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SUPREME COURT NO. 102411-8

NO. 37714-8-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RAYMUNDO CASARES,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Gayle Harthcock, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Raymundo Casares seeks review of the Court of Appeals' decision in State v. Casares, No. 37714-8-III (Op.), originally filed June 13, 2023, and Division Three's order denying reconsideration, filed August 24, 2023, both of which are appended to this petition.

B. ISSUES PRESENTED FOR REVIEW

1. At his 2019 trial for aggravated first-degree murder, attempted first-degree murder, first-degree assault, and unlawful possession of a firearm, Mr. Casares moved pretrial to suppress two eyewitness identifications tainted by a suggestive photomontage. The trial court agreed the montage was impermissibly suggestive, but it denied the motion because it found the identifications sufficiently reliable. At trial, which began the same day, several witnesses provided testimony directly relevant to the reliability analysis this Court would later adopt in State v. Derri, 199 Wn.2d 658, 511 P.3d 1267 (2022), on stress and weapon focus, witness confidence, and accuracy of

the witnesses' initial descriptions. Where this Court decided Derri after Mr. Casares's trial but while his appeal was still pending, does basic fairness require the appellate court to consider relevant trial testimony, as well as the more limited evidence presented at the pre-trial suppression hearing, when it conducts the Derri analysis on appeal? (Yes. Mr. Casares is entitled to the benefit of Derri's rule because his appeal is not yet final.)

2. Even if the appellate court considers only the evidence presented at the pretrial suppression hearing, were the photomontage identifications unreliable under a proper application of the Derri analysis? (Yes. The Court of Appeals' analysis—according to which a photomontage that highlights the defendant's image in two distinct ways, which was both assembled and administered by the detective who wanted to pin the crime on the defendant, is reliable solely because the eyewitnesses in question saw the defendant's face—renders Derri meaningless.)

C. STATEMENT OF THE CASE

Brothers Oscar and Jorge Gutierrez were the victims of a random shooting in Sunnyside, Washington, in early May of 2015. RP 401, 432-36. The shooter walked up to them, made brief gang-related comments, and then immediately started shooting. RP 515, 521. Tragically, Oscar died from his injuries and Jorge was paralyzed. RP 425, 440.

The witnesses to the shooting gave varying descriptions of the shooter's tattoos. Jorge told the police that the shooter had a tattoo on his cheek with two lines and four dots. CP 92. Jorge's and Oscar's younger brother, Brayan, who was in a nearby apartment when the shooting occurred, told police the shooter had a square-shaped tattoo on his neck and no other tattoos. RP 417; CP 92. The brothers' cousin, Oscar Garcia-Gutierrez, who was present for the shooting, told the police the shooter had a tattoo under his left eye and on his neck. RP 536; CP 92.

In other respects, as well, these witnesses' descriptions varied widely. Brayan said that the shooter had long hair, down

to his shoulders. RP 420; CP 92. But Jorge said that the shooter had hair so short that he was almost bald. CP 92; RP 448. Jorge said that the shooter had been wearing a white shirt. RP 459-60. But Mr. Garcia-Gutierrez said that he had on a black shirt. RP 520.

Neighbor Francisco Rosales saw a man with a gun running away from the apartment complex. RP 590. He told responding officers that he could not provide any description of the shooter. CP 92. But when detectives interviewed him a few days later, he told them the shooter was shorter than the lead detective (who was five feet nine inches), and that he was someone Mr. Rosales had seen with Jorge on at least one prior occasion. RP 591-92, 728.

Lead Detective Jaime Prieto knew Mr. Casares and knew that Mr. Casares's mother lived near the site of the shooting. RP 613. "With Mr. Casares in mind," he created a photomontage with six images, including Mr. Casares's." Ex. 2; RP 613, 619, 624-25.

Of the six individuals depicted, Mr. Casares was the only one with a face tattoo of two lines and four dots. Ex. 2. And only one out of the five other photos showed a person with any face tattoo at all—three dots, and no bars, very close to the left eye. Ex. 2.

Mr. Casares's image was also one of only two in which the individual had very short, buzzed hair. Ex. 2.

Finally, Mr. Casares's image was the only one cropped differently from all the others, to include his entire body from mid-chest up. Ex. 2. The other images were all tight shots of the subject's head and neck. Ex. 2. As a result, Mr. Casares appears smaller in the frame, occupying far less of the total field, relative to every other subject. Ex. 2; see RP 396.

