

FILED

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**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 29144-8-III
)	
Respondent,)	
)	
v.)	Division Three
)	
ERNESTO CERVANTES,)	
)	
Appellant.)	UNPUBLISHED OPINION

Korsmo, A.C.J. — Ernesto Cervantes challenges the trial court’s decision to admit some “gang” testimony at his trial for first degree robbery. The evidence was necessary to identify the robber and explain the context of the incident. The trial court did not abuse its discretion by admitting the testimony. The conviction is affirmed.

FACTS

Gilberto Zuniga was riding his bicycle in Toppenish shortly after midnight on New Year’s Day 2009 when a green sedan accelerated up behind him and nearly hit his rear wheel. Mr. Zuniga pulled over and stopped, and then fell to the ground when he became

tangled up. The front seat passenger, Mr. Cervantes, got out of the car and approached him with a knife.

Mr. Cervantes asked, “what do you bang?” Mr. Zuniga responded, “I don’t bang anything.”¹ Report of Proceedings (RP) (Aug. 18, 2009) at 146. Mr. Cervantes then held the knife to Mr. Zuniga’s stomach and demanded all his money. Mr. Zuniga did not have any money, but handed over a digital camera and some fireworks. Mr. Cervantes then reached into his pocket and pulled out Mr. Zuniga’s keys and iPod. The iPod fell to the ground. Mr. Zuniga stood up and was cut on the head with the knife. Mr. Cervantes then punched him in the head. Mr. Zuniga turned and ran.

A friend picked him up nearby and drove him to the police station. Officer Dustin Dunn interviewed Mr. Zuniga and observed he was bleeding from the head, his face had swelling, he was shaking, and he was frightened. Zuniga identified his assailant as “Smurf.” He later told the officer that “Smurf” was Ernesto Cervantes.

Police arrested Cervantes. He was wearing blue shoes, a blue belt, and mushrooms similar to those in the Smurf cartoons were engraved on his belt buckle. He was charged with one count of first degree robbery.

¹ Mr. Zuniga later explained that the initial question asked what gang he was affiliated with, and the response was that he was not affiliated with a gang. Report of Proceedings (Aug. 18, 2009) at 148.

After jury selection, defense counsel orally moved to exclude any “testimony relating or referring to gangs” at trial on the basis that it “would be highly prejudicial to my client.” RP at 100. The prosecutor explained how the victim had identified the defendant as “Smurf” and described the Smurf-like attire Mr. Cervantes was wearing when arrested. The trial court found that limited gang evidence related to the robbery would be admissible as part of the *res gestae* of the incident. RP at 101.

The only trial evidence relating to gangs involved the initial question and response at the robbery, as well as the fact that “Smurf” was Mr. Cervantes’ gang name. The evidence of Mr. Cervantes’ attire was also elicited, although it was not directly tied to any gang matters. The prosecutor did not mention gangs in his closing remarks, but defense counsel argued that Toppenish was infested with gangs while attempting to discredit Mr. Zuniga’s testimony. In rebuttal, the prosecutor noted the initial question Mr. Cervantes asked, but did not pursue any gang-related testimony further.

The jury returned a guilty verdict. The trial court imposed a standard range sentence. Mr. Cervantes then timely appealed to this court.

ANALYSIS

The sole issue raised in the appeal involves the gang evidence ruling.² The parties approach the issue as presenting an ER 404(b) claim. We do not believe that was the basis for the trial court's ruling, but under any analysis we find no abuse of discretion.

Evidence of gang affiliation is considered prejudicial. However, gang affiliation is protected by the right of association recognized by the First Amendment. *Dawson v. Delaware*, 503 U.S. 159, 117 L. Ed. 2d 309, 112 S. Ct. 1093 (1992). Therefore, evidence of criminal street gang affiliation is not admissible in a criminal trial when it merely reflects a person's beliefs or associations. *Id.* at 166-167. There must be a connection between the crime and the organization before the evidence becomes relevant. *Id.* at 166, 168; *State v. Johnson*, 124 Wn.2d 57, 67, 873 P.2d 514 (1994). Typically, admission of such evidence is measured under the standards of ER 404(b). *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009), *review denied*, 168 Wn.2d 1004 (2010); *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009); *State v. Asaeli*, 150 Wn. App. 543, 576, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009); *State v. Boot*, 89 Wn.

² In his Statement of Additional Grounds (SAG), Mr. Cervantes argues *pro se* that his offender score should be "3" rather than "5." SAG at 2. He cites to RCW 9.94A.525(7) and claims that his two prior violent offenses only count one point each. However, because the current crime was a violent offense, it is governed by RCW 9.94A.525(8), which counts the prior violent offenses as two points each. The offender score of "5" is correct.

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App. 780, 788-790, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998); *State v. Campbell*, 78 Wn. App. 813, 821-822, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995).

