IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ULISES FLORES-MARTINEZ, Appellant.	No. 40896-1-II UNPUBLISHED OPINION

Johanson, J. — Ulises Flores-Martinez appeals jury convictions for malicious harassment and felony harassment. He claims (1) the trial court improperly admitted evidence obtained through an unreasonable search and seizure; (2) his defense counsel was ineffective for failing to move to suppress evidence obtained through an unreasonable search and seizure; and (3) the trial court improperly admitted evidence of Flores-Martinez's alleged gang affiliation. We affirm because Flores-Martinez failed to preserve his search and seizure issue and demonstrate ineffective assistance of counsel; also, the trial court did not abuse its discretion in admitting gang evidence under ER 404(b).

FACTS

In January 2010, Ambar Perez drove her boyfriend, Kenton Bozeman, and their baby to the Chehalis Safeway. While Perez shopped for groceries, Bozeman waited in the car with the baby. As Perez left Safeway, a group of seven to nine men who had arrived in a white Escalade—including Angel Velasquez, Bernardo Trevino, and Ulises Flores-Martinez—stood roughly 15 feet from her car. Velasquez, Trevino, and Flores-Martinez approached her car and "started to antagonize Kenton." 1 Verbatim Report of Proceedings (VRP) at 35-36. A fight

broke out between these men and Bozeman and Perez. The group threatened Bozeman with racial slurs, and they stated they had a gun.[1]

Eventually, an older man, who had also arrived in the white Escalade, broke up the fight. As Velasquez, Trevino, and Flores-Martinez walked away from Bozeman and Perez, they flashed what Bozeman and Perez described as LVL[2] gang signs.[3] Bozeman and Perez also testified that these men made various statements implying their membership in LVL.[4] And, at least some of the men wore royal blue, LVL's color. Trevino later testified to his own membership in LVL, but

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[1] The men disparaged Bozeman and his baby with various racial slurs. Bozeman, an African American, testified that he believed these men targeted him and Perez, a Hispanic, because they are an interracial couple.

[2] LVL is the common abbreviation for "Lil Valley Lokotes."

[3] Perez testified on direct examination:

> Q: How did you know [about the gang signs]? What were the people doing with their hands?
> A: Throwing up an LVL sign.
> Q: Have you seen an LVL sign?
> A: Yeah. They're on the side of buildings in Chehalis. People put them in graffiti. They're all over in town.
> Q: Are you familiar or have you ever seen people that have held themselves out to be gang members in the past?
> A: Yes.
> Q: Specifically the LVL gang?
> A: Yes, I saw.
> Q: And you saw [Trevino] make the hand signal that you recognize to be the LVL hand signal?
> A: Yes, I did.
> Q: Did you see Ulises [Flores-Martinez] make that hand signal?
> A: I believe so.

1 VRP at 42.

[4] Perez testified that she heard these men saying: "Oh, we're LVL" and "We're LVL, bitch. We're not scared of nobody." 1 VRP at 48, 55.

other witnesses differed in their understanding whether Velasquez or Flores-Martinez belonged to LVL.

Bozeman testified that immediately following the Safeway altercation, the men climbed into their Escalade and yelled, "Follow us if you want to fight." 1 VRP at 94. Bozeman followed the Escalade, identified the neighborhood the Escalade entered, and then returned to Safeway in 60 to 90 seconds. Perez waited for police at Safeway.

Police arrived at Safeway and spoke to Perez and Bozeman for about 10 minutes. Police then left Safeway and drove to the neighborhood where Bozeman had followed the Escalade. After some initial confusion, officers proceeded to an apartment Chehalis Police Officer Jeffrey Elder described as "full of Hispanics." 1 VRP at 25. Velasquez testified that police "kicked the door in."[5] 2 VRP at 208. Officers instructed the men in the apartment to come outside so the victims could identify the people involved in the Safeway incident.

Perez and Bozeman identified Flores-Martinez as one of the individuals from Safeway; and, as Flores-Martinez was being handcuffed, he asked Officer Elder why he was arresting him. Officer Elder told Flores-Martinez that his arrest related to the incident at Safeway. Flores-Martinez then stated that he had not been at Safeway that night. Officers had not advised Flores-Martinez of his rights to this point.

The State charged Flores-Martinez with malicious harassment[6] and felony harassment

[5] Aside from Velasquez's testimony the record does not indicate how police achieved entry into this house, whether police had a warrant, or whether anybody offered consent.

[6] RCW 9A.36.080(a) and/or (c).

(threat to kill).[7] Flores-Martinez filed a motion in limine to preclude the State from introducing evidence of Flores-Martinez's gang membership or affiliation. Based on the State's offer of proof, the trial court denied the motion and determined that evidence of Flores-Martinez's gang membership had probative value.

The jury convicted Flores-Martinez on both counts. Flores-Martinez timely appeals.

ANALYSIS

I. Search and Seizure

Flores-Martinez argues that police unlawfully entered a residence without a search warrant and unlawfully seized him by ordering him out of the residence and parading him and at least 13 other men in front of Perez and Bozeman for identification. However, Flores-Martinez failed to preserve this issue for appeal by not raising these issues at trial; accordingly, the record is insufficient to determine if the search and seizure were illegal.

