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NO. 92389-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FABIAN ARREDONDO,

Appellant.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court acted within its discretion by prohibiting the defendant from inquiring into a witness's drug use and mental health diagnoses when there was no evidence that these conditions affected his perception or ability to recall and relate the substance of his testimony?

2. Whether the trial court acted within its discretion by admitting evidence of the defendant's involvement in a previous gang-related drive-by shooting under ER 404(b) to show motive and intent?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Fabian Arredondo with first degree murder and three counts of first degree assault, alleging that each count was committed with a firearm and for the benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, CP 1-2. The State alleged that Arredondo drove while accomplice Rudy Madrigal¹ shot at a carload of rival gang members, killing Ladislado Avila. 2B RP 269-74.²

¹ Though they were initially joined for trial, the court granted Arredondo's and Madrigal's motions to sever under Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), RP 48.

² The verbatim report of proceedings consists of nine total volumes, six of which are consecutively paginated and referred to herein as "RP." The State refers to the remaining, separately-paginated volumes designated "Supplemental," "Supplemental 2A" and "Supplemental 2B," as "Supp. RP," "2A RP," and "2B RP," respectively.

The State intended to offer the testimony of Arredondo's former cellmate, Maurice Simon, to whom he had admitted his involvement in the charged crimes. Arredondo sought leave to inquire into Simon's past mental health conditions on cross-examination. Supp. RP 4-8. The trial court reserved ruling until Simon was examined outside the presence of the jury. Supp. RP 8; RP 54, 556-57. When that examination revealed no indication that Simon's mental health issues affected his perception or memory, the trial court concluded that the probative value of the evidence was substantially outweighed by the risk of unfair prejudice and excluded it. RP 566. The court allowed evidence of Simon's convictions, including several crimes of dishonesty, to be used for impeachment. Supp. RP 19.

Arredondo moved to exclude evidence implicating him in a gang-related drive-by shooting that occurred several months before Avila's murder. Supp. RP 22-26. The State argued this evidence was admissible as proof of a common scheme or plan. Supp. RP 25. The trial court ruled that the evidence was admissible to show identity and motive. Supp. RP 26. The court instructed the jury that evidence about the prior shooting could be considered only on the issues of identity and motive, as well as intent. RP 466, 479. A written instruction was also provided. CP 63.

The jury found Arredondo guilty of the lesser included offense of second-degree murder and all three counts of first-degree assault. The

jury found that Arredondo was armed with a firearm on all counts and committed the offenses to benefit a criminal street gang. RP 867-68.

The Court of Appeals, Division Three, affirmed the convictions. State v. Arredondo, No. 30411-6-III, ___ WL ___ (2015). This Court granted Arredondo's petition for review in part, limiting its consideration to two issues: "(1) whether the Petitioner's right of confrontation was violated when the trial court barred inquiry on cross-examination into the mental state of a witness, and (2) the admission of evidence of other crimes, wrongs or acts under ER 404(b)." Order, State v. Arredondo, No. 92389-2 (April 29, 2016).

2. SUBSTANTIVE FACTS

On the evening of the murder, December 5, 2009, Arredondo attended two parties. The first was a family party at his uncle's home in Yakima. Alberto Marquez and his sister Maria also attended that party. RP 537, 543. At some point, Alberto loaned his blue or blue/green Honda Accord to "his homeys." RP 544. Maria did not see who borrowed the Accord, but she believed it was Arredondo. RP 544, 547. No one ever returned the car. RP 544-45, 553.

When the Yakima party ended, Arredondo went to a second party on Robart Lane in nearby Toppenish. RP 708-09, 744, 746. Most of the people at the Toppenish party, including Arredondo, were members or

associates of the Norteño street gang. RP 82, 85, 382, 747. At some point, Ladislado Avila, Gabriel Rodarte, Miguel Vasquez, and Maximino Castillo – all members or associates of the rival Sureño street gang – appeared at the party. RP 62, 64, 174-75, 286-87, 453. A fight broke out, and some of the Norteños pulled out guns. RP 67, 77, 135, 335, 750-54. After the fight, someone called out “cops, cops, cops” and everyone began to leave the party. RP 68, 83, 759.

