IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 29677-6-III
Respondent,	)	
v.	)	
JOSHUA VIENTO BOJORQUEZ,	)	UNPUBLISHED OPINION
Appellant.	)	

Brown, J. • Joshua Viento Bojorquez appeals his first degree assault conviction and gang aggravator, mainly contending the trial court erred in denying his evidence suppression motion, allowing certain evidence, and permitting certain evidence following alleged discovery violations. We reject his contentions, and affirm.

FACTS

On October 15, 2009, local residents around the 1500 block of McKinley Avenue in Yakima reported gunshots; this is a known Sureños gang territory. Witnesses reported a man dressed in a black jacket over a white jacket ran towards an alley after the

shooting. Later, a victim came forward and reported a person in the front passenger side of a blue car yelled "South side LVL" shortly before someone shot at him. December 21, 2010 Report of Proceedings (RP) at 71. "LVL" refers to the Little Valley Locos, a subset of the Sureños. December 21, 2010 RP at 108.

Within two minutes of the shots-fired reports, Sergeant Joe Salinas, noticed a car hurriedly leaving the alley. According to the officer, when the driver noticed him, he abruptly stopped the car and then immediately signaled to turn toward the patrol car. The Sergeant testified it was not uncommon for drivers, who were suspects, to turn toward patrol cars to make it more difficult for law enforcement to engage them.

Sergeant Salinas approached the stopped vehicle because he felt the occupants might be able to provide information about the shooting. The Sergeant shined his spotlight on the car and ordered everyone inside to raise their hands. The front seat passenger was Jessie Moreno. Sergeant Salinas saw the driver, Mr. Bojorquez, was wearing a red shirt; the Sergeant considered this odd because they were in Sureños territory and Sureños members typically wore blue. The rival gang, the Norteños, are identified by the color red. According to the officer, "Nobody wears a red shirt in that neighborhood unless they're asking for trouble." Report of Proceedings (RP) (May 7, 2010) at 37. The gangs in Yakima are uniquely territorial.

Sergeant Salinas approached the vehicle and its three occupants. He inquired

whether they heard gun shots or were shot at while in the neighborhood. The occupants replied that they had not. The Sergeant considered this odd because the car windows were rolled down. The Sergeant then asked for their names; Mr. Bojorquez suspiciously, denied he was the brother of Chris Bojorquez, a known Norteño gang member, even though the last name is uncommon. About this time Sergeant Erik Hildebrand, the gang unit supervisor, arrived and took over the investigative lead. The vehicle's occupants were known to be associated with the Norteños gang or affiliate groups.

Mr. Bojorquez explained they were smoking marijuana. Mr. Bojorquez was placed in a patrol car until another officer who was qualified to detect signs of marijuana impairment arrived at the scene. Mr. Bojorquez was arrested for driving offenses.

The officer read Mr. Bojorquez his *Miranda*[1] warnings and asked to search the car. Mr. Bojorquez gave officers permission to search the cab of his car; but he required a search warrant for the trunk. After the car occupants had been removed from the scene, a young man, Troy Caoile, approached the investigating officers and reported he had been walking nearby when someone in the front passenger seat of a passing blue car yelled out to him a gang name, "South side LVL." Minutes later, someone appeared from around the corner from the direction the car had gone and started to shoot at him. Mr. Caoile described the shooter as a Mexican male dressed in a gray zip up hoodie that covered a

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

hat. Calling out "south side" Sergeant Hildebrand explained at the suppression hearing would be useful for Norteños in identifying a rival gang member as a target.

Police had searched the alley and found a Mariner's baseball cap and a black cotton glove turned partially inside out. Later DNA testing connected the glove to Mr. Moreno and the cap to both Mr. Bojorquez and Mr. Moreno. Mr. Caoile later identified one of the car's passengers as the shooter from a photo montage and again identified him in person at trial. The policed recovered a bullet slug from a mobile home that was submitted to ballistics testing.

