

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 28170-1-III**

**Respondent,**

)

)

) **Division Three**

**v.**

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)

**JAVIER CALDERON, JR.,**

) **UNPUBLISHED OPINION**

)

**Appellant.**

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Kulik, C.J. — Javier Calderon, Jr., appeals his conviction for first degree robbery. He argues the trial court committed reversible error by admitting evidence related to his gang affiliation, which he contends was irrelevant, unfairly prejudicial, and improper propensity evidence. To be admitted, gang affiliation evidence must show a nexus between the gang affiliation and the crime. Here, it did not. And we cannot say that the error was harmless. Therefore, we must reverse the conviction and remand for a new trial.

**FACTS**

On December 28, 2008, Mr. Calderon, then age 16, was listening to music in his

room when his friend, Ivan Cruz, came to his house. Mr. Cruz brought beer with him. The two drank the beer in Mr. Calderon's room while listening to music. Mr. Cruz also brought a knife with him to open the beer bottles. After drinking for 45 minutes, Mr. Cruz began acting drunk. Mr. Calderon decided to take Mr. Cruz to a friend's house. While they were walking, Mr. Cruz told Mr. Calderon that he had cotton mouth and needed something to drink. They did not have any money.

According to Mr. Calderon, they saw a man looking for something in his car. Mr. Calderon tapped the man's leg and asked him if he could have \$2 or \$3. The man did not speak English, so Mr. Calderon asked him again in Spanish. Mr. Calderon testified, "I can't speak Spanish too much." Report of Proceedings (Apr. 22-23, 2009) (RP) at 77. The man told Mr. Calderon "yes, to hold off," so they waited for him. RP at 77. While they were talking, Mr. Cruz took out the knife. Mr. Calderon testified he grabbed it from Mr. Cruz and told him to put it away, but Mr. Cruz took it back and moved toward the man. Mr. Cruz tried to grab the man, but Mr. Calderon pulled him away. The man then gave him \$5, and they headed to their friend's house.

The man, Hector Garcia-Reyes, gave a different account of the encounter. Mr. Garcia-Reyes testified that he was heading home after finishing his laundry when he pulled over to look for his cell phone in the back seat of his truck. Two men approached

him. One of the men touched his foot. The man, who he later identified as Mr. Calderon, told him in English and Spanish that they wanted money. He did not say why. Mr. Garcia-Reyes told them he did not have any money with him. He did not plan on giving them any money at first, but then they showed him a bat. Mr. Garcia-Reyes moved to retrieve his own bat from the truck to defend himself. He was in fear because he could tell both men were drunk. He then turned and saw that Mr. Calderon had a knife in his hand. He did not get out his bat.

Mr. Garcia-Reyes gave them money that he had in his shirt pocket. Mr. Cruz fell; Mr. Calderon picked him up, and they took off running. Mr. Garcia-Reyes found his telephone and called 911. He told Pasco Police Officer Anthony Aceves that Mr. Calderon was wearing a black and white checkered hat and a blue jersey with the number “69” on it. RP at 25.

Mr. Garcia-Reyes later identified Mr. Calderon as the man who asked him for money and had the knife in his hand. Police detained Mr. Calderon outside an apartment building. Mr. Garcia-Reyes had gone in the same direction as the young men, but lost sight of them for about five minutes. As the police arrived, Mr. Calderon was walking toward Mr. Garcia-Reyes; they were within 10 feet of each other at the time of the identification. Mr. Calderon was then detained.

At that time, Mr. Calderon did not have in his possession the hat, the bat, or the knife described by Mr. Garcia-Reyes. The police later located the hat in the front yard of the apartment. The bat was found inside the apartment on a chair. The knife was found in the bedroom of the apartment between the mattress and the frame of the bed with the handle visible.

Police found Mr. Cruz inside the apartment, face down on a bed, smelling of alcohol. Mr. Cruz ran into a window and fell down in the driveway as police escorted him outside. Mr. Garcia-Reyes identified him as the second man.

The State charged Mr. Calderon with first degree robbery. The amended information added the special allegations that Mr. Calderon was armed with a deadly weapon, the offense was a gang related felony, and that Mr. Calderon involved a minor in the commission of the offense. The State told the court in its offer of proof that it would establish (1) expert witness testimony that Mr. Calderon was a member of a local gang, which was also documented through the Pasco Police Department, (2) the weapon Mr. Calderon used had gang graffiti on it, and (3) Mr. Calderon was wearing gang attire at the time of the robbery. Mr. Calderon objected several times to the gang affiliation allegation, arguing that the State could not prove a nexus between the offense and his

alleged gang affiliation. The court admitted the gang affiliation evidence.

At trial, Officer Aceves testified that after finding the hat described by Mr. Garcia-Reyes in the front yard of the apartment building where the suspects were located, he showed it to Mr. Calderon, who denied owning it. Officer Aceves testified that the hat had the name “Toker” on it, and that Mr. Calderon was a known gang member with the gang moniker “Toker.” RP at 26. Officers also located a bat near Mr. Cruz. Officer Patrick Barnett testified that the bat had “Toker” on it, as well as various other gang symbols. RP at 54. According to Mr. Calderon, he was carrying the bat that day because he likes grabbing rocks and hitting them with the bat while he walks.

At the close of its case, the State withdrew the gang allegation enhancement. At the close of evidence, Mr. Calderon moved for a mistrial, arguing that the State failed to prove a nexus between his gang affiliation and the robbery. The court denied his motion.