Carmen Romero was in a car on Robart Lane and noticed four cars leaving the party: a black Audi, a white Impala, a white station wagon, and a blue/green Honda Accord. RP 134-35, 138. The black Audi and white Impala went in one direction and the white station wagon and blue/green Honda Accord raced off in the other. RP 135. The driver of the white Impala was a woman on a cell phone. RP 150. Romero saw the blue/green Honda Accord pull up next to the white station wagon and flashes between the cars; the wagon then disappeared. RP 139, 146-47.

Avila, Rodarte, Vasquez and Castillo were in the white station wagon. RP 68, 175, 180. They noticed the blue/green Honda Accord chasing them and tried to escape it. RP 70-71, 75, 87, 135, 138, 182-83, 185, 195, 264. As the Honda caught up, someone in the station wagon saw a gun in the other car and yelled for everyone to duck. RP 184. The passengers all ducked as three shots were fired. RP 184-85. One bullet

struck Avila in the back of the head. RP 72, 185, 199. Avila lost control of the car, and it crashed into a tree. RP 73, 185. The blue/green Honda Accord drove off. RP 197. Avila died from the gunshot wound. RP 373.

About a week after the shooting, police located Alberto Marquez's blue/green Honda Accord in a Wapato parking lot. RP 231, 330, 457. Adjacent business owners could not say who owned the car or how long it had been parked there. RP 232. The Honda had been wiped down with a cleaner; the passenger side was covered with a white soap-like film and the inside of the car was wet. RP 328, 469, 578, 671, 677.

As part of the investigation into Avila's murder, Detective Dunn interviewed Elena Guzman. RP 459. Guzman told the detective that Arredondo had borrowed and was driving Alberto's Honda Accord on the night of the shooting. RP 460, 462. She stated that she encountered Arredondo and Madrigal after the shooting, and that they said they had been doing some "dirty ass work" in Toppenish. RP 464, 666. Guzman said that Madrigal told her that Arredondo had been driving the car. RP 667. She was upset because Madrigal, who was like a brother to her, was "running his mouth" about the shooting.³ RP 465, 473. She was afraid and did not want Madrigal to know what she had said. RP 465, 473-74.

³ Detective Dunn initially testified that Guzman said that Arredondo was like a brother to her, but corrected himself on cross examination. RP 465, 473.

Arredondo contacted Guzman multiple times while he was in custody on this case. RP 799. After this contact, Guzman claimed that she remembered nothing about the night of the shooting and denied making the statements described by Detective Dunn. RP 110-21. The court instructed the jury to consider the detective's testimony about what Guzman reported solely for the purpose of considering Guzman's credibility. RP 461, 665, 667.

While he was in custody, Arredondo shared a cell with Maurice Simon. RP 570-71. Arredondo told Simon that he was a Norteño, that he had been at a party when some Sureños showed up, that words were exchanged, and that Arredondo and Madrigal later obtained a gun and looked for the Sureños. RP 574, 576. Arredondo said that he was driving a borrowed Honda Accord with Madrigal in the passenger seat, found the Sureños, told Madrigal to "blast them," and that one person had been killed. RP 577-78. Simon provided information that was unknown to the general public. RP 687.

Arredondo also told Simon that he would "walk" on this crime if "the two bitches" did not testify and suggested that they needed to be "taken care of." RP 583-84. Simon understood Arredondo to be suggesting that certain witnesses be killed. RP 585. Arredondo also told

Simon that his uncle would provide him an alibi, and he was concerned that Madrigal was "stealing" his alibi. RP 612.