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. U.S. Const. amend IV. Article I, section 7 of the Washington Constitution states: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 requires "no less" than the Fourth Amendment. *State v. Patton*, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). A valid warrant, subject to a few jealously guarded exceptions, establishes the requisite "authority of law." *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010) (quoting Wash. Const. art. 1, § 7).

A party must raise an issue at trial to preserve it for appeal, unless the party can show the presence of a "'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d

[7] RCW 9A.46.020(1)(a)(i) and (2)(b)(ii).

292, 304, 253 P.3d 84 (2011) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Issue preservation rules "encourage 'the efficient use of judicial resources' . . . by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals." *Robinson*, 171 Wn.2d at 304-05 (quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). A party may still raise an issue for the first time on appeal if she or he can show that the claimed error resulted in a manifest error affecting a constitutional right. RAP 2.5(a)(3).

We employ a multi-pronged analysis to determine whether an error is a "manifest error affecting a constitutional right" under RAP 2.5(a)(3). *See State v. Grimes*, 165 Wn. App. 172, 179-80, 267 P.3d 454 (2011). First, we must determine whether an alleged error is truly constitutional; second, we must determine whether the alleged error is "manifest." *Grimes*, 165 Wn. App. at 180. And, under RAP 2.5(a)(3), a manifest error requires a party to show actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences at trial. *O'Hara*, 167 Wn.2d at 99.

In determining whether the alleged error was identifiable, the trial record must be sufficient to determine the merits of the claim. *O'Hara*, 167 Wn.2d at 99. A party fails to demonstrate actual prejudice, and thus an error is not manifest, if the record lacks the facts necessary to adjudicate the claimed error. *O'Hara*, 167 Wn.2d at 99.

At trial, Flores-Martinez did not seek suppression of any evidence based on an unreasonable search or seizure. Therefore, to bring his claims for the first time on appeal, Flores-

Martinez must demonstrate that any search and seizure error was of a constitutional magnitude and manifest. *See Grimes*, 165 Wn. App. at 180. The State concedes that Flores-Martinez's claims of error under the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution constitute issues of "constitutional magnitude." Br. of Resp't at 7. Therefore, we must then determine whether the errors Flores-Martinez alleges were "manifest." *See Grimes*, 165 Wn. App. at 180.

Flores-Martinez must show actual prejudice in order to demonstrate manifest error. *See O'Hara*, 167 Wn.2d at 99. But, the record is nearly bare regarding the circumstances surrounding the lawfulness of the search. It is therefore impossible to determine whether the error, if any, prejudiced Flores-Martinez, and was thus manifest. Specifically, the record does not convey whether or not police obtained a warrant or had consent to enter the apartment. The record is similarly sparse in its support for Flores-Martinez's claim that he was unlawfully seized. The record demonstrates that police did seize Flores-Martinez, but the parties never developed the record of the specific circumstances surrounding the seizure.

Ultimately, Flores-Martinez must demonstrate that the alleged errors had practical and identifiable consequences at trial. *See O'Hara*, 167 Wn.2d at 99. But because Flores-Martinez failed to request a suppression hearing, the State had no opportunity to demonstrate the legality of the search. From this record, we cannot determine whether the trial court would have granted a motion to suppress; thus, Flores-Martinez cannot show prejudice. *See O'Hara*, 167 Wn.2d at 99.

II. Effective Assistance of Counsel

Flores-Martinez next argues that his defense counsel ineffectively assisted him because he

failed to seek suppression of evidence gained through an unlawful search and seizure. To prevail on an ineffective assistance claim, a defendant must overcome "'a strong presumption that counsel's performance was reasonable.'" *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). An appellant must show: (1) defense counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant. *McFarland*, 127 Wn.2d at 334–35. A failure to make either showing terminates review of the claim. *State v. Fenwick*, 164 Wn. App. 392, 406, 264 P.3d 284 (2011), *review denied*, 173 Wn.2d 1021 (2012). And, where a party brings a claim on direct appeal, we will not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335.

We must decide the issue of ineffective assistance of counsel based on the record before us. *Fenwick*, 164 Wn. App. at 406. As explained above, because Flores-Martinez failed to seek the suppression of evidence at trial, the State had no opportunity to demonstrate the legality of the search and seizure. Because the record does not indicate whether or not the trial court would have granted the suppression motion, Flores-Martinez cannot show prejudice. *See O'Hara*, 167 Wn.2d at 99.

Thus, even assuming that trial counsel acted deficiently, Flores-Martinez fails to show prejudice resulting from ineffective assistance, and we terminate our review of this claim. *See Fenwick*, 164 Wn. App. at 406.

III. Evidence of Gang Affiliation

Flores-Martinez asserts that the trial court erroneously admitted irrelevant and prejudicial

evidence regarding his alleged gang affiliation. Specifically, he claims the trial court should have excluded evidence of his gang affiliation under ERs 402, 403, and 404(b). After hearing an offer of proof and witness testimony, the trial court did not abuse his discretion by admitting evidence of gang affiliation.