Officer Chris Taylor telephonically applied for the warrant. The officer had been briefly on the scene to gather information before going back to the station to request a warrant. Officer Taylor told the judge that officers saw a suspect running toward an alley following the gunshots, but the officer later testified this statement was a mistake; it was actually a witness who saw a suspect running down an alley in a dark jacket over a white jacket. Mr. Bojorquez challenges the accuracy of Officer Taylor's report of the bullet recovery location; Officer Taylor stated he informed the judge of this over the phone but did not state the bullet was located in the cabin of Mr. Bojorquez's car. Officer Taylor admitted he did not take notes on the information provided to him prior to calling the judge. The judge granted the warrant to search the trunk of Mr. Bojorquez's car. Inside the trunk, officers recovered a .357 magnum, containing six spent .38 caliber shell

casings, a 12-gauge shotgun with the barrel partially sawed off, 12-gauge shotgun shells, 3 black hooded sweatshirts, and a black cotton glove. One of the sweatshirts was black with white lining. The glove matched the one found in the alley. Ballistics testing connected the slug found in the motor home, the .357, and the .38 shell casings.

The State charged Mr. Bojorquez with first degree assault as principal or as an accomplice to Mr. Moreno, the shooter, and the State alleged a gang aggravator.

Mr. Bojorquez unsuccessfully moved to suppress the evidence seized under the warrant. He argued officers lacked an articulable suspicion to stop his car and challenged the veracity of the search warrant based on claimed inaccuracies. The court found Officer Taylor's misstatements were not deliberate and that the events were "fast moving and fluid." Clerk's Papers (CP) at 72. The court concluded officers were authorized to approach Mr. Bojorquez because they received reports about gunshots fired in or near the area where Mr. Bojorquez's car was spotted. The trial court reasoned that the warrant to search the trunk was untainted by any stop issues and in any event, valid. After the first warrant to search for guns, a second warrant was issued for the clothing seen in the trunk.

Additionally, Mr. Bojorquez unsuccessfully moved the court to exclude the sawed-off shotgun and gang affiliation information. He argued the purpose of the shotgun evidence was to prejudice the jury because it was not used in the shooting. Mr. Bojorquez argued gang affiliation evidence was irrelevant to the crime because neither

the person who was allegedly shot at nor Mr. Bojorquez was a gang member. The court reasoned the shotgun was not illegal and would not necessarily cast Mr. Bojorquez in a negative light. The court found gang evidence was relevant as to motive and would not unduly prejudice Mr. Bojorquez at trial.

At a joint trial with Mr. Moreno, the State produced evidence attempting to show evidence in support of its theory that the assault was gang motivated because the participants were "putting in work," meaning the shooting was to aggrandize their status in their gang and was thus, gang related. The State argued in opening and closing that calling out South side LVL was inferably done to target a rival gang member.

During trial, Mr. Bojorquez unsuccessfully moved to suppress certain evidence or dismiss the case based on claimed discovery violations. The court found the violations were not substantive. Mr. Bojorquez asked the court to reconsider the motion when the State introduced a more in-depth ballistics report a day before the expert witness was scheduled to testify in court. The witness was expected to testify that the bullet recovered from the crime scene came from the .357 magnum found in Mr. Bojorquez's trunk. Mr. Bojorquez argued he was unprepared to respond to this evidence. The trial court denied the motion, finding Mr. Bojorquez could have requested a *Frye*[2] hearing, which would have required an expert. The court concluded it was left to speculate about

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

prejudice unless Mr. Bojorquez could provide some evidence that his inability to present a defense was prejudiced.

The jury found Mr. Bojorquez guilty of first degree assault. The jury specially found a firearm had been used in the commission of the assault and the crime had been committed to either directly or indirectly benefit a gang. The court imposed an aggravated exceptional sentence based on the gang aggravator. Mr. Bojorquez appealed.

ANALYSIS

A. Suppression

Did the trial court err in denying Mr. Bojorquez's evidence suppression motion? He contends officers lacked a reasonable suspicion necessary to justify a *Terry*[3] stop and probable cause did not exist to justify a warrant to search his car's trunk.