Arredondo's uncle, Efrain Arredondo, testified for the defense. RP 707. He stated that Arredondo and Gabriel Limone attended the family party in Yakima, that they had arrived in Limone's white Impala, and that they left before 10 p.m. RP 710-12. He did not see whether Arredondo left in the Impala. RP 715. Efrain testified that Arredondo returned shortly after midnight and stayed the night.⁴ RP 716.

Arredondo testified, confirming many of the details presented by the State's witnesses. RP 740. He admitted that he is a Nortefio member. RP 751. He described the family party in Yakima and confirmed that Guzman and Marquez were there. RP 783. He confirmed that he attended the house party in Toppenish, that there were a number of Nortefio members flashing guns, and that a fight broke out with some Surefios. RP 750, 754, 756, 787. Arredondo claimed that he left the Toppenish party with Limone in the white Impala⁵ and returned to his uncle's house in Yakima. RP 759, 764-65. Arredondo confirmed that he had shared a cell with Simon, but denied that he had admitted his involvement in the shooting or suggested that witnesses be killed. RP 770, 775, 778.

⁴ The shooting occurred just after 1:00 a.m. RP 251, 393.

⁵ This is inconsistent with Carmen Romero's testimony that the white Impala was driven by a woman on a cell phone. RP 150.

Arredondo explained that anyone who spoke against another Norteño would be in danger. RP 789-90, 793.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY LIMITED CROSS EXAMINATION BECAUSE THERE WAS NO SHOWING THAT SIMON'S MENTAL CONDITIONS AFFECTED HIS PERCEPTION OR MEMORY.

Arredondo contends that the trial court violated his Sixth Amendment right to confront witnesses by precluding him from inquiring into Simon's mental health. Because Arredondo failed to show that Simon's mental health conditions affected his perception, long-term memory, or ability to relate events, this Court should reject the claim.

a. Relevant Facts.

Defense counsel for Arredondo and Madrigal interviewed Simon before trial. At the beginning of that interview, Simon asked counsel to make his questions short and straight-forward because Simon had trouble "staying focused" and "comprehending sometimes when things run on." Supp. CP __ (Intv. at 2); RP 559. This remark did not mean that he "can't remember every day average things[.]" RP 559. Simon was later asked about submitting to a polygraph. Supp. CP __ (Intv. at 44). Simon stated that he would take one if needed, but had failed a polygraph before. He attributed his poor performance to his "PTSD, anxiety disorder and

depression with ... interpersonality sensitivities[.]” Supp. CP ___ (Intv. at 44); Supp. RP 6, 8-9.

Arredondo argued that Simon’s mental health conditions were relevant to his credibility. Supp. RP 5. The trial court reviewed the transcript and disagreed, observing that Simon’s remark about his various mental health conditions “is in reference to a polygraph and not in reference to an inability to recall or remember or accurately describe [the] things that he’s seen or heard.” Supp. RP 8-9. The court reserved ruling until Simon testified. Supp. RP 9.

When Simon was examined outside the jury’s presence, he testified that he had no condition or disorder that affects his ability to recall and describe events. RP 558. In fact, Simon stated that he had been told in his psychiatric evaluation that his ability to recall and describe events was probably better than most. RP 558. Simon denied having any conditions that affected his long-term memory, telling Arredondo’s counsel, “my memory is fine. I could tell you what you wore the day we had the interview. I could tell you how many words you said if I really had to count, but you really didn’t say that much.” RP 561-62. He also stated, “right now as I sit here in this court chair after recollecting over the things I’ve heard in the few days I was in the cell with Mr. Arredondo, I have no problems remembering.” RP 562. Simon admitted to prior

substance abuse, which he thought might have caused short-term memory problems, but denied any problem with long-term memory. RP 564.