The governing case law concerning evidentiary rulings is well settled. An individual's prior crimes, wrongs, or acts are inadmissible to determine the individual's character or propensities, but they may be admissible under ER 404(b) to show motive. ER 404(b) is read in light of ER 401, ER 402, and ER 403. *State v. Smith*, 106 Wn.2d 772, 775, 725 P.2d 951 (1986). ER 402 prohibits the admission of evidence that is not relevant. ER 401 defines "relevant evidence" as "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 403 requires the exclusion of evidence, even if relevant, if the probative value is substantially outweighed by the danger of unfair prejudice. *State v. Wilson*, 144 Wn. App. 166, 176, 181 P.3d 887 (2008). We will not reverse a trial court's evidentiary rulings absent an abuse of discretion. *See State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995); *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (ER 404(b)). Discretion is abused if 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).

In order to admit evidence of other bad acts under ER 404(b), the proponent of the evidence must first convince a trial court by a preponderance of the evidence that the “misconduct” actually occurred. *State v. Lough*, 125 Wn.2d 847, 853, 864, 889 P.2d 487 (1995). A trial court may conduct a hearing to take testimony, but is not required to do so. *State v. Kilgore*, 147 Wn.2d 288, 294-295, 53 P.3d 974 (2002). If the court determines that the misconduct occurred, the court then must identify the purpose for which the evidence is offered, determine whether the evidence is relevant to prove an element of the offense, and weigh the probative value of the evidence against its prejudicial effect. *Lough*, 125 Wn.2d at 853. The court may then admit the evidence subject to a limiting instruction telling the jury the proper uses of the evidence. *Id.* at 864.

This background explains why we view the motion here differently than the parties have approached it. It does not appear to have been treated as an ER 404(b) issue at trial. The State did not seek to prove defendant’s membership in a gang, nor did it attempt to establish the relevance of gang membership to this crime. The court did not conduct the analysis required by ER 404(b). No hearing was held concerning gang membership. Instead, this issue simply came up as a typical *in limine* motion prior to the testimony. Under the circumstances, this was a common ER 403 objection and ruling.

The numerous cases cited previously discussing the treatment of gang testimony in the ER 404(b) context all dealt with gang affiliation evidence. That is, the State attempted to prove the defendant's membership in a gang, provide information about how gangs behaved, and then connect the defendant's behavior to the gang's values. *E.g.*, *Asaeli*, *Boot*, *Campbell*, *Young*. Typically the evidence was relevant to provide a motive or otherwise explain the defendant's actions. *Id.* Expert testimony was necessary to establish the gang background and trial courts would probe for a connection between the defendant and the crime and the gang affiliation. These cases present prototypical ER 404(b) problems.

However, just because the word "gang" is mentioned does not mean that an ER 404(b) issue exists. This case provides a clear example. The State was not seeking to prove the defendant's affiliation with a specific gang, let alone connect the gang's mores with the defendant's behavior. Instead, it simply wanted to prove his identity; the victim knew him as "Smurf," a name known to gang investigators. Mr. Cervantes also injected the gang issue into the trial by his initial interrogatory to the victim. Thus, the "gang" issue was a tangential part of this case, unlike the previous cases where gang affiliation was directly connected to a central feature of the case.

This was not an ER 404(b) case. The words "*res gestae*" have several distinct

meanings in the law, some of which are related to ER 404(b). *See, e.g., State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981). However, it also has a more general meaning that encompasses the idea of “completing the picture.” *Id.* It is in this more general sense that we believe the trial court’s comments should be understood.

Properly understood, the trial court faced and ruled upon an ER 403 objection—otherwise admissible evidence should be excluded because its prejudicial impact outweighed the evidentiary value. There were tenable bases supporting the trial court’s conclusion that the evidence was admissible. The issue of identity was the primary question for the jury to decide. While the victim knew the defendant, the defense in essence was that some unknown gang member committed the crime. Thus, evidence establishing that “Smurf” was the culprit was critical to the case. The victim knew the defendant by that name. The fact that gang investigators also knew “Smurf” to be Ernesto Cervantes was important corroboration of the victim’s testimony. The fact that defendant was also dressed in Smurf attire when arrested further established the identity of the robber.

In light of the centrality of the identity issue, the trial court could easily conclude that the value of the evidence outweighed any prejudicial impact it might have. Similarly,

the robber's opening gambit further suggested that a gang member was involved. That evidence, too, went to the identity issue. On this record, we see no abuse of discretion.

The result would be the same if analyzed through the lens of ER 404(b). The reason is that once an appropriate reason for admitting the evidence is identified, the court must still conduct the ER 403 balancing by determining that the probative value of the evidence outweighs the prejudicial impact. *Lough*, 125 Wn.2d at 853. The trial court already did that here. Labeling this as either an ER 403 or an ER 404(b) issue would not change the trial court's conclusion. The evidence was admissible and highly probative. The prejudicial impact was comparatively slight. The court did not abuse its discretion in admitting the limited testimony that touched upon the gang world.

Affirmed.

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, A.C.J.

WE CONCUR:

Brown, J.

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Siddoway, J.