We review the trial court's determination on a motion to suppress for substantial evidence and to see if the findings support the conclusions of law. *State v. Schlieker*, 115 Wn. App. 264, 269, 62 P.3d 520 (2003). Unchallenged findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of a finding's truth. *Id.*

Generally, warrantless searches and seizures are unconstitutional. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A *Terry* stop is a well-established

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

exception; however, that allows the police to briefly stop and detain a person to investigate whether a crime has occurred. *Id.*; *Terry*, 392 U.S. at 30-31. Although less intrusive than an arrest, a *Terry* stop is nevertheless a seizure. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). A *Terry* stop is justified if the State can point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. *State v. Kinzy*, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000).

When reviewing *Terry* stop justification, we evaluate the totality of the circumstances. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). The totality of the circumstances include factors such as the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained. *State v. Acrey*, 148 Wn.2d 738, 747, 64 P.3d 594 (2003).

One of the reasons given for the stop was Mr. Bojorquez's presence in a known gang neighborhood. Mr. Bojorquez relies on *State v. Doughty*, 170 Wn.2d 57, 65, 239 P.3d 573 (2010) to argue the mere presence in a high crime area is not enough to justify a *Terry* stop. There, the court noted a defendant's mere presence in a high crime area, late at night, did not provide the legal basis for a *Terry* stop. *Id.* at 62, 64. But *Doughty* is distinguishable. Mr. Bojorquez's presence in a gang area was not the sole basis for

justifying the *Terry* stop. A shooting had been reported in the area. Mr. Bojorquez's location when the police contacted him was relevant, not only for its proximity to the alleged high crime area, but also for its proximity to the specific shooting report. And, the officer saw Mr. Bojorquez's vehicle leaving the alley shortly after the shooting at a rather fast speed and then turn toward the officer; in the officer's experience, that was a move offenders made to make it difficult for officers to engage. The officer noticed Mr. Bojorquez was wearing red in a blue gang area. Sergeant Hildebrand testified to the unique territorial nature of the gangs involved.

The officer then asked the occupants general questions; Mr. Bojorquez responded that they were in the alley to smoke marijuana. Mr. Bojorquez was placed in a patrol car until a qualified marijuana detection officer arrived at the scene. The totality of this evidence supports the officers' reasonable suspicion, grounded in specific and articulable facts, that Mr. Bojorquez was engaged in or was about to engage in criminal activity. We do not consider each piece of evidence in isolation. Instead, we consider the totality of the circumstances presented to the officers, including their experience, the location, and Mr. Bojorquez's conduct. *Glover*, 116 Wn.2d at 514. We conclude the record supports the trial court's conclusion that the *Terry* stop was justified.

Mr. Bojorquez next contends the search warrant lacked probable cause because the search warrant affidavit included misrepresentations.[4] Normally, once issued, a search

warrant is entitled to a presumption of validity, and courts give great deference to the magistrate's determination of probable cause and resolve any doubts in favor of the warrant. *State v. Chenoweth*, 160 Wn.2d 454, 477, 158 P.3d 595 (2007). A reviewing court may invalidate a warrant, and the fruits of a search may be suppressed, if it finds that the applying officer intentionally or recklessly omitted or misrepresented material information from the warrant affidavit. *Id.* at 470. A defendant challenging a warrant on this basis is entitled to an evidentiary hearing if he or she makes a substantial preliminary showing of the omissions or misrepresentations and their materiality. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Probable cause exists where facts and circumstances sufficiently establish a reasonable inference that a defendant is involved in criminal activity and evidence of the criminal activity can be found at the place to be searched. *State v. Atchley*, 142 Wn. App. 147, 161, 173 P.3d 323 (2007). The test for probable cause when information is allegedly misrepresented or omitted from a search warrant affidavit is whether the

[4] When reviewing whether an affidavit establishes probable cause, our review is generally "limited to the four corners of the affidavit." *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The affidavit is not included in this court's record. But, because the court conducted a *Franks* hearing on the issue and there is sworn testimony in our record relevant to this issue, this issue is reviewable. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978); *see State v. Moore*, 54 Wn. App. 211, 214-15, 773 P.2d 96 (1989) ("The *Franks* hearing arose as an exception to the 'four corners' rule.").