After this examination, defense counsel opined, "I think it's going to be evident to the jury that he does have memory and concentration problems, even without that evaluation." RP 565. Counsel intended to ask Simon whether he has mental conditions that affect his memory, even though he knew the answer was no, because "I think with this fellow being asked enough questions, it's just going to be obvious to the jury that he's not all there. ... I think he's going to impeach himself." RP 565-66. Defense counsel then proposed, "without asking him about the mental conditions, I should simply ask him if there's anything he's aware of that affects his ... short-term memory and ability to recall events. If he says no, that's fine." RP 566.

The trial court barred inquiry into Simon's past or present mental state, finding the evidence irrelevant, of "negligible" probative value, and "enormous[ly]" prejudicial. RP 567.

On cross-examination during Simon's trial testimony, defense counsel asked Simon if he had any "problems with his memory," just as he had proposed before the court's ruling. RP 566, 617. Simon responded, "no sir, no more than, I guess, probably the average person." RP 617.

b. The Right To Cross-Examine Witnesses Is Not Absolute.

A criminal defendant has the constitutional right to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI; CONST. art. I, § 22; Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The right to conduct a meaningful cross-examination is the most important component of the confrontation right. State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). The purpose of cross-examination is to test the perception, memory, and credibility of witnesses. State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

Despite its importance, the right to cross-examine adverse witnesses is not absolute. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). “[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on ... cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The cross-examination right is thus subject to two basic

limitations: (1) the evidence must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. Hudlow, 99 Wn.2d at 15.

Reviewing courts will uphold a trial court's ruling on the admissibility of evidence absent abuse of discretion. Darden, 145 Wn.2d at 619. Abuse exists when the court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id. "Similarly, a court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion." Id.

c. **Simon's Mental Health Was Not Relevant Absent Evidence That It Affected His Perception, Memory, Or Ability To Relate Events.**

The trial court precluded inquiry into Simon's mental health and past substance abuse because there was no evidence connecting these conditions to Simon's ability to perceive, recall, and relate events from several months before. Simon's mental health conditions were therefore irrelevant. This Court should affirm that ruling.

"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.

Here, Arredondo argued that the evidence of Simon's PTSD, anxiety, depression, and "interpersonality sensitivities" was relevant to his credibility and ability to recall events accurately. Supp. RP 5. But there is no evidence that Simon's conditions affect his memory or make him less credible. Simon was adamant that he has no condition or disorder that impacts his ability to recall or accurately describe events. RP 558. Indeed, Simon offered to prove that he clearly recalled details of an interview that had occurred several months before. RP 558, 561-62. Arredondo never attempted to rebut Simon's testimony.

This Court considered a similar issue many years ago in State v. Smythe, 148 Wash. 65, 268 P. 133 (1928). There, the defense wished to impeach one of the State's principal witnesses with evidence that he suffered from epilepsy. Id. at 68. The defense claimed that epilepsy compromised a person's memory, but the trial court excluded the evidence. This Court affirmed the ruling because "there was no proof in the case as to the possible effect that epilepsy may have upon the mind or memory of its victims, and the offer as shown does not include or cover that important point." Id. Similarly, in State v. Renneberg, 83 Wn.2d 735, 737, 522 P.2d 835 (1974), this Court held that evidence of the defendant's drug addiction was not admissible to impeach her credibility without medical proof that drug addiction is related to credibility or veracity. And

in State v. Thomas, 150 Wn.2d 821, 863, 83 P.3d 970 (2004), this Court observed that a witness's drug use was not admissible to impeach her credibility without a showing that the witness was actually influenced by drugs at the time of the occurrence about which she would testify. Thus, the law is clear: witnesses cannot be cross-examined as to their mental conditions and disorders absent specific proof that those conditions actually affect their abilities to perceive, recall, or relate events.⁶

This Court's decision in State v. Froelich, 96 Wn.2d 301, 635 P.2d 127 (1981), is not to the contrary. There, a principal witness for the State demonstrated obvious "mental defects" when he was in an "extreme state