A. LVL Affiliation

As a preliminary matter, Flores-Martinez asserts that the State failed to establish that he belonged to the LVL gang and that the State failed to prove LVL qualifies as a criminal gang. Prior to associating a defendant with a gang, the trial court must find by a preponderance of the evidence that the gang exists. *See State v. Asaeli*, 150 Wn. App. 543, 577-78, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009). The trial court should find insufficient evidence of a gang's existence when evidence consists merely of conclusory testimonial statements given without basis for belief or knowledge or without some definition of "gang." *See Asaeli*, 150 Wn. App. at 577. Evidence is also insufficient if the actions associated with the accused may merely be "ganglike traditions that the defendants [] absorbed into their culture." *See Asaeli*, 150 Wn. App. at 577-78.

Here, lay witnesses testified to having personal contact with LVL members, seeing LVL graffiti in the local community, and witnessing individuals using LVL gang signs. Also, one witness testified to having been a past member of LVL while another testified to his current LVL membership and using LVL signs on the night of the Safeway altercation. This evidence establishes by a preponderance of the evidence that the LVL gang exists.

In addition, Flores-Martinez asserts that before evidence of the gang can be admitted, the

State must prove that the LVL gang meets the definition of "criminal [street] gang." Br. of Appellant at 20. He cites no authority supporting his assertion. Thus, the trial court properly allowed the State to associate Flores-Martinez with LVL. *See Asaeli*, 150 Wn. App. at 577-78.

B. Admission of Gang Affiliation Evidence Standard of Review

We review evidentiary rulings for abuse of discretion. *State v. Morales*, 154 Wn. App. 26, 37, 225 P.3d 311, *affirmed in part, reversed in part*, 173 Wn.2d 560 (2012). We will not disturb a trial court's ER 404(b) ruling absent a manifest abuse of discretion such that no reasonable trial judge would have ruled as the trial court did. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State v. Lord*, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A trial court abuses its discretion when it relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Lord*, 161 Wn.2d at 284.

Gang evidence falls within the scope of ER 404(b). *Yarbrough*, 151 Wn. App. at 81. A trial court may admit gang evidence offered for proof of motive, intent, or identity. *Yarbrough*, 151 Wn. App. at 81. But, before the court may admit such evidence, it must (1) find by a preponderance of the evidence that the misconduct occurred; (2) identify the purpose for which the evidence is sought to be introduced; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against the prejudicial effect. *Yarbrough*, 151 Wn. App. at 81-82.

To determine whether misconduct occurred, the trial court need only hear testimony when

it cannot fairly decide—based upon the proponent's offer of proof—that the ER 404(b) incident probably occurred. *State v. Kilgore*, 107 Wn. App. 160, 190, 26 P.3d 308 (2001), *affirmed*, 147 Wn.2d 288 (2002). A court should hear this offer of proof for admissibility of evidence outside the presence of the jury. *Kilgore*, 107 Wn. App. at 190.

Here, prior to trial, the State made an offer of proof in opposition to Flores-Martinez's motion to prohibit introduction of gang affiliation evidence. The State offered that Flores-Martinez, along with other LVL members, intentionally targeted Perez and Bozeman because they are an interracial couple with an interracial baby. The State argued that Flores-Martinez's gang affiliation was relevant to show why the victims were placed in reasonable fear that Flores-Martinez would carry out his threats because the victims knew LVLs disapprove of interracial relationships.

Further, the State offered that Flores-Martinez and his associates identified themselves as LVL members at Safeway during the altercation; they wore colors the victims knew to be LVL colors; members of the group flashed LVL gang signs during the altercation; and that they worked as a group.

The trial court determined that gang affiliation evidence had sufficient probative value with regard to the charged crime. The trial court accepted the offer of proof that Flores-Martinez and his associates selected Bozeman and Perez because of their status as an interracial couple; that the victims knew of the LVL gang, which led to their fear and whether their fear was reasonable; and that Flores-Martinez's group identified themselves as LVLs and wore LVL colors. The trial court concluded that "all of those things I think go to the reasonableness of the alleged victims' fear and

has to do with the motivation which is specifically charged." 1 VRP at 13.

The court's findings satisfy the four *Yarbrough* elements. The court: (1) indicated that it found by a preponderance of the evidence that the misconduct at Safeway occurred; (2) identified that the State would introduce the evidence of gang affiliation to show motive; (3) determined that the evidence was relevant to prove an element of the crime charged—the victim's reasonable fear; and (4) weighed the probative value against prejudicial effects stating, "In balance [], I think there is certainly probative value here given this crime. I believe it is directly related based on the offer of proof." 1 VRP at 12; *see Yarbrough*, 151 Wn. App. at 81-82. Therefore, the trial court did not abuse its discretion in allowing evidence of Flores-Martinez's gang affiliation.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Van Deren, J.

Worswick, A.C.J.