

Views from the Field:

**MEMORANDUM IN SUPPORT
OF GANG EXPERT TESTIMONY**

BY

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INTRODUCTION:

Maryland, unlike some other states, has no statutes regarding enhanced penalties for gang members convicted of committing criminal offenses. Nor does Maryland have a procedure for introducing relevant evidence concerning gang activity during the prosecution of a criminal case involving a gang member. The purpose of this article is to share with jurisdictions, similarly situated to Maryland, a memorandum of law filed in a gang related case. Without significant gang legislation, it becomes incumbent for prosecutors to educate the courts to the gang problems in their jurisdictions.

FACTS:

On June 18, 2003, Jose Orellana was at Amity Park. Mr. Orellana was approached by an individual known to him as "Snoopy". "Snoopy" pulled a knife on Mr. Orellana and put it to Mr. Orellana's side, and stated, "Do you want to die right here?" "Snoopy" then forced Mr. Orellana into a black Chevy Camaro driven by an unknown individual. Mr. Orellana was driven to a location in the area of West Deer Park and Route 355 in Gaithersburg, Montgomery County Maryland. At that location approximately 15 Hispanic males forced Mr. Orellana out of the car. An individual, known to Mr. Orellana as "Psycho", used a knife to cut Mr. Orellana's right shoulder 4 or 5 times. On Mr. Orellana's left shoulder was a tattoo of the Roman numeral "X". On his right shoulder

was a tattoo of the number 8.

“Snoopy” has been identified as the defendant Henry Salvador Alfaro Argueta.

HISTORY:

The defendant is a member of Mara Salvatrucha. Mara Salvatrucha, a Hispanic criminal street gang with thousands of members in at least six countries, is a presence within the Montgomery County area. Also referred to as “MS 13,” the gang is involved in a range of criminal activity including transporting and distributing drugs. Members of Mara Salvatrucha are often extremely violent, principally against members of rival gangs. One of MS 13’s rivals is 18th Street. The gang, MS 13, traditionally has been composed of loosely affiliated groups known as “cliques;” however, increased coordination of criminal activity has been seen between Mara Salvatrucha cliques in the Washington, D.C. area and cliques in other regions of the country.

Mara Salvatrucha was originally formed by illegal El Salvadoran immigrant youths in the 1980’s in Los Angeles, California. Nearly 1 million refugees fled the civil war-torn El Salvador between 1984 and 1992 to settle in the United States, primarily in Los Angeles. By 1995, the Washington Metropolitan area was home to approximately 250,000 illegal Salvadoran immigrants. This influx made the Washington area the second largest Salvadoran population outside of El Salvador.

In 1993 Mara Salvatrucha forged a close relationship with the Mexican Mafia. This relationship caused the Mexican Mafia to designate Mara Salvatrucha a “Sureno 13” gang. Sureno 13 is the designation given to an affiliation of southern California Hispanic criminal street gangs influenced by the Mexican Mafia. Sureno 13 has a two-part meaning: Sureno which is Spanish for “southern” as in southern California and the number “13” which represents the 13th letter in the alphabet, or “M”, for Mexican Mafia.

Members communicate via cell phones, pagers, hand signs, and graffiti but do not use secret codes or cipher systems. Hand signs are used routinely to greet other MS 13 members and to challenge other individuals to identify their gang affiliation. Tattoos are used as a means of identifying gang affiliation. Mara Salvatrucha graffiti closely resembles clique tattoos and often includes “MS”, “MS13”, or “XIII”.

The 18th Street gang was originally formed by illegal Mexican immigrant youth in Los Angeles, California, during the 1960’s. During the 1980’s membership in the 18th Street gang grew, its territory expanded, and it became increasingly involved in drug distribution.

The 18th Street gang’s principal rival is Mara Salvatrucha. The conflict between the two gangs arose over drug distribution in the Rampart section of Los Angeles and expanded beyond Los Angeles to other locations, including the greater Washington D.C. metropolitan area, specifically Montgomery County.

The victim, Jose Orellana, has tattoos indicating he is a member of 18th Street. The defendant is a member of MS 13.

ARGUMENT:

The defendant is charged, in the lead count, with first degree assault. Maryland's first degree assault statute, Criminal Law Article, § 3-202, is a re-codification of the former article 27, § 386, assault with intent to maim, disfigure, or disable. The crime of assault with intent to maim, disfigure, or disable was a specific intent crime. Richmond v. State, 330 MD 223 (1993). Specific intent has been defined as not simply the intent to do an immediate act, but the additional deliberate and conscious purpose or design of accomplishing a very specific and more remote result. Harris v. State, 353 MD 596 (1999).

