IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRE L. BONDS, Appellant.	No. 40069-3-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Andre L. Bonds guilty of first degree assault. RCW 9A.36.011(1)(c). In this appeal, Bonds argues that the trial court erroneously admitted gang evidence. He adds that his judgment and sentence contains a scrivener's error. In a pro se statement of additional grounds (SAG),[1] Bonds also contends that the evidence was insufficient to prove his intent and motive to commit assault or his infliction of great bodily harm. Finding no reversible error, we affirm but remand for correction of the judgment and sentence.

FACTS

Late one evening, Bonds went to a Tacoma bar to celebrate a friend's birthday. While there, he greeted Roosevelt Ports, and Ports introduced Bonds to his friend, Tommy Pitts. Bonds

[1] RAP 10.10.

saw Ports and Pitts at another bar before ending up at a Denny's restaurant, where he again saw the two men.

Pitts and Bonds exchanged words and then blows outside the restaurant. They separated, and Bonds went to his car until his friend, Larry Brown, drove up. Pitts again confronted Bonds in the parking lot and threw the first punch. Bonds hit Pitts in the head and knocked him to the pavement. Bonds then stood over Pitts, who was lying on the ground on his back, and stomped Pitts's head into the pavement. Several customers and employees inside Denny's witnessed the altercation.

Bonds left the scene with Brown, and officers responded to the waitress's 911 call. Police and medical aid arrived to find Pitts unconscious, with severe trauma to his right eye socket and a pool of blood under his head. Shoeprints were on his forehead. Pitts was taken to the hospital, where doctors determined that he had suffered serious eye and brain injuries.

Detective John Ringer interviewed Bonds following his arrest. Bonds said that Pitts was from "Cali," or California, and had felt "disrespected" when Bonds was unimpressed. 8 Report of Proceedings (RP) at 656, 658. Bonds said that Pitts started the fight after insulting him and that no weapons were involved. Bonds admitted kicking Pitts two or three times. When the detective asked why he "put the boots" to Pitts, Bonds replied that Pitts needed to know where he was from, explaining that he told Pitts, "I'm an original from here. Don't come talking like that." 7 RP at 631.

The State charged Bonds with first degree assault. During a CrR 3.5 hearing, Detective Ringer described Bonds's statements to him and explained that the reference to being "an original" meant that Bonds was an "original gangster," or a founder of a Tacoma gang who

carried special status in the gang community.[2] 1 RP at 44. Defense counsel conceded that Bonds's statements were voluntary but sought to exclude them under ER 404(b) and ER 403. The State argued that Bonds's statements were admissible as res gestae evidence and as evidence of motive and intent under ER 404(b).

The trial court ruled that Bonds's statements were admissible under ER 404(b) because they were relevant to motive and intent, but the court excluded any evidence about Bonds's gang history and any speculation about what his reference to being "an original" meant. The detective could testify as to the quotations contained in his report, but he could not interpret them.

Ten eyewitnesses then testified about the fight between Bonds and Pitts and said that Bonds, the taller of the two by approximately one foot, had stomped Pitts in the head after he fell to the ground. (Bonds is approximately six feet six inches tall and Pitts is approximately five feet six inches tall.) None described Pitts as making any aggressive movement after he fell to the ground; most stated that he lay motionless while Bonds stomped him. A waitress stated that Bonds stomped Pitts in the head more than 10 times. Pitts testified that he could not remember the altercation and that he now has vision and memory problems. One of his doctors testified that Pitts has suffered permanent brain damage.

Detective Ringer testified that Bonds told him he kicked Pitts because the latter had insulted him, and the detective repeated Bonds's statement that he was "an original." 7 RP at 631. Bonds admitted that he went to Brown's house after the altercation and wiped the blood from his shoes with a towel. Officers found a bloody towel at Brown's house.

[2] Rap artist Ice-T coined the phrase "Original Gangster" in 1991. *United States v. Cook*, 550 F.3d 1292, 1296 n.3 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2819 (2009).

Bonds testified that Pitts started the fight and that he kicked him in the face three times because he thought Pitts was reaching toward his midsection for a weapon. "I just wanted to do enough so I can get away from him." 11 RP at 1186. He did not remember telling the police that no weapons were involved.