⁶ Many other courts have come to the same conclusion in more recent years. See, e.g., People v. Baldwin, 17 N.E.3d 746, 755 (Ill. App. Ct. 2014), cert. denied sub nom. Baldwin v. Illinois, 136 S. Ct. 413, 193 L. Ed. 2d 327 (2015) (mental health history not admissible for impeachment unless proponent first establishes its relevance); People v. Fillyaw, 948 N.E.2d 1116, 1134 (Ill. App. Ct. 2011) (same); Jackson v. United States, 940 A.2d 981, 995 (D.C. 2008) (use of evidence of witness's mental health history for impeachment is "greatly disfavored and is allowed only where it is shown that the evidence casts substantial doubt on the witness's capacity to comprehend and relate the truth of pertinent events"); State v. Fichera, 903 A.2d 1030, 1039-40 (N.H. 2006) (observing that "federal courts appear to have found mental instability relevant to credibility only where, during the time-frame of the events testified to, the witness exhibited a pronounced disposition to lie or hallucinate, or suffered from a severe illness, such as schizophrenia, that dramatically impaired her ability to perceive and tell the truth"); Perry v. State, 236 S.W.3d 859, 866 (Tex. App. 2007) (trial court properly excluded evidence when testimony did not demonstrate that witness's mental illness affected his perception of events); State v. Stewart, 925 P.2d 598, 600-01 (Utah Ct. App. 1996) ("Merely asserting that the witness suffers from a mental disorder does not meet this requirement of showing that the disorder directly affects the witness's ability to perceive, recall, and relate events"); United States v. Rivera-Santiago, 872 F.2d 1073, 1085 (1st Cir. 1989) (defendant may cross-examine a witness about her psychiatric history to impeach her credibility, but this "does not mean that the basis for impeachment can be suggestion or innuendo with no evidentiary foundation"); United States ex rel. Kline v. Lane, 707 F.Supp. 368, 370 (N.D.Ill.1989) ("the modern decisional trend is to not allow cross-examination into a witness's psychiatric background where such cross-examination is sought as a means of attacking the witness's credibility").

of nervousness” during his testimony. Id. at 302, 306. Outside of the jury’s presence, the witness revealed that “he had a hard time remembering things and forgot almost everything unless he used repetition or was reminded frequently.” Id. at 303. In his direct testimony before the jury, the witness acknowledged his nervous condition, treatment, medication, and memory problems. Id. at 304. On cross-examination, he was unable to remember important details of the alleged burglary, including whether the defendant took anything. Id. at 303-05. On these facts, this Court held it was not error to permit a psychiatrist to testify about the witness’s mental condition. Id. at 308. “Where, as here, the mental disability of a witness is clearly apparent and his competency is a central issue in the case, the jury need not be left in ignorance about that condition or its consequences.” Id. at 306-07. Froelich is inapposite because Simon’s mental health conditions were not “clearly apparent” and his competency was not at issue.

Here, nothing in Simon’s defense interview or testimony supported Arredondo’s claim that Simon’s addiction and mental health issues affected his memory. And Arredondo supplied no expert testimony or other evidence to rebut Simon’s testimony. Because Arredondo failed to show that Simon’s mental health issues were relevant to his credibility, the trial court correctly determined that the evidence was not admissible.

d. Even If Relevant, The Evidence Was Properly Excluded Because It Was More Prejudicial Than Probative.

Even relevant evidence is properly excluded when 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. Because evidence of Simon's addiction and mental health issues had "negligible" probative value, yet posed an "enormous" danger of unfair prejudice, the trial court properly excluded the evidence.

As explained above, the trial court correctly found that Simon's depression, anxiety, PTSD, concentration problems, and possible short-term memory loss did not implicate his ability to recall and relate the events about which he was called to testify. RP 566-67. The probative value of this evidence was therefore deemed "negligible." RP 567.

