IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28560-0-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
JUAN ZEPEDA JR.,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Juan Zepeda was convicted of unlawful possession of a firearm, intimidating a witness, and second degree assault after a jury trial in the Yakima County Superior Court. His appeal raises several claims relating to the evidence presented at trial and his counsel's performance, as well as the charging theory for the witness intimidation count. We reverse that conviction, but affirm the other convictions.

FACTS

This case had its beginnings with a funeral in Grandview. Mr. Zepeda, a former resident of the area now living in Spokane, had traveled back to Grandview to join relatives planning a memorial service for an elderly family member. He was joined by several family members and friends who were members of the North Side Vatos (NSV) gang. Mr. Zepeda was a former member of that organization.

Across the street from the house where the NSV group was gathered was a house populated with members of the rival Brito Brothers/BLG gang. After returning from the funeral home, Mr. Zepeda was confronted by a "kid" on a bike. An argument ensued and Mr. Zepeda was shot in the leg by either the "kid" or a Brito Brother. A gunfight erupted and 15-20 shots were exchanged. Neighbors Brad and Melodie Smith heard the gunfire and called police. Brad Smith began to photograph the affair.

During the gun battle, family members helped Mr. Zepeda to a car across the street. The car began to drive away from the scene. Mr. Smith took photos of the car as it drove toward him. Mr. Zepeda stuck his arm out the window and yelled at Mr. Smith to stop taking pictures or he would kill him. Mr. Smith testified that Mr. Zepeda had a gun in his hand; Mr. Zepeda testified he had a cell phone.

The car was later stopped by Officer Carl Ramirez. He identified the occupants

and let them continue to a hospital. The car passed two closer hospitals and drove to Kennewick General Hospital. After treatment, Mr. Zepeda was arrested and eventually taken to the Grandview jail. The next day he was interviewed by Detective Ricardo Abarca. After advice of rights, Mr. Zepeda consented to a videotaped interview.

The videotaped interview lasted 30 minutes. Despite being shown photographic evidence that he was in Grandview, Mr. Zepeda insisted he had not been there. Instead, he told the detective he had been shot in Kennewick. After the videotape was completed, Mr. Zepeda admitted to the detective that he had been shot in Grandview.

Charges of unlawful possession of a firearm, second degree assault, and intimidating a witness were filed. The charging document alleged that the assault count had been committed while armed with a firearm. That document also alleged that Mr. Zepeda threatened Mr. Smith for the purpose of inducing him not to report to the police and/or to influence his testimony.

After a CrR 3.5 hearing, the trial court concluded that Mr. Zepeda had properly waived his rights. The videotaped statement was found to be admissible. The entire videotape was played for the jury during the State's case-in-chief. Both parties presented evidence concerning gang activity and both parties mentioned the topic in argument. The court instructed the jury on both of the charged methods of committing witness

intimidation, but did not require the jury to identify the basis for its verdict on that count.

The jury found Mr. Zepeda guilty on all three counts, and also determined that he had been armed with a firearm while committing the assault. The trial court imposed concurrent sentences on the three convictions and ordered the firearm enhancement to run consecutively to those sentences. Because the unlawful possession charge carried the longest standard term, the enhancement effectively ran consecutive to that count.

Mr. Zepeda then timely appealed to this court.

ANALYSIS

This appeal presents several arguments, but in light of our conclusion we need only address four of them: Mr. Zepeda's evidentiary arguments, his challenge to the verdict on the witness intimidation count, the effectiveness of his trial counsel, and the ordering of his sentence.

Evidentiary Challenges. Mr. Zepeda's first two challenges can be treated as one because the relevant rule of law is the same. Mr. Zepeda argues first that the court erred in permitting testimony concerning gang activities without giving a limiting instruction required by ER 404(b). He next argues that the court erred in permitting the entire videotaped interview to be played during the State's case without also giving a limiting instruction.

Several well-settled basic principles govern our review of these claims. A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 709, 921 P.2d 495 (1996). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Our rules of evidence require a party to object to evidence in order to preserve a challenge for appeal. ER 103(a)(1). Appellate courts generally will not review claims of error that were not presented to the trial court. RAP 2.5(a). With respect to alleged evidentiary errors at trial, the rule is even more specific. Appellate courts will only consider the specific challenges that were raised at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). As explained in *Guloy*:

> As to statement (d), counsel objected but on the basis that it was not proper impeachment nor was it within the scope of redirect. A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.

Id. (citation omitted).