affidavit remains sufficient to support a finding of probable cause with the omission inserted and/or the misrepresentation redacted. *State v. Garrison*, 118 Wn.2d 870, 873, 872 P.2d 1388 (1992). Thus, if the affidavit supports probable cause even when the omitted information is considered, and any misrepresented information redacted, the suppression motion fails. *Id.*

Here, Officer Taylor informed the judge that officers saw a suspect running toward an alley following the gunshots. The officer later testified that this statement was a mistake; it was actually a witness who saw a suspect running down an alley in a white jacket with a dark jacket. There was a question whether Officer Taylor informed the judge that a bullet had been recovered at the crime scene; Officer Taylor stated he informed the judge of this over the phone but did not state the bullet was located in the cabin of Mr. Bojorquez's car. And, Mr. Bojorquez claims a misstatement about a jacket being located in the cabin of the vehicle, but Officer Taylor testified that a jacket was found in the trunk.

Aside from these statements, the judge was correctly informed that a car was acting suspicious in a location where shots were recently fired, the occupants were wearing red in a blue-color gang area, and, when questioned, Mr. Bojorquez admitted he was smoking marijuana in the vehicle. Based on this information, the statements about whether officers or witnesses saw a suspect running down the alley and the confusion

regarding a bullet and a jacket would be immaterial. As the trial judge stated, Officer Taylor did not "deliberately misrepresent[] facts" and the events were "fast moving and fluid." CP at 72. Given all, we conclude the trial court properly denied Mr. Bojorquez's suppression request.

B. Evidence Rulings

Did the trial court abuse its discretion in admitting certain evidence? Mr. Bojorquez contends the court improperly allowed the shotgun and gang affiliation evidence.

We review a trial court's evidentiary rulings for abuse of discretion. *State v. Lormor*, 172 Wn.2d 85, 94, 257 P.3d 624 (2011). A trial court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *Id.* A trial judge has wide discretion in balancing the probative value of evidence against its prejudicial impact. *State v. Stenson*, 132 Wn.2d 668, 702, 940 P.2d 1239 (1997) (citing *State v. Rivers*, 129 Wn.2d 697, 710, 921 P.2d 495 (1996)).

Under ER 402, only relevant evidence is admissible at trial. But, ER 403 requires the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." "'[U]nfair prejudice' is that which is more likely to

arouse an emotional response than a rational decision by the jury [and which creates]' . . . an undue tendency to suggest a decision on an improper basis." *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting *State v. Gould*, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)).

Inside Mr. Bojorquez's trunk, officers recovered a .357 magnum, a 12-gauge shotgun with the barrel partially sawed off, 12-gauge shotgun shells, and .38 caliber casings that fit the .357 revolver. The State charged Mr. Bojorquez with first degree assault with a deadly weapon. The State's theory was that the shooting was gang motivated. A vehicle with occupants wearing red in a blue-color gang area with a trunk containing weapons would be relevant to the State's theory. The evidence clearly showed the charged deadly weapon was the .357 magnum. Thus, any prejudice would not outweigh the probative value nor arouse an emotional response from the jury. The court had tenable grounds to allow the evidence. We conclude the trial court did not abuse its discretion in allowing the shotgun evidence.

Next, Mr. Bojorquez argues the court abused its discretion in allowing gang evidence. Evidence of other crimes, wrongs, or acts is not admissible to prove character or conformity with it, but it may be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b). Before a trial court may admit evidence of other crimes or

misconduct, it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) determine whether the evidence is relevant to a material issue, (3) state on the record the purpose for which the evidence is being introduced, and (4) balance the probative value of the evidence against the danger of unfair prejudice. *State v. Kilgore*, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). "ER 404(b) is not designed 'to deprive the State of relevant evidence necessary to establish an essential element of its case,' but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged." *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)).

A trial court can admit evidence of gang membership where that evidence indicates motive. *State v. Campbell*, 78 Wn. App. 813, 821, 901 P.2d 1050 (1995). But, evidence of gang membership lacks probative value "when it proves nothing more than a defendant's abstract beliefs." *Id.* at 822 (citing *Dawson v. Delaware*, 503 U.S. 159, 164-67, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992)).