The danger of unfair prejudice, however, was "enormous." RP 567. The trial court explained: "You could label him as a mental case, if you would, and so that the jury would disbelieve anything he had to say because he has some type of psychiatric disorder." RP 567. Absent evidence that mental health issues affected Simon's ability to perceive, recall, and accurately describe events, such an inference is patently unfair.

Many people suffer from anxiety-related issues, depression, or PTSD.⁷ Yet not all mental disorders affect a person's credibility. See United States v. Lopez, 611 F.2d 44, 45 (4th Cir. 1979). Where there is no evidence that a witness's mental condition compromises his or her credibility, it would be prejudicial and intrusive to allow routine cross-examination into these private health matters.

Further, the court must weigh against the probative value of the evidence not only the risk of unfair prejudice, but also the danger of confusing the issues, misleading the jury, undue delay and waste of time.

ER 403. The Fourth Circuit aptly explained the problem:

One's psychiatric history is an area of great personal privacy which can only be invaded in cross-examination when required in the interests of justice. This is so because cross-examination of an adverse witness on matters of such personal privacy, if of minimal probative value, is manifestly unfair and unnecessarily demeaning of the witness. Moreover, such cross-examination will generally introduce into the case a collateral issue, leading to a large amount of testimony substantially extraneous to the essential facts and issues of the controversy being tried.

Lopez, 611 F.2d at 45.

Here, no evidence linked Simon's depression, anxiety, PTSD, and concentration problems to his ability to perceive, recall, and accurately describe events; these conditions therefore had no probative value. Had

⁷ See <http://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-among-us-adults.shtml> (last visited 7/28/2016) (over 18% of the U.S. adult population suffers from some type of mental illness).

Arredondo been permitted to impeach Simon with his mental health conditions, the State would have had to establish through expert testimony that such conditions do not affect perception or long-term memory. Thus, in addition to subjecting Simon to needless embarrassment and stigma, admitting Simon's mental health history would also confuse the issues and waste time and judicial resources.

Further, excluding the mental health evidence did not leave Arredondo without an effective means to attack Simon's credibility. Rather, Arredondo impeached Simon with his prolific criminal history, including multiple convictions for crimes of dishonesty. RP 600. Additionally, Arredondo established that Simon expected to receive a beneficial sentencing recommendation on a pending conviction in exchange for his testimony. RP 599. Arredondo also highlighted inconsistencies between Simon's trial testimony and his statements during the defense interview and emphasized any lapses in Simon's memory. RP 607-11, 616-17. This evidence allowed Arredondo to argue in closing that Simon has a history of dishonesty, was using the justice system to get favorable treatment, and that his ability to recall some details and not others undermined his credibility. RP 843-47. Thus, any error in barring inquiry into Simon's mental health was harmless.

Defendants have the right to cross-examine witnesses effectively, but they do not have the right to cross-examine witnesses “in whatever way, and to whatever extent, the defense might wish.” Kentucky v. Stincer, 482 U.S. 730, 739, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) (internal quotation marks omitted). The Constitution is offended only when the defendant is denied the opportunity effectively to attack the credibility of the prosecution’s witnesses. United States v. Baptista-Rodriguez, 17 F.3d 1354, 1371 (11th Cir. 1994). Here, Arredondo had no right to impeach Simon with details of his mental health and was not prevented from effectively cross-examining Simon. The trial court’s decision was not unreasonable. This Court should affirm.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION UNDER ER 404(b).

Arredondo contends the trial court erred by admitting evidence of his involvement in an uncharged drive-by shooting several months before Avila’s murder. The trial court found the State’s evidence sufficient to prove that Arredondo was involved in that gang-related crime by a preponderance of the evidence, and that its probative value outweighed its prejudicial effect. This reasonable determination should be upheld.

ER 404(b) generally prohibits the use of evidence of other crimes to prove the character of the person in order to show action in conformity

therewith. Such evidence “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). Where the State seeks to admit evidence of an uncharged crime, the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudice. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002).