Against these basic principles, Mr. Zepeda's first two arguments founder. He did not object to the admission of the gang evidence that was used at trial. Indeed, he even

offered some of the evidence himself. He also did not object to the admission of the videotape. He did not seek limiting instructions for either. He has waived his opportunity to now complain to this court.

Mr. Zepeda's initial evidentiary challenges cannot be reviewed.[1]

Witness Intimidation Conviction. Mr. Zepeda next challenges the sufficiency of the evidence to support one of the alternative means of committing witness intimidation. We agree that the evidence did not support one of the methods.

Once again well-settled rules govern review of a challenge to the sufficiency of the evidence. The reviewing court does not weigh evidence or sift through competing testimony. Instead, the question presented is whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

The constitutional right to a unanimous verdict includes the right to unanimity on

[1] We also note that our Supreme Court has recently concluded that a trial judge does not have an obligation to *sua sponte* give a limiting instruction when admitting ER 404(b) evidence. *State v. Russell*, 2011 WL 662927 (Wash. Feb. 24, 2011). For this reason, also, there is no basis for hearing the claim for the first time on appeal.

the means of committing the crime. *Green*, 94 Wn.2d at 231-232; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). The State need not elect a particular means of committing the crime, but a verdict will be set aside if one of the charged methods is not supported by sufficient evidence. *Ortega-Martinez*, 124 Wn.2d at 707-708.

The State alleged that Mr. Zepeda violated RCW 9A.72.110(1)(a) and (d), which provide in relevant part that:

> A person is guilty of intimidating a witness if a person, by use of a threat against a current or prospective witness, attempts to:
> (a) Influence the testimony of that person;
> . . . .
> (d) Induce that person not to report the information relevant to a criminal investigation.

Mr. Zepeda argues that insufficient evidence supports each alternative, pointing to *State v. Brown*, 162 Wn.2d 422, 173 P.3d 245 (2007), in support of his position. We agree that *Brown* is dispositive here.

There the defendant committed a burglary. He informed a woman who overheard him discussing the burglary that she would "pay" if she spoke to police; she believed it to be a credible threat of force. *Id.* at 426. He was subsequently convicted of intimidating a witness under the theory that his threat was made to a person he believed would be called

as a witness against him. *Id.* at 427. On review, the Supreme Court concluded that insufficient evidence supported his conviction because it only proved that he intended to prevent the witness from providing information to police; it did not show that he intended to influence her testimony. *Id.* at 430.

This case is in largely the same fact pattern. There was ample evidence that Mr. Zepeda did not want Mr. Smith reporting his activities to the police. There was no evidence that Mr. Zepeda wanted Mr. Smith to change his testimony. This was not a situation where the influencing testimony prong of the statute applied.

The evidence did not support the instruction on that aspect of the statute. Because the jury returned a general verdict, it is unknown which prong the jury found persuasive. In this circumstance, the verdict must be reversed and the case remanded for a new trial on that count. *State v. Martin*, 69 Wn. App. 686, 689, 849 P.2d 1289 (1993).

Attorney Performance. Mr. Zepeda extensively argues that his attorney provided ineffective assistance. The primary focus of his argument is on counsel's failure to challenge the two evidentiary issues discussed previously.

The standards of review of a claim of ineffective assistance of counsel are well understood. The Sixth Amendment guarantees the right to counsel; more than the mere presence of an attorney is required. The attorney must perform to the standards of the

profession. Counsel's failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-692.

With these standards in mind, we must review Mr. Zepeda's arguments. He first contends that trial counsel erred in not challenging the State's use of "gang" testimony and, in fact, offering similar evidence for the defense. This is so clearly a matter of strategy that it cannot be a basis for finding counsel ineffective. *Id*. at 689-691. The defense theory of the case was that the defendant, a former gang member, was the victim of gang violence rather than a participant in it. Any challenge to gang testimony also would undoubtedly have been a futile gesture. The defendant was injured in the course of a shoot-out between two rival gangs. There was no way to tell the story of this incident without mentioning the gang factor. This was classic *res gestae* evidence. Defense counsel understandably did not waste time objecting to admissible evidence.

The initial challenge to counsel's performance is without merit.

Mr. Zepeda next argues that his counsel erred in failing to object to the State's use of the entire videotaped interview during its case-in-chief. He contends that the only evidentiary value of the recording was to impeach his testimony and, thus, the evidence was out-of-place until he did testify. He also contends that, in light of his subsequent admission that he lied, this was improperly cumulative impeachment. His argument views the evidence too narrowly.