In *Campbell*, the trial court permitted evidence of gang membership because "there was a nexus between gang culture, gang activity, gang affiliation, drugs, and the homicides" at issue. 78 Wn. App. at 818. Division Two of this court affirmed the trial court's decision to admit the evidence because the "fact that Campbell was a member of a

gang and a drug dealer provided the basis for the State's theory of the case. . . . The challenged evidence clearly was highly probative of the State's theory• that Campbell was a gang member who responded with violence to challenges to his status and to invasions of his drug sales territory." *Id.* at 821-22.

To convict Mr. Bojorquez of first degree assault, the State had to prove he as a principal or accomplice (1) intended to inflict great bodily harm and (2) assaulted another with any deadly weapon or by any force or means likely to produce great bodily harm or death. RCW 9A.36.011(1)(a). The State theorized the shooting was gang motivated given Mr. Bojorquez's clothing, the area, his association with members of a rival gang, someone yelling "South side LVL" shortly before the shooting, and Mr. Bojorquez's lie regarding his brother's gang membership. Given all, the trial court did not abuse its discretion in permitting the gang evidence because it was probative of the State's case theory and gave context to the crimes.

C. Discovery Claims

Did the trial court err by abusing its discretion in denying Mr. Bojorquez's motion to suppress the ballistics report? He contends the evidence was not timely offered to the defense.

We review a trial court's decision to admit or exclude evidence at trial under an abuse of discretion standard. *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004),

abrogated on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Abuse of discretion will solely be found on a clear showing that the trial court's exercise of discretion was manifestly unreasonable, or exercised on untenable grounds, or made for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "[I]t is an abuse of discretion to exclude testimony as a sanction for discovery violations absent a showing of . . . [a] willful violation of a court order." *In re Estate of Foster*, 55 Wn. App. 545, 548, 779 P.2d 272 (1989). "A 'willful' violation means a violation without a reasonable excuse." *Id.* Inadvertent error in failing to disclose an expert may be deemed willful, justifying the exclusion of testimony. *Id.* "[T]he particular sanction imposed should at least insure that the wrongdoer does not profit from his wrong." *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984).

Mr. Bojorquez claims he was not supplied the full ballistics report. But, when asked if he received the report, defense counsel stated, "I don't remember it coming in." RP (Dec. 14, 2010) at 66. The inability of a trial attorney to remember a report supplied by the State does not rise to the level set forth above, requiring a dismissal of the trial or exclusion of evidence.

In *State v. Krenik*, 156 Wn. App. 314, 320, 231 P.3d 252 (2010), the State admitted mid-trial, during the testimony of a primary witness, that a surveillance video of

the scene of the charged crime existed. This would appear to be far in excess of the alleged violation in this case. There, the court stated, "Where previously undisclosed discovery is revealed during the State's case-in-chief, a continuance can be an appropriate remedy." *Id.* at 321. But, when defense counsel does not "'move for such a continuance, the prosecutor's noncompliance with the discovery rule [is] not prejudicial error.'" *Id.* (citing *State v. Brush*, 32 Wn. App. 445, 456, 648 P.2d 897 (1982).

Here, the State offered a more in-depth version of a report that the State had already provided to defense counsel. Counsel was free to interview the expert prior to his testimony. The failure to do so is not a discovery violation on the part of the State. Moreover, Mr. Bojorquez was free to request a continuance, but declined to do so. Therefore, any alleged error would not be prejudicial. The trial court even noted Mr. Bojorquez could not "provide some evidence that his inability to present a defense was prejudiced." RP (Dec. 22, 2010) at 124. Accordingly, we conclude the trial court had tenable grounds to deny Mr. Bojorquez's request to exclude the ballistics report and did not abuse its discretion.

Affirmed.[5]

A majority of the panel has determined this opinion will not be printed in the

[5] In light of our amended opinion on reconsideration in *State v. Moreno*, No. 29692-0-III, Mr. Bojorquez's motion to supplement his brief with an additional assignment of error is denied.

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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Siddoway, A.C.J.

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Sweeney, J.