The jury found that Mr. Calderon was guilty of first degree robbery and that he had been armed with a deadly weapon during the commission of the crime. Mr. Calderon moved for a new trial, again arguing that evidence of his gang affiliation had been improperly admitted. The trial court denied his motion and sentenced him to 55 months in prison. Mr. Calderon appeals.

## ANALYSIS

A trial court's evidentiary rulings are reviewed for an abuse of discretion. *State v. McDonald*, 138 Wn.2d 680, 693, 981 P.2d 443 (1999). A trial court's ruling will be reversed only if it is manifestly unreasonable or based on untenable grounds or reasons. *State v. Wilson*, 144 Wn. App. 166, 183, 181 P.3d 887 (2008). "The burden is on the appellant to prove abuse of discretion." *State v. Asaeli*, 150 Wn. App. 543, 573, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009).

"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*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010). Evidence of gang association is "inadmissible when it proves nothing more than a defendant's abstract beliefs." *State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995). "Evidence of gang affiliation is considered prejudicial" and is only admissible where there is a nexus between the crime and the defendant's gang membership. *Scott*, 151 Wn. App. at 526. An analysis under ER 404(b) dictates whether such evidence is admissible. *Asaeli*, 150 Wn. App. at 576-77.

Pursuant to ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not

admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Before a trial court may admit evidence of gang affiliation, “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.” *State v. Ra*, 144 Wn. App. 688, 701, 175 P.3d 609 (2008).

The trial court must conduct this analysis on the record. *Asaeli*, 150 Wn. App. at 576 n.34. “[W]here the trial court fails to conduct an ER 404(b) analysis on the record, the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial.” *State v. Sublett*, 156 Wn. App. 160, 196, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010).

Here, the trial court failed to conduct an ER 404(b) analysis on the record. It failed to identify any proper basis for admitting this evidence, and the State’s offer of proof provided none that the trial court could have relied upon. Therefore, the trial court erred when it allowed evidence of Mr. Calderon’s gang affiliation or membership.

Specifically, in its offer of proof, the State argued that it would be presenting evidence that Mr. Calderon was in a gang, that the weapon he used had gang graffiti on it, and that he was wearing gang attire during the robbery. However, its offer of proof and the State's evidence at trial showed no nexus between Mr. Calderon's gang affiliation and the robbery. Nor did the testimony of the officer that Mr. Calderon was a gang member explain the basis of this knowledge of that fact.

The final question, then, is whether admission of this evidence was harmless. An error is prejudicial, and therefore not harmless, if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Asaeli*, 150 Wn. App. at 579 (internal quotation marks omitted) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)). “An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Banks*, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003) (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

In *Scott*, this court held that evidence of a defendant's gang membership was not



harmless. *Scott*, 151 Wn. App. at 529. “Without a connection of that status to the crimes, the only reasonable inference for the jury to draw from the testimony was that [the defendant] was a bad person.” *Id.* ER 404(b) has been adopted to prevent juries from making decisions based on past actions or prejudicial information about a defendant. *See Scott*, 151 Wn. App. at 529 (citing *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). However, it was noted that it was “very significant that the conviction for one of the assault charges was based on the theory of accomplice liability.” *Scott*, 151 Wn. App. at 529.

Mr. Calderon’s credibility was an important issue in this case. The testimony of Mr. Calderon and Mr. Garcia-Reyes are not significantly dissimilar. Mr. Calderon and Mr. Garcia-Reyes agree that Mr. Calderon was carrying a bat. They also agree that at some point, a knife was made visible. Mr. Calderon speaks very little Spanish and Mr. Garcia-Reyes speaks very little English, so there was a language barrier between the two that may have created confusion as they spoke. Mr. Calderon claims that they were simply asking for money rather than demanding it, and Mr. Garcia-Reyes told them “to hold off.” RP at 77. Mr. Calderon and Mr. Garcia-Reyes agree that the bat and knife were never presented in a threatening manner. Under these circumstances, it seems likely that Mr. Garcia-Reyes actually felt as if he was being robbed.

The testimony provided by Mr. Calderon may also have been truthful—that he did not intend to rob Mr. Garcia-Reyes and simply asked him for money. It is possible that the jury could have believed Mr. Calderon’s version of the story—that he carried the bat to hit rocks and wrestled the knife from his friend to protect Mr. Garcia-Reyes from possible injury.

Similar to *Scott*, the State here was unable to connect the crime with Mr. Calderon’s gang affiliation. And this prejudicial error was not likely harmless because the jury likely determined the verdict based on whether they believed Mr. Calderon’s testimony, rather than any physical evidence. The jury knew that Mr. Calderon was a gang member and may likely have inferred that he was a bad person. Evidence of his gang membership was mentioned three times during the trial. This is not likely a fact that the jury would have forgotten or disregarded. *See Ra*, 144 Wn. App. at 701 (After discussing evidence provided by the State concerning the defendant’s membership in a gang, the court stated, “[w]e are unwilling to assume that the jury missed the State’s message.”). The inclusion of evidence that Mr. Calderon was a gang member may have played a significant role in the jury’s determination.

The trial court abused its discretion by allowing the State to present evidence of

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Mr. Calderon's gang affiliation without showing any nexus to the crime committed. The error was not harmless.

We reverse the conviction for first degree robbery and remand for a new trial.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Kulik, C.J.

WE CONCUR:

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Korsmo, J.

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Siddoway, J.