The jury found Bonds guilty of first degree assault, and the trial court imposed a mid-range sentence of 276 months. Bonds appeals.

ANALYSIS

Admissibility of "Original" Statement

We review the correct interpretation of an evidentiary rule de novo as a question of law. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Once the rule is correctly interpreted, we review the trial court's decision to admit or exclude evidence for abuse of discretion. *DeVincentis*, 150 Wn.2d at 17. Bonds argues that the trial court's decision to admit his statement that he was "an original" is reversible error under either standard.

Gang evidence is admissible in a criminal trial if there is a nexus between the crime and gang membership. *State v. Scott*, 151 Wn. App. 520, 521, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010). Such evidence is inherently prejudicial, however, and is measured under the standards of ER 404(b). *Scott*, 151 Wn. App. at 526; *see also State v. Asaeli*, 150 Wn. App. 543, 579, 208 P.3d 1136 (referring to "inflammatory nature of gang evidence generally"), *review denied*, 167 Wn.2d 1001 (2009). Evidence of other bad acts is admissible under ER 404(b) when a trial court identifies a significant reason for admitting the evidence and determines that the relevance of the evidence outweighs any prejudicial impact. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995); *Scott*, 151 Wn. App. at 527. The trial court must balance these interests on

the record. *Scott*, 151 Wn. App. at 527.

Bonds sought to exclude evidence of his gang affiliation, including his reference to being "an original." RP (Aug. 10, 2009) at 36. The State responded that his statements were admissible under ER 404(b) to explain the intent, motivation, and res gestae of the assault. In addition to the "original" statement itself, the State wanted Detective Ringer to explain what it meant. Defense counsel objected to any reference to this statement and suggested this rephrasing: "I'm from Tacoma, you don't bring your California trash talk and talk to me like that." RP (Aug. 10, 2009) at 36. The trial court excluded any explanation of Bonds's statements to Ringer but ruled that the statements themselves were admissible:

> One, I believe that the State has established by a preponderance of the evidence that the statements in question were made by the defendant and those statements, pursuant to Criminal Rule 3.5, can be used against him at trial. And those statements go to both motive and intent. However, I'm going to preclude any evidence regarding Mr. Bonds' gang history and I'm going to preclude Detective Ringer from speculating about or giving his opinion as to what original means. And I believe that in this case, Mr. Bonds has said enough and it's obvious that he had resentment from Mr. Pitts because Mr. Pitts was mouthing off about being from California or Cali and Mr. Bonds had problems with that and they had problems with each other.
>
> But the most important thing is that to allow Detective Ringer to get into the issue of gang affiliation, which is what opening the door to original gangster means, that the probative value of that is outweighed by the potential prejudice because once this is put in the light or the jury believes that this is gang related, it could lead to confusion on the part of the jury and prejudice the defendant and the prejudice outweighs any probative value of the testimony of Detective Ringer's testimony or speculation or opinion about what original means.

RP (Aug. 10, 2009) at 41-42. Bonds's statements to the detective spoke for themselves; the court asked the prosecuting attorney "to make it clear to Detective Ringer that when he testifies, he testifies from the words in quotes in the report, no additions, no interpretations, just the straight deal." RP (Aug. 10, 2009) at 43.

The State contends that Bonds failed to preserve his challenge to this ruling by failing to object to subsequent testimony concerning his "original" statement. An objection was not necessary, however, because Bonds had a standing objection after the trial court denied his motion in limine to exclude the statement. *See State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995) (losing party is deemed to have standing objection where judge has made final ruling on motion in limine).

In justifying the trial court's decision to admit Bonds's "original" statement, the State argues first that it was not gang evidence subject to ER 404(b) because the trial court sanitized it into a pedestrian explanation of why the fight took place. We agree that the statement was not gang evidence subject to ER 404(b), but for different reasons.