Detective Prieto personally conducted photo-lineups with the witnesses. RP 616, 728. Neither Brayan nor Mr. Garcia-Guttierez selected any image. RP 521; CP 92.

Two days after the shooting, Mr. Rosales selected Mr. Casares as the shooter in the photo lineup. RP 593-94.

Five days after the shooting, while he was heavily medicated in the hospital, Jorge selected Mr. Casares's image in the photomontage. RP 464; CP 92. But later that day, Jorge called detectives and told them he was no longer confident in his identification. RP 727; CP 92.

Based on these identifications, police arrested Mr. Casares in Snohomish County, at his girlfriend's residence. RP 657-61. At the time of his arrest, Mr. Casares was near a black bag that contained a .38 caliber revolver wrapped in a red bandana, a 9mm handgun and ammunition, and some clothing and other personal items. RP 661-64. And the trunk of the car he had just exited contained more ammunition, three baseball caps, clothing and shoes, and a photograph of an apparently deceased man in a casket. RP 664-67.

The State charged Mr. Casares with aggravated first-degree murder of Oscar, attempted first-degree murder of Jorge and Mr. Garcia-Gutierrez, first-degree assault of Jorge and Mr.

Garcia-Gutierrez, and unlawful possession of a firearm. CP 146-49.

Trial

The parties proceeded to trial more than four years later, in September of 2019. Mr. Casares moved to suppress Jorge's and Mr. Rosales's identifications as tainted by the impermissibly suggestive photomontage. CP 66-68; RP 388-92.

A hearing was held on September 10, 2019. RP 382, 387. No witnesses testified; instead, the parties relied on the montage itself and the undisputed facts recited in the State's briefing on the motion. See CP 91-93; RP 388-94.

The State's briefing said that Mr. Rosales was initially unable to provide any description of the shooter, then later described him as short with short hair, and ultimately, after seeing the montage, expressed confidence he could identify the shooter if he saw him again. CP 92.

The State's briefing said that Jorge described a tattoo of bars and lines on the left side of the shooter's face, that he

identified Mr. Casares in the montage but then called detectives later to express doubts about that identification, and that he ultimately maintained those doubts over time. CP 92-93.

The trial court agreed that the photomontage was suggestive, both because of the facial tattoo and because of the distinctive layout of Mr. Casares's picture relative to all the others. RP 395-96. With respect to the tattoo, the court found: "When shown to eye witnesses that have seen this individual, it is a distinct tattoo." RP 395.

But the court ruled the identifications were nevertheless reliable and admitted them. RP 396-99; CP 223-27. It did so because it found that:

> Both Jorge Gutierrez and Francisco Rosales had an opportunity to view the assailant at the time of the shooting, paid a high degree of attention during and after the shooting, had accurate prior descriptions of the assailant, and demonstrated a high degree of certainty when shown the photo montage. Further, both witnesses were shown the photo montages within five days of the shooting.

CP 226.

The parties gave opening statements immediately thereafter. RP 401. Jorge testified that same day and Mr. Rosales testified the following day, September 11. RP 423-71, 587-604.

Jorge testified the whole incident took seconds. RP 446-47. He said the shooter approached him and his brother, making comments about the "North Side" gang, and then immediately pulled a handgun out of his waistband and started shooting. RP 435-36.

Jorge strongly disavowed his photo lineup selection, saying he picked an image at random because he was angry, traumatized, and on pain medication. RP 465-67. He also testified that he could not remember which photo he selected, but that it must have been number four because that was the only photo with the facial tattoo, and he said he was only sure he recognized Mr. Casares as the shooter when he saw him in news coverage of the prosecution. RP 467-69. Jorge testified repeatedly, including on redirect examination, that he selected

photo four "because of the lines underneath the eye." RP 469, 470.

Mr. Rosales testified, on direct examination, that his opportunity to see the shooter was "very fast," and so he was not sure he could identify him if he saw him again. RP 592. He also testified that he could not identify Mr. Casares in the courtroom as the shooter. RP 590. On direct examination, he repeatedly reminded the prosecutor that the incident happened "very fast," that he was very scared, and that he had a very limited opportunity to observe anything. RP 590-94, 596-97. On cross-examination, Mr. Rosales testified that he told the defense investigator that he felt the shooter might have been pointing his gun at him (Mr. Rosales). RP 600-01.

