

In Zammora, the court concluded “the use of the word ‘gang’ referred only to the usual and ordinary crowd of young people living in any particular neighborhood who associate themselves together, and from time immemorial have been referred to as a gang.” Id. at 215, 152 P.2d at

205. Even so, the court recognized the term “gang” could take on a sinister meaning when associated with group activities. Id.

Times have changed considerably since Zammora. By the late 1960’s and early 1970’s, courts acknowledged that popular prejudice against groups such as the Hell’s Angels might well affect the fairness of the proceedings, although the evidence was not always found prejudicial. See People v. McKee, 265 Cal. App. 2d 59, 71 Cal. Rptr. 29 (1968); People v. Beyea, 38 Cal. App. 3d 194-96, 113 Cal. Rptr. 265-66 (1974); Clifton v. Superior Court, 7 Cal. App. 3d 250-52, 86 Cal. Rptr. 615-617 (1970); People v. Sawyer, 256 Cal. App. 2d 95, 63 Cal. Rptr. 757 (1967).

By 1981, when People v. Perez, 114 Cal. App. 3d 470, 170 Cal. Rptr. 619 (1981) was decided, the appellate court noted that, “when the word ‘gang’ is used in Los Angeles, one does not have visions of characters from the ‘Our Little Gang’ series. The word gang as used in the case at bench connotes opprobrious implications.” Id. at 479, 170 Cal. Rptr. at 623.

Here, the prejudicial impact gang affiliation evidence may have had on the jury could have been quite substantial. As argued above, the term gang and any affiliations therewith carried with it certain menacing connotations. To add to that, throughout trial, Mr. Saenz was referred to by his street name, Spooky. 8/13/08 RP at 17; 9/11/08 RP at 240; 9/16/08

RP at 736; 9/16/08 RP at 665. The suggestiveness of the name Spooky only served to enhance any prejudicial affect.

ii. Uncharged Acts. The Rules of Evidence strictly confine the use of a defendant's prior bad acts because such evidence has a great capacity to arouse prejudice. See ER 404, 405, 608. Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes. State v. Emmanuel, 42 Wn.2d 13, 253 P.2d 386 (1953). A fair trial is denied when the jury is permitted to conclude the accused deserves punishment because of other bad acts. Instead, the jury must determine whether the accused committed the crime charged. State v. Goebel, 36 Wn.2d 367, 218 P.2d 300 (1950).

Our State Supreme Court, in common with all others, has held that a defendant must be tried for the offenses charged in the indictment and information, and that to introduce evidence of unrelated crimes is grossly and erroneously prejudicial. State v. Thompson, 14 Wn. 285, 44 P. 533 (1896); State v. Gottfreedson, 24 Wn. 398, 64 P. 523 (1901); State v. Gaines, 144 Wn. 446, 258 P. 508 (1927); State v. O'Donnell, 195 Wn. 471, 81 P.2d 509 (1938); State v. Richardson, 197 Wn. 157, 84 P.2d 699 (1938); State v. Barton, 198 Wn. 268, 88 P.2d 385 (1939); State v. Anderson, 10 Wn.2d 167, 116 P.2d 346 (1941); State v. Kritzer, 21 Wn.2d 710, 152 P.2d 967 (1944); State v. Brown, 31 Wn.2d 475, 197 P.2d 590, 202 P.2d 461 (1949). Such evidence may be entirely lacking in probative

value and be no more than a piece of damning prejudice, in which case the reason and necessity for its exclusion is apparent. To the extent that an unrelated crime can be relevant and have probative value, its exclusion is based on the policy of avoiding undue prejudice. State v. Goebel, 36 Wn.2d at 369.

The State has the burden of establishing that evidence of other offenses is not only relevant but necessary to prove an essential ingredient of the crime charged. State v. Goebel, 40 Wn.2d at 21. Evidence is relevant and necessary if the purpose in admitting the evidence is of consequence to the action and makes the existence of the identified act more or less probable. State v. Dennison, 115 Wn.2d 628, 801 P.2d 193 (1990); ER 401.

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. State v.

Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984) citing Michelson v. United States, 335 U.S. 475-76, 69 S.Ct. 213, 218-19, 93 L.Ed. 168 (1948).

Here, the State totally avoided the issue of whether these acts were relevant to prove the crimes charged and instead theorized the evidence was admissible as admission of a party opponent. 9/15/08 RP at 557-558. "It's also the mentality of the party opponent. Knowing that he needed to stop this co-defendant from testifying, he basically was admitting that he, in fact, had some guilty conscientious of guilt. For the same reason I'm asking that he be allowed to testify about the statements and the assault that he incurred while he was in jail." 9/15/08 RP at 558.