It is the State's theory that the defendant committed the crimes charged because he is a member of MS 13, and the victim had tattoos indicating that he was a member of a rival gang, 18th Street. The State alleges the defendant intended to commit the first degree assault, the cutting, at the site of the victim's tattoo, as a means of showing disrespect to the rival gang. It is well settled in Maryland that where intent is at issue, proof of a defendant's prior conduct may be admissible to prove the defendant's intent. Johnson v. State, 332 MD 456 (1993). In the case at bar, the State seeks to establish the defendant's membership and/or association with MS 13. Although the State has no records or other documents proving membership in MS 13, the State does have expert testimony from police officers, trained in street gang identification, who are familiar with the defendant and with MS 13. Intent, of course, is a subjective matter and may be proved by establishing facts which permit a reasonable inference that the accused intended the consequences of his acts. Perez v. State, 7 Md. App. 452 (1969). Although, one may infer that a person ordinarily intends the natural and probable consequences of his act, it is not required by Maryland law. See, Maryland Pattern Jury Instructions, Criminal 3:31.

The defendant's acts, in this case, caused a disfigurement of Mr. Orellana. Disfigurement is generally regarded as an extremely visible blemish or scar that impairs one's appearance. Thomas v. State, 128 Md. App. 274 (1999). The results of this crime are 4 or 5 scars on the victim's right shoulder.

Maryland Rule 5-401 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". The intent to cause disfigurement is of significant consequence to the crime of first degree assault, and to this case. In Cook v. State, 118 Md. App. 404 (1997), cert. denied, 349 MD 234 (1998), the appellate court held it was not an abuse of the trial court's discretion in allowing testimony that was relevant to appellant's state of mind at the time of the subject shooting. The defendant's gang membership/association is of probative value. See,

U.S. v. Abel, 469 U.S. 45 (1984). Maryland Rule 5-402 states in part, "...all relevant evidence is admissible." Analogous to the evidence sought in the case at bar is a hate crime case where the Court of Special Appeals stated the trial court did not abuse its discretion in ruling that the probative value of the defendant's statement "Just the nigger I'm looking for," made just before the defendant shot the victim, was not substantially outweighed by the danger of unfair prejudicial effect. Jenkins v. State, Md. App. (2002).

"As stated in Wharton's Criminal Evidence (13th ed.) §170: 'motive and intent are not synonymous. Motive is the inducing cause, while intent is the mental state with which the criminal act is committed. As motive is ordinarily not an element of the crime charged, evidence of motive does not establish guilt. While "proof of motive is not required because motive is ordinarily not an element of a crime" the State may, however, 'find it useful to produce evidence of motive in order to confirm the conclusion reached from the other evidence that it was in fact the defendant who had committed the offense charged'. Otherwise stated: "motive and lack of motive are always relevant, but motive alone is not enough to support a conviction'. Chandler v. State, 23 Md. App 645 (1974). Although not required to prove motive, the State seeks to show the defendant's motive in committing these crimes. This evidence is always admissible on the issue of criminal agency and mental state. Meyerson v. State, 181 MD 105 (1942).

Expert testimony will also establish the defendant's identity. Police officers will testify that they know "Snoopy" to be Henry Salvador Alfaro Argueta. Police were able to establish the defendant's identity, in part, based on the description of his tattoos. Maryland Rule 5-901 permits the testimony of a witness with knowledge to establish identity.

CONCLUSION:

The State requested the Court to permit the testimony of an expert witness regarding the defendant's membership/association with MS 13, and the rivalry between MS 13 and 18th Street. This testimony was deemed relevant by the State because it established the defendant's motive and intent, and, it established the defendant's identity.

Although this issue was never ruled on by the court in this case, the defendant entered a guilty plea, there exists a need in all states for a procedural means to introduce relevant gang evidence in the prosecution of gang members. This evidence would include: (1) common characteristics of persons who are members of a gang; (2) rivalries between specific gangs; (3) common practices and operations of the gang; (4) social customs and behavior of the gang; (5) terminology used by the gang; (6) codes of conduct by that particular gang; and, (7) types of crimes that gang is involved with.