Appellate courts review decisions on the admission of evidence for abuse of discretion. Darden, 145 Wn.2d at 619. Abuse exists when the court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id. “A trial court’s ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did.” State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396, 408 (2007) (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

Here, the State proffered sufficient evidence to show that Arredondo was involved in the February 2009 shooting in Toppenish. The State represented that the evidence would show that the targeted home belonged to a Sureño member and that the Sureños are rivals of

Arredondo's gang. Supp. RP 24, 26. Officers located a spent shell casing in front of the targeted home, and forensic testing showed that it had been fired by the same weapon as a spent shell casing found in a Mercedes that belonged to Arredondo. Supp. RP 24, 26. In other words, the weapon from the February shooting had been in Arredondo's car. Additionally, evidence presented during trial showed that the victim of the February 2009 shooting said the suspect's vehicle "appeared to be like a Mercedes." RP 468. The victim's residence was in Sureño territory. RP 468, 682-83. The call about the shooting there involved Norteños. RP 682. Arredondo is a Norteño. RP 683. When contacted about the shooting days later, Arredondo had the keys to the Mercedes in his possession. RP 481, 485. Arredondo also told Simon that he owned a Mercedes. RP 581.

A preponderance of the evidence means that considering all the evidence, the proposition asserted is more probably true than not true. State v. Otis, 151 Wn. App. 572, 213 P.3d 613 (2009). The trial court concluded the evidence here was sufficient to show that Arredondo was more probably involved in the February shooting than that he was not.⁸ Arredondo has not shown that no reasonable judge would have ruled as did the trial court. This Court should affirm.

⁸ The trial court did not make this ruling explicitly, but the Court of Appeals concluded that "the record is sufficient to show that the court made this finding before reaching its decision." Slip Op. at 19 n.2. Arredondo did not seek review of this conclusion.

The trial court also reasonably determined that the probative value of the 404(b) evidence outweighed its prejudicial effect. The State offered the evidence to show common scheme or plan and identity.⁹ The trial court admitted the evidence to show identity, motive,¹⁰ and intent.

In State v. Yarbrough, Division Two of the Court of Appeals held that evidence of the defendant's gang affiliation was relevant to prove motive, mental state, and the same gang aggravator charged in Arredondo's case. 151 Wn. App. 66, 84-85, 210 P.3d 1029 (2009). "Motive is an inducement which tempts a mind to commit a crime." Id. at 84 (internal quotation omitted). In that case, evidence that the defendant belonged to one gang and perceived his victim to be associated with a rival gang was "relevant to establish an inducing cause for Yarbrough to act with extreme indifference by shooting at [the victim] only a few days after the two gangs had a prior altercation." Id. at 84. The trial court in that case explained that the evidence was not admitted to show that the defendant was a criminal type, "but it's simply to show that

⁹ Although the State originally proffered the evidence in part to prove identity, the State no longer relies on that basis for admission. To be admissible to show identity by establishing a unique modus operandi, prior bad acts must have been committed in the same distinctive manner as the charged crime. State v. Foxhoven, 161 Wn.2d 168, 176, 163 P.3d 786 (2007). Drive-by shootings, unfortunately, are not so rare as to constitute a "signature"-like means of committing assault and murder. Any error in admitting the evidence to show identity is harmless, however, because the evidence was properly admitted to show motive and intent.

¹⁰ "[I]t is well established that the State can prove motive, even when it is not an element of the crime charged." State v. Yarbrough, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009).

as a member of an organization which apparently had hard feelings toward a different organization ... that of itself would provide an explanation why somebody would do [something] otherwise as inexplicable” as shooting someone without provocation. Id. at 84.