Detective Prieto confirmed that Jorge initially "backed away" from his montage identification. RP 727. And he testified that Mr. Rosales told investigators that the shooter was someone he had seen previously with Jorge. RP 728. Jorge testified he had never seen Mr. Casares or the shooter before. RP 454.

Detective Prieto also testified that he had not tried very hard to find photomontage images of individuals with similar facial tattoos, because he did not believe he would find any. RP 613-15, 619-20. But the defense presented evidence proving that the database Detective Prieto used had contained, at that time, at least three Yakima County Jail booking photos of similar-looking men with the same facial tattoo. RP 819-23; Ex. 144-46.

The State's theory was that Mr. Casares was a member of the Norteño gang, who committed the shooting to gain status in the organization. It was undisputed that the victims were *not* gang members, but the State argued Mr. Casares mistook them for members of the rival Soreño gang because they were wearing blue. RP 738-39, 867.

Over defense objection, the State was permitted to present testimony, by Sunnyside Police Officer Jose Ortiz, that Mr. Casares had tattoos and possessions (such as red clothing and the picture of the man in a casket), and had engaged in behaviors, characteristic of a Norteño gang member. RP 752-56. Officer

Ortiz told the jury that Mr. Casares had "associated with" with Norteño gang members in the Sunnyside area in the past, and that he believed Mr. Casares was a Norteño. RP 752-54.

The trial court sustained several defense objections to Officer Ortiz's gang testimony. For example, Mr. Casares successfully objected when Officer Ortiz said that "violence is just automatic" for gang members. RP 734.

The court also sustained the defense objection when Officer Ortiz told the jury that Mr. Casares's tattoo "means" he's a Norteño. RP 741.

Mr. Casares also successfully objected to Officer Ortiz's testimony that someone asking the question "you bang?" means that someone "is going to get assaulted." RP 750.

Finally, the court sustained a defense objection to the use of the present tense when Officer Ortiz testified that Mr. Casares "is" a Norteño gang member. RP 754

But Mr. Casares's defense attorney did not move to strike any of the testimony that led to those sustained objections. RP

734, 741, 750, 754. Accordingly, that evidence remained part of the record for the jury to consider.

During cross-examination of Officer Ortiz, defense counsel elicited the following testimony:

> DEFENSE COUNSEL: Okay. So when you testify about your opinion, what you can say is at some point in his life he was associated with the Norteno gang, right?
>
> OFFICER ORTIZ: I don't think he was associated. He was a member.
>
> DEFENSE COUNSEL: He told you that?
>
> OFFICER ORTIZ: We have it documented.

RP 759-60.

Defense counsel did not object to the testimony that the police "ha[d] it documented" that Mr. Casares was a gang member. RP 759-60.

Officer Ortiz admitted that it was not unusual for former gang members to "get married, have children, and move on from gang life" when they got older. RP 758. He also admitted that he had not seen Mr. Casares associating with any gang members

or engaged in any other type of gang activity, or even seen him in the Sunnyside area, "in years." RP 760.

Notably absent from the State's case was any forensic evidence linking Mr. Casares to the shooting. The State did not allege that either of the weapons found in Mr. Casares's possession was used to perpetrate the shooting. See Op. at 4 n.3.

The jury found Mr. Casares guilty of each charge. CP 204-22. The court imposed a sentence of life without the possibility of parole. RP (8/21/20) 124-25. Mr. Casares had just turned 21 at the time of the shooting; he was 25 when given a life sentence. RP (Aug. 21, 2020) at 120-124.

Appeal

Mr. Casares raised several issues on appeal, including the admission of Jorge's and Mr. Rosales's photomontage identifications, the admission of Officer Ortiz's gang membership opinion testimony, and defense counsel's ineffective assistance for failing to move to strike the portions of

that testimony to which the trial court sustained objections. Op. at 1-2.