1. Res Gestae Exception

In addition to the purposes listed in ER 404(b), evidence of other misconduct is admissible as part of the res gestae of the crime if it is so connected in time or place that proof of the misconduct constitutes proof of the history of the crime charged. 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 404.18 at 526-27 (5th ed. 2007); *see also Lane*, 125 Wn.2d at 831 (evidence may be admitted as part of the res gestae to complete the story of the crime on trial by proving happenings near in time and place). Evidence admitted under this exception to ER 404(b) must be a "piece in the mosaic" and necessary to depict a complete picture for the jury. *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). Testimony concerning a defendant's escalating gun use was admissible as res gestae evidence to show his quest for greater gang status, thereby permitting the jury to get the whole picture and "try to make some sense out of a senseless crime," in *State v. Boot*, 89 Wn. App. 780, 789-90, 950 P.2d

964, *review denied*, 135 Wn.2d 1015 (1998).

Bonds's statement about being an "original" was an integral part of the assault charged. He cited this statement to explain both what he said to Pitts before he kicked him and why he kicked him. Rather than constituting a prior bad act, the statement was part of the history of the assault and thus admissible under the res gestae exception to ER 404(b).

The statement also was admissible to rebut Bonds's claim of self-defense. Misconduct that is part of the res gestae may be admissible if relevant to rebut a material assertion by the defendant, such as a claim of self-defense. 5 Tegland, *supra*, § 404.18 at 528 (citing *State v. Thompson*, 47 Wn. App. 1, 11, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987)). Bonds explained at trial that he kicked Pitts because he thought Pitts was reaching for a gun, and his prior "original" statement contradicted that explanation and undermined his claim of self-defense.

2. Evidence of Motive

The State argues in the alternative that the trial court properly admitted the statement under ER 404(b) to prove Bonds's motive in assaulting Pitts. Courts have admitted gang affiliation evidence to establish the motive for a crime. *See State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009) (gang-related evidence properly admitted under ER 404(b) because relevant to defendant's motive and mental state in committing murder and assault); *State v. Campbell*, 78 Wn. App. 813, 821-22, 901 P.2d 1050 (gang evidence properly admitted as proof of defendant's premeditation, motive, and intent), *review denied*, 128 Wn.2d 1004 (1995).

Bonds told the detective that he kicked Pitts because, as "an original," he felt insulted by Pitts's comments and attitude. This statement had a nexus to the crime and thus was also admissible as evidence of motive under ER 404(b).

3. Other Gang-Related Testimony

Bonds points to what he characterizes as additional gang-related testimony to reinforce his argument that admission of the "original" statement was error. He complains that (1) Detective Ringer testified that Bonds referred to Pitts by a nickname; (2) Ringer described Bonds and Brown as close associates or friends who shared similar nicknames or street names; (3) Ports referred to Brown as "Stretch" during his testimony (8 RP at 750); and (4) another officer described Ports as saying that "Stretch," aka Bonds, had injured Pitts (thus providing evidence of the shared nickname). RP (Aug. 12, 2009) at 16. Ports also testified that Bonds told him to take his "home boy," Pitts, from the parking lot. 8 RP at 776. Bonds did not object to any of this testimony.

Bonds also complains about Detective Ringer's testimony that Bonds explained the fight by stating, "[Pitts] was the aggressor. I've just been doing it longer, I guess." 8 RP at 657. When asked about that statement, the detective replied, "Bonds indicated he literally had been doing it longer than the victim had and was better at it." 8 RP at 657. Bonds now contends that this testimony implied he had a history of violence. He also complains about the detective's testimony that Bonds believed Ports was working as a police informant, which Bonds now contends suggested an insider's knowledge of criminal activity. Again, there were no timely objections to this testimony,[3] and the fact that it may have had some prejudicial effect did not render it inadmissible. ER 403.

The trial court was careful to exclude irrelevant gang-related evidence from the jury when defense counsel so requested. On cross-examination, Bonds denied making the "original"

[3] The defense did object to Ringer's testimony about Ports's alleged informant status after the detective testified. The trial court found no violation of its pretrial ruling and no prejudice.

statement but volunteered that he described himself as "the original brother from Tacoma" who did not need to get involved in "this foolishness." 11 RP at 1213. The trial court granted the defense motion to strike this response and the preceding question, and it permitted counsel to caution Bonds about such testimony. The trial court excluded evidence that officers found "dog tags" with street names in Brown's car, and it prohibited Detective Ringer from testifying that Bonds said he was not impressed with Pitts's California credentials because he had spent seven years in a California federal prison with real gangsters. The trial court also prevented Ringer from testifying about Ports's involvement in a gang-related assault after Bonds asked if he was a police informant, and it prevented Ports from testifying about anyone's gang affiliation. The trial court was careful to "sanitize" the evidence when requested and did not abuse its discretion in admitting the gang-related testimony set forth above.