The Yarbrough court also held that gang affiliation evidence was relevant to prove the requisite mental state for first degree assault, intent to inflict great bodily injury. Id. at 86-87. As this Court has recognized, “evidence of intent ... is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (internal quotes and citations omitted). In Yarbrough, the court held that evidence of the defendant’s gang affiliation, the victim’s affiliation with a rival gang, and the two gangs’ mutual animosity were properly admitted to show the circumstances of the assault, including the relationship between the defendant and victim. 151 Wn. App. at 87.

As in Yarbrough, here the February shooting demonstrated the extent of Arredondo’s animosity toward rival Sureños, which was probative of his motive and intent in chasing down and shooting at a carload of Sureño members in the incident charged. The other acts evidence, together with evidence of the Sureño victims’ appearance at the

Norteño-dominated Toppenish party, also showed the context of the assaults and murder and supported the State's theory that Arredondo acted with the requisite intent to cause death and inflict great bodily injury. Like Yarbrough, this evidence was also relevant to prove the street gang aggravator, which required the State to prove that the murder of Avila and assaults on his companions were based on Arredondo's desire "to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang ..., its reputation, influence, or membership." RCW 9.94A.535(3)(aa); Yarbrough, 151 Wn. App. at 84.

The trial court concluded that the evidence of the February 2009 shooting was more probative than prejudicial. But to further ensure that the evidence would not unfairly prejudice Arredondo, the trial court gave limiting instructions:

Ladies and gentlemen of the jury, I need to give you a limiting instruction at this time. There's going to be testimony that's offered, I believe starting now, regarding an incident that allegedly occurred on February the 9th of 2009.

That – the testimony regarding that particular incident can be considered by you in only one way. Okay? You can only consider it in regard to the issue of whether – the issues of identity and motive and intent of the Defendant. Okay?

So you cannot consider it as to whether Mr. Arredondo may or may not be a bad person or may or may not have acted in a similar fashion on February the 9th of 2009 to what he's alleged to have done on December the 5th of 2009. You can only consider the testimony regarding the incident of February 9, 2009, only on the issues of motive, intent, and identity.

RP 466. See also RP 478-79. The court also gave the jury a written instruction, reiterating the limitation above and stating that “any discussion of the evidence during your deliberations must be consistent with this limitation.” CP 63. Juries are presumed to follow the court’s instructions. State v. Dye, 178 Wn.2d 541, 309 P.3d 1192 (2013).

The trial court has wide discretion in balancing the probative value of evidence against its potential prejudicial effect. This Court reviews the trial court’s balancing “with a great deal of deference, using a ‘manifest abuse of discretion’ standard of review.” State v. Luvone, 127 Wn.2d 690, 707, 903 P.2d 960 (1995). While other courts may come to a different conclusion, Arredondo has not shown that “no reasonable person would have decided the issue as the trial court did.” State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). Accordingly, the trial court did not abuse its discretion and this Court should affirm.

D. CONCLUSION

For the reasons set forth above, the State respectfully asks this Court to affirm Arredondo’s convictions.

DATED this 4th day of August, 2016.

Respectfully submitted,

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney

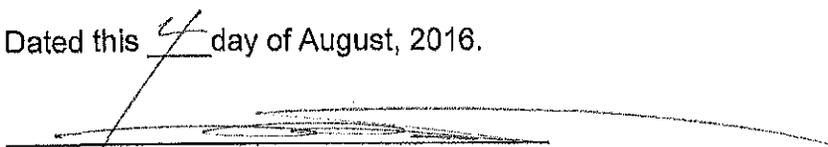
By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Oliver Davis, the attorney for the appellant, at Oliver@washapp.org, containing a copy of the Supplemental Brief of Respondent, in State v. Fabian Arredondo, Cause No. 92389-2, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 4 day of August, 2016.


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Done in Seattle, Washington

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Good afternoon,

Attached for filing in the above-referenced case, please find the **SUPPLEMENTAL BRIEF OF RESPONDENT**.

Please let me know if you should have difficulties opening the attachment.

Thank you,

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