Even under that theory, any testimony regarding alleged witness intimidation and any statements made during the alleged assault should have been excluded. ER 801(d)(2) specifically states, an admission by a party-opponent is not hearsay and may be admitted if offered against the party. ER 801(d)(2). But codefendants are not party-opponents. United States v. Gossett, 877 F.2d 906 (11th Cir.1989), cert. denied, 493 U.S. 1082, 110 S.Ct. 1141, 107 L.Ed.2d 1045 (1990). Guillen was, in fact, Mr. Saenz' co-defendant. Therefore, any testimony regarding those acts was not admissible under ER 801(d)(2).

The issue then comes back to whether the evidence was relevant to prove the crimes charged. Mr. Saenz was on trial for First Degree Assault and Unlawful Possession of a Firearm. The elements of which had

nothing to do with alleged witness intimidation and alleged witness assault. “The admission of evidence of irrelevant prior specific acts of conduct could only distort the true issues at trial. The admission of this evidence would be prejudicial and hence constitutes reversible error.”

State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984).

b. Reversal is the only appropriate remedy. Erroneously admitted evidence is grounds for reversal if it unfairly prejudices the defendant.

State v. Bourgeois, 133 Wn.2d 403, 945 P.2d 1120 (1997). Evidentiary error is prejudicial if within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.

Bourgeois, 133 Wn.2d at 403 quoting State v. Tharp, 96 Wn.2d 599, 637 P.2d 961 (1981)).

Here, it seemed reasonably probable the outcome of the trial would have been materially affected had the jury not been exposed to evidence about gang affiliation and uncharged acts.

II. THE EVIDENCE PRESENTED WAS TOO INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT COMMITTED THE CRIMES CHARGED.

In a criminal prosecution, due process requires the State to prove every element of the charged crime beyond a reasonable doubt. State v. Teal, 152 Wn.2d 337, 96 P.3d 974 (2004); In re Winship, 397 U.S. 361-64, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the

light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 209, 829 P.2d 1068 (1992).

When considering facts in a challenge to sufficiency of the evidence, courts will draw all inferences from the evidence in favor of the State and against the defendant. Salinas, 119 Wn.2d at 201. A reviewing court will reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. Id.

The question is “What constitutes such a doubt?” State v. Harsted, 66 Wn. 162, 119 P. 24 (1911). The expression reasonable doubt means a doubt founded on some good reason, and must not arise from sympathetic feelings, but must arise from the evidence or lack of evidence. State v. Harsted, 66 Wn. 162.

A defendant is entitled to the benefit of a reasonable doubt. Whether a doubt exists and, if so, whether that doubt is reasonable may be subject to debate in a particular case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt. State v. Warren, 165 Wn.2d 27, 195 P.3d 940 (2008).

Here, Mr. Saenz was charged with 2 counts First Degree Assault and 1 count Unlawful Possession of a Firearm. CP at 405-406; CP at 408-

409. In order to convict, the State had to introduce evidence that proved beyond a reasonable doubt Mr. Saenz, with intent to inflict great bodily harm, assaulted another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death. CP at 89-90.

The State's evidence fell short of this burden of proof. In fact, the State's case overflowed with evidence that raised reasonable doubt. For example, eyewitnesses could not identify the shooter. 9/11/08 RP at 233. Even the person shot was unable to identify the shooter. 9/11/08 RP at 203. Only Guillen placed Mr. Saenz at the crime scene after he negotiated a plea agreement with the State for reduced charges. 9/15/08 RP at 502.

Moreover, the concerned citizen, also a State witness, testified that she overheard Guillen bragging about the shooting. "He just said that he had gotten off and started shooting at some kid and he took off running toward Ace." 9/11/08 RP at 245.

Finally, there was no physical evidence to link Mr. Saenz to the crime. A Washington State Patrol Crime Lab scientist used DNA³ analysis to examine the following items collected as evidence: 1 Smith and Wesson pistol, 1 magazine, 10 cartridges, and some cartridge cases." 9/12/08 RP at 384; 9/12/08 RP at 396.

"The DNA typing profile obtained from the gun is of mixed

³ DNA stands for Deoxyribonucleic Acid. 9/12/08 RP at 376.

origin. They can be excluded as substantial contributors.” 9/12/08 RP at 398. “No meaningful comparison can be made to the trace DNA evidence. The DNA profile obtained from the magazine is of mixed origin, consistent with having originated from at least 3 individuals. Mr. Saenz is excluded as a contributor to this profile.” 9/12/08 RP at 399. However, “due to the complexity of the mixture and the presence of trace contributors, no meaningful inclusions or exclusions could be made with regards to David Guillen.” 9/12/08 RP at 399. “No DNA typing profile was obtained from the cartridges.” 9/12/08 RP at 399.

Given how the State’s evidence lacked substance, no rational trier of fact could have found all the elements of the crimes charged were proven beyond a reasonable doubt. Therefore, reversal is the only appropriate remedy.

E. CONCLUSION

For the reasons set forth above, Mr. Saenz asks this Court to reverse his convictions and grant a new trial.

Respectfully submitted this 1st day of September, 2009.


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