4. Probative Value versus Prejudicial Effect

Bonds makes the related argument that the trial court erred in failing to balance the probative value of the "original" statement against its prejudicial effect. Such a balancing on the record is required for ER 404(b) evidence, and res gestae evidence should be excluded under ER 403 if it is unfairly prejudicial. *Scott*, 151 Wn. App. at 527; 5D Karl B. Tegland, Courtroom Handbook on Washington Evidence, Rule 404(b) at 242 (2010). The trial court did conduct a balancing test concerning the statement and its meaning, however, following which the trial court excluded any explanation of the statement as overly prejudicial. As the trial court later explained, "When you say I'm the original gangster, then that . . . tilts it where the prejudice outweighs the probative value, and that's why I have drawn that line there." 8 RP at 730. We agree that the "original" statement by itself was not unfairly prejudicial.

5. Absence of Limiting Instruction

Finally, Bonds argues that the trial court erred when it admitted ER 404(b) evidence without giving the jury a limiting instruction. If ER 404(b) evidence is admitted, the trial court must give a limiting instruction to the jury specifying how the evidence may be used. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). But a trial court is not required to give such an instruction sua sponte. *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011). Bonds did not request a limiting instruction, so the trial court did not err in failing to give one.

We hold that Bonds's "original" statement was admissible under the res gestae exception and as evidence of motive under ER 404(b) despite the absence of a limiting instruction. *See State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (appellate courts may affirm the trial court on any ground the record supports). Consequently, the trial court did not abuse its discretion in finding the "original" statement admissible.

Sufficiency of the Evidence

Bonds argues in his SAG that the evidence was insufficient to prove his motive and intent to commit first degree assault or to establish that Pitts suffered great bodily harm. Evidence is sufficient if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201.

To convict Bonds of first degree assault, the State had to prove that he acted with intent to inflict great bodily harm and that he committed assault with the force or means likely to produce great bodily harm or with the actual infliction of great bodily harm. RCW

9A.36.011(1)(a), (c). The trial court defined "[g]reat bodily harm" for the jury as "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." Clerk's Papers (CP) at 61; *see* RCW 9A.04.110(4)(c). The trial court also instructed the jury that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime." CP at 62.

Bonds argues that the evidence is insufficient to show that Pitts suffered great bodily harm as a result of the assault because there is nothing permanent about his disfigurement, memory loss, or brain impairment. This contention ignores Pitts's testimony that he has suffered brain damage and has been told he will never be the same, as well as his doctor's testimony that Pitts incurred permanent brain damage as a result of the assault. The physician also testified that the deformity of Pitts's face and eye after the assault showed an application of "very significant force" from more than one blow, and he added that Bonds's actions in stomping Pitts's head could cause traumatic brain injury. 10 RP at 1091. When viewed in the light most favorable to the State, this evidence shows that Bonds assaulted Pitts with the force or means likely to produce great bodily harm and that he inflicted great bodily harm.

The State was not required to prove Bonds's motive, or his inducement to commit the assault. *See Boot*, 89 Wn. App. at 789 (evidence showing motive may be admissible, but State is not required to prove motive as an element of offense). Bonds's intent to commit assault was established by evidence that he repeatedly stomped Pitts's head and face. *See State v. Pierre*, 108 Wn. App. 378, 386, 31 P.3d 1207 (2001) (intent to cause great bodily harm shown by defendant's actions in continuously kicking victim's head).

Scrivener's Error

Finally, Bonds argues that a remand is necessary because the judgment and sentence incorrectly lists the date of his offense as "12/08/09." CP at 109. Bonds is correct; his offense occurred on "the 9th day of December, 2008." CP at 29. We remand for correction of this error. *See* CrR 7.8(a) (court may correct clerical mistake in judgment at any time); *In re Pers. Restraint of Mayer*, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (remedy for citation error in judgment and sentence is remand for correction of clerical/scrivener error).

