IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 29291-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
LARRY GLENN GATEWOOD,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Brown, J. — Larry G. Gatewood appeals his convictions for two counts of felony harassment and one count of witness intimidation. He contends the trial court erred by (1) allowing gang affiliation evidence and (2) imposing an aggravated exceptional sentence. Finding no error, we affirm.

FACTS

Toni J. Tusken and Mr. Gatewood were married for a short time in 2008. When the marriage broke up, she asked him to move. He refused and she filed a no-contact order and had the police remove him. Mr. Gatewood continued to try and contact her. Ms. Tusken testified against Mr. Gatewood in a related trial. Mr. Gatewood was found guilty of multiple counts of harassment, stalking, and assault in that case.

Two days after the court sentenced Mr. Gatewood to 18 years, Ms. Tusken's

son, I.J.P., received a telephone call from Mr. Gatewood at Ms. Tusken's home. When asked where his mother was, I.J.P. said she was not at home. Mr. Gatewood then said, "Check this out; just let her know when I get out I am killing your whole family." Report of Proceedings (RP) (July 27, 2010) at 27.

Even though Mr. Gatewood was imprisoned, I.J.P. was scared because of "people" Mr. Gatewood knows. *Id*. I.J.P. believed "he could carry out that threat." *Id.* After hanging up, I.J.P. called his mother. When told of the threat, Ms. Tusken was scared. She was concerned for her safety because Mr. Gatewood was a gang member, and she apparently believed gang members might carry out Mr. Gatewood's threat. Based on her report, the State charged Mr. Gatewood with harassing phone calls, two counts of felony harassment of I.J.P., intimidating a witness (Ms. Tusken), and felony harassment of Ms. Tusken.

In pretrial motions, Mr. Gatewood requested to exclude any mention of gangs. The State argued the evidence should come in as it went to state of mind of the victims. The defense claimed it was ER 404(b) evidence of prior bad acts. But, the court characterized the evidence as showing an association rather than a prior bad act, stating, "Well, what we are talking about here is an association rather than prior bad act. It seems to me that in the context of the particular charges that are referenced here, that it is allowable to have a basis for the fear on the part of the complainant to be explained." RP (July 26, 2010) at 11.

At trial, the prosecutor asked an investigating officer, Detective Scott Anderson, if he had taken any gang training, which he responded in the affirmative. The prosecution asked if he was familiar with the Insane Crips gang, whereupon the defense objected, "Your Honor, I object. This is not a gang case. It is not a fundamental part of the crime charged." RP (July 27, 2010) at 67. The court overruled the objection. Over further defense objection, Detective Anderson testified it was typical for gang members to help other gang members, even going so far as to kill someone.

One of the felony harassment counts against I.J.P. was eventually dismissed and a mistrial was declared on the harassing phone calls count, but the jury found Mr. Gatewood guilty of two counts of felony harassment (one for I.J.P. and one for Ms. Tusken) and one count of witness intimidation. The court imposed an aggravated exceptional sentence of 162 months by running one harassment conviction and the intimidating a witness conviction consecutively as "[n]ot to do so would amount to a free crime based upon the offender score." Clerk's Papers (CP) at 137-38. Mr. Gatewood's offender score was 17, eight points off the top of the sentencing grid. The present sentence is consecutive to his 18-year sentence. Mr. Gatewood appealed.

ANALYSIS

A. Gang Affiliation Evidence

The issue is whether the trial court erred by abusing its discretion in allowing

gang affiliation evidence.

"The decision to admit evidence lies within the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion." *State v. Veliz*, 160 Wn. App. 396, 412, 247 P.3d 833, *review granted*, 171 Wn.2d 1028 (2011). Discretion is abused when a trial court exercises it on untenable grounds or for untenable reasons, or where the discretionary act was manifestly unreasonable. *Id.*

"Evidence of gang affiliation is admissible when it is relevant to a material issue in the case." *United States v. Takahashi*, 205 F.3d 1161, 1164 (9th Cir. 2000). Conversely, 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). While evidence of gang affiliation may be prejudicial, it is still admissible where there is a nexus between the crime and the defendant's gang membership. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009).

Under 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 gang affiliation evidence under ER 404(b), "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 court must conduct this analysis on the record. *State v. Asaeli*, 150 Wn. App. 543, 576 n.34, 208 P.3d 1136, *review denied*, 167 Wn.2d 1001 (2009).

Here, the trial court did not allow the evidence under an ER 404(b) exception; rather, evidence went to the victims' state of mind. *See* RCW 9A.46.020(1)(b) ("A person is guilty of harassment if . . . [t]he person by words or conduct places the person threatened in *reasonable fear* that the threat will be carried out." (emphasis added)). Several other courts have allowed gang affiliation evidence for reasons outside ER 404(b). *See, e.g.*, *State v. Craven*, 67 Wn. App. 921, 927, 841 P.2d 774 (1992) (trial court properly allowed prosecutor to question defense witnesses about whether they were in the same gang as defendant to show bias); *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009) (in addition to motive, gang evidence showed defendant's mental state); *State v. Boot*, 89 Wn. App. 780, 789-90, 950 P.2d 946 (1998) (in addition to motive, gang evidence relevant to show "the context in which the murder was committed," premeditation, and under the res gestae exception "'to complete the story of the crime on trial by proving its immediate context of happenings near in time and place'" (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981))).

In sum, gang affiliation evidence went to the victims' state of mind. The

evidence established Ms. Tusken's and I.J.P.'s knowledge of Mr. Gatewood's gang affiliations, which constituted a significant basis for their fear that his threats would be carried out despite his being incarcerated. This evidence established a sufficient nexus between the gang affiliation evidence and the charged crimes of harassing phone calls, harassment, and intimidating a witness. And, "[a]ll relevant evidence is admissible." ER 402. Gang affiliation evidence was highly relevant to establish Ms. Tusken's and I.J.P.'s fear. Thus, tenable grounds exist for the trial court's decision. We conclude the trial court did not abuse its discretion in admitting the gang affiliation evidence.

B. Exceptional Sentence

The issue is whether the trial court erred by abusing its discretion in imposing consecutive sentences.

The sentencing court imposed standard-range sentences on one harassment conviction and the intimidating a witness conviction, but ordered Mr. Gatewood to serve the sentences consecutively because "[n]ot to do so would amount to a free crime based upon the offender score." CP at 137-38. Under RCW 9.94A.589(1)(a), consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. Under RCW 9.94A.535, a court may impose an exceptional sentence when the statute's enumerated aggravating factors are present. To reverse an exceptional sentence, we must find: "(a) Either that the reasons

supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive." RCW 9.94A.585(4). We review whether a sentence was clearly excessive for abuse of discretion. *State v. Smith*, 124 Wn. App. 417, 435, 102 P.3d 158 (2004), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007).

The sentencing judge had tenable grounds to consecutively sentence because imposing concurrent sentences would result in some of the current offenses remaining unpunished because any concurrent term would not have been enhanced by the higher offender score resulting from the other current offenses. This is the trade-off at the heart of the multiple-offense policy of the Sentencing Reform Act of 1981, chapter 9.94A RCW. *State v. Batista*, 116 Wn.2d 777, 783, 808 P.2d 1141 (1991). The trade-off ceases to be effective when the offender score exceeds nine. Under the free crimes analysis the sentence was not clearly excessive. Accordingly, the trial court did not abuse its discretion in exceptionally sentencing Mr. Gatewood.

Affirmed.

A majority of the panel has determined that 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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Brown, J.

WE CONCUR:

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Kulik, C.J.

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Sweeney, J.