The State responds that the videotaped lie to the detective had value independent of its impeachment quality because it demonstrated Mr. Zepeda's consciousness of guilt. We agree. From the moment he was shot, Mr. Zepeda began trying to create a story that he was not involved. First, he was driven to a hospital far from the scene. Rather than seeking local emergency treatment, he was driven 43 miles to Kennewick and bypassed hospitals in Prosser and Richland to go there. That was the beginning of the cover-up. He then followed that the next day by telling the detective that he had been shot in a Kennewick park, not in Grandview. The interview was itself part of the cover-up. The prosecutor understandably wanted the jury to conclude that Mr. Zepeda knew about his guilt and immediately began actively attempting to avoid responsibility. This evidence was admissible independent of its potential impeachment value. Thus, counsel did not err

in failing to object to its use at trial.

Mr. Zepeda also argues that counsel erred in not seeking to limit how much of the videotape was presented to the jury, contending that something less than the entire videotape would have sufficed. While it is possible that a trial judge might have granted a motion to limit use of the videotape, such a practice also entailed a risk that the jury would conclude there was a reason it was not seeing the entire videotape. Counsel could reasonably conclude it was better to see the entire videotape than only a limited portion. But, even if it was error to not challenge the use of the entirety of the videotape, Mr. Zepeda has not established that the error prejudiced him. It has long been recognized that the admission of cumulative evidence is not reversible error. *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970); *State v. Dunn*, 125 Wn. App. 582, 589, 105 P.3d 1022 (2005). This argument does not establish that counsel provided ineffective assistance.

The remaining bases for claim that trial counsel failed can be summarily addressed. Some of the arguments are based on the original claim that "gang" evidence was improperly admitted. Other arguments simply reflect disagreement with the way counsel tried the case by arguing that he should have objected to some of the testimony. The decision to object, even if testimony is not admissible, is a tactical decision not to highlight the evidence to the jury. It is not a basis for finding counsel ineffective. *State*

v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989).[2] One other challenge to counsel's performance involved the offender score; he contends his attorney should have argued that the assault and unlawful possession constituted the same criminal conduct. That alleged error did not affect the jury's guilt or innocence determination, and cannot have harmed Mr. Zepeda in any case because he can raise the argument at the resentencing required by our reversal of the witness intimidation count.[3]

Mr. Zepeda's arguments reflect disagreement with counsel's trial tactics. They do not establish prejudicial error by his attorney. The ineffective assistance claim is without merit.

Weapons Enhancement. Because Mr. Zepeda has to be resentenced, his challenge to the offender score calculation can be presented at that proceeding. One challenge that we will address is his argument that the weapons enhancement cannot be served consecutively to the unlawful possession conviction. It can and must be so served.

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[2] "The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn. App. at 763.

[3] If the witness intimidation count is not retried or if Mr. Zepeda is acquitted following a new trial, a new sentencing is required for the two remaining convictions. If there is a retrial and a conviction, sentencing would again be required.

A firearms enhancement is available on all but a small handful of crimes that must necessarily be committed with a firearm. Unlawful possession of a firearm is one of the excepted offenses. RCW 9.94A.533(3)(f). When a jury concludes that a crime was committed with a firearm, the term for that enhancement "must be added to the total period of confinement for all offenses, *regardless of which underlying offense is subject to a firearm enhancement*." RCW 9.94A.533(3) (emphasis added). Whether the sentences for the offenses are served concurrently or consecutively, the enhancement must be served consecutively. RCW 9.94A.533(3)(e).

Mr. Zepeda argues that because unlawful possession of a firearm is an offense that cannot receive an enhancement, the enhancement for the second degree assault cannot run consecutively to the unlawful possession sentence. His argument confuses eligibility for an enhancement with the ordering of sentences. They are two disparate concepts. Whether or not an enhancement is potentially applicable is governed by subparagraph (f); how an enhancement is served in relation to other sentences is governed by subparagraph (e). RCW 9.94A.533(3)(f) prevented Mr. Zepeda from facing enhancements on both crimes he committed with the firearm, but it does not prevent him from serving the enhancement consecutively to the unlawful possession count.

The trial court properly ordered the sentences.

CONCLUSION

The convictions for unlawful possession of a firearm and second degree assault while armed with a firearm are affirmed. The conviction for witness intimidation is reversed. The cause is remanded for further proceedings consistent with this opinion.

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.

_____
Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.