We affirm the conviction but remand for correction of the current offense date in Bonds's judgment and sentence.

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.

QUINN-BRINTNALL, J.

I concur:

ARMSTRONG, J.

Worswick, A.C. J. (concurring in the result) — I concur with the majority as to the sufficiency of the evidence and the scrivener's error. I write separately because I disagree with the majority in two respects. First, I disagree that Andre Bonds's "original from here" statement constituted "gang evidence." 7 Report of Proceedings at 631. And second, assuming the evidence *was* gang evidence, I disagree with the majority's holding that it was admissible despite the trial court's ruling that gang evidence was more prejudicial than probative in this case.

The majority holds that "the statement was not gang evidence subject to ER 404(b)." Majority at 6. Based on the majority's subsequent analysis, the majority apparently means that the statement was gang evidence *subject* to ER 404(b), but *within an exception* and thus admissible under ER 404(b). I disagree with the majority's conclusion on this point.

The State argues that Bonds's statement, without any explanation of gang culture, is not ER 404(b) evidence because the jury was never presented with evidence connecting the statement to gang affiliation. In my view, the State is correct. There was no evidence presented to the jury that would have enabled it to conclude that the word "original" was gang related. Without any such evidence, Bonds's statement was not "[e]vidence of other crimes, wrongs or acts" governed by ER 404(b).

Because the evidence was not gang evidence and did not relate to "other crimes, wrongs or acts," ER 404(b) was not relevant to its admissibility. I believe the majority's analysis of possibly applicable exceptions to ER 404(b) is therefore unnecessary and ill-advised. By applying ER 404(b) to evidence outside that rule's ambit, the majority risks expanding the exceptions to ER 404(b), which already come close to swallowing the rule. The majority also risks causing confusion as to when ER 404(b) applies. It is important to recognize that by its plain terms, ER

404(b) applies only to evidence of "other crimes, wrongs, or acts." I would hold that Bonds's statement was not an "other" crime, wrong, or act and thus outside the scope of ER 404(b).

If one assumes that Bonds's "original" statement was gang evidence subject to ER 404(b), then the majority's analysis usurps the trial court's role in weighing the probative and prejudicial nature of ER 404(b) evidence. Even if a trial court finds evidence of "other crimes, wrongs, or acts" falls under an exception to ER 404(b), the evidence is inadmissible unless the court finds on the record that the evidence's probative value exceeds its prejudicial effect. *State v. Tharp*, 96 Wn.2d 591, 595, 637 P.2d 961 (1981). Such balancing is within the sound discretion of the trial court, not the court of appeals. *See State v. Tharp*, 27 Wn. App. 198, 206, 616 P.2d 693 (1980).

This court reviews a trial court's balancing of probative value against prejudicial effect for abuse of discretion. *Tharp*, 27 Wn. App. at 206. Unless the trial court abused its discretion in holding that evidence of Bonds's gang affiliation was more prejudicial than probative, this court must abide by that ruling. But the majority, by declaring the statement to be gang evidence but holding it admissible under ER 404(b), disregards that standard of review.

To be sure, the trial court found the "original" statement to be more probative than prejudicial. But this ruling was premised on the trial court's finding that the statement, by itself, was *not* gang evidence. The trial court excluded all evidence of Bonds's gang affiliation, finding it more prejudicial than probative. As such, if the trial court erred in finding that the statement was not gang evidence, then the statement should have been excluded per the trial court's ruling excluding gang evidence. Unless the trial court abused its discretion by finding all gang evidence more prejudicial than probative, this court may not subvert that ruling to uphold the admittance of gang evidence. I respectfully submit that the majority errs by implicitly overruling the trial court's

decision on this point without even addressing the appropriate standard of review.

I would hold that the trial court did not abuse its discretion in finding that Bonds's statement was not gang evidence, and as such, was more probative than prejudicial and admissible. Accordingly, I concur in the result only as to this issue. But because the majority's analysis applies ER 404(b) beyond its terms and disregards the trial court's exclusion of gang evidence, I cannot accept the majority's reasoning. I concur in all other respects.

I concur in the result.

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WORSWICK, A.C.J.