With respect to the photomontage challenge, the parties agreed on the two-prong analysis traditionally applied under the Fourteenth Amendment and article I, section 3 of the Washington Constitution. BOA at 13; BOR at 10-11. Under this analysis (the Brathwaite[1] analysis), the court asks first whether the identification procedure was unnecessarily suggestive. Perry v. New Hampshire, 565 U.S. 228, 238-39, 132 S. Ct. 716, 181 L. Ed. 2d 694 (2012). If it was, the court then asks whether other indicators of reliability outweigh "the corrupting effect of the suggestive [procedure]." Brathwaite, 432 U.S. at 114.

The parties also agreed that the factors to be considered in the second step of the analysis include (1) the witness's opportunity to observe the subject at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the

[1] Manson v. Brathwaite, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

witness's prior description; (4) the witness's level of certainty at the subsequent identification; and (5) the passage of time between the offense and the identification. BOA at 15; BOR at 11-12.

The parties disagreed, however, about the manner in which the trial and appellate courts should apply the Brathwaite analysis. The U.S. Supreme Court decided Brathwaite in 1977, and Mr. Casares cited numerous subsequent empirical studies on eyewitness identification, which he argued should inform a contemporary application of the test. BOA at 13-45. By contrast, the State argued the trial court had no duty to consider studies on eyewitness identifications, because those studies were not made part of the record at Mr. Casares's trial. BOR at 17-18. Likewise, it contended the appellate court could not consider the studies in its review. BOR at 17-18.

While Mr. Casares's appeal was pending, this Court adopted his theory, significantly altering the standard for admitting tainted eyewitness identifications. Op. at 8 (citing

Derri, 199 Wn.2d 658). Recognizing that Mr. Casares was entitled to the benefit of this change, Division Three called for supplemental briefing and set the case for oral argument. Op. at 8; Wash. Court of Appeals oral argument, State v. Casares, No. 37714-8-III (April 24, 2023), audiovisual recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-3-court-of-appeals-2023041277/?eventID=2023041277.

One June 13, 2023, Division Three affirmed Mr. Casares's convictions. Op. at 2. On August 24, 2023, the Court amended its opinion but denied Mr. Casares's motion for reconsideration. Order Denying Reconsideration (Order), appended.

Court of Appeals Opinion

The amended opinion correctly concludes that the photo lineup procedures used in this case were unduly suggestive for multiple reasons: the lack of double-blind administration, the distinct framing of Mr. Casares's image, and failure to include other subjects with similar or identical facial tattoos. Op. at 17.

After agreeing that these three separate aspects of the montage rendered it unnecessarily suggestive, the Court of Appeals found that only *one* of the five Derri factors weighed in favor of reliability. Op. at 17-21; Order at 1-2. This was the first factor: the witness's opportunity to observe. Op. at 18-19. According to the Court of Appeals: "Jorge had a significant opportunity to see the assailant's face" and "Rosales had been able to see the assailant's face because he was 'face on' with the assailant as he fled the scene." Op. at 18-19 (quoting RP 397).

Based solely on the fact that the two witnesses had briefly seen the assailant's face, Division Three concluded the tainted montage identifications were sufficiently reliable to overcome all the improper, suggestive techniques used in compiling and administering them. Op. at 20-21.

In reaching that decision, the Court of Appeals expressly rejected Mr. Casares's repeated requests that it consider overwhelming evidence that stress, weapon focus, shifting descriptions, and witness uncertainty all weighed against

reliability in the Derri analysis. See Motion to Reconsider at 13-24; Casares, No. 37714-8-III, TVW audiovisual recording at 14 min. 47 sec. Relying on dicta in Derri, the Court of Appeals declined to consider this evidence because it was presented at trial, rather than just a few hours earlier, at the hearing on the motion to suppress. Op. at 15.[2] It did so even while acknowledging, in the very same paragraph, that "Derri not only changed the factors to consider but also the weight assigned to various factors." Op. at 15.

In other words, the Court of Appeals held that Mr. Casares was theoretically entitled to the benefit of Derri's holding—since the opinion issued before his case was final—but that, as a practical matter, he will never see that benefit.[3]

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[2] In this part of the opinion, Division Three wrote: "We do not consider evidence that was presented later during trial or on appeal." Op. at 15. It is not clear what the court meant by "evidence . . . presented . . . on appeal."

[3] The Court of Appeals also denied Mr. Casares's request, in the alternative, to remand for a hearing on the reliability factors. See Motion for Reconsideration at 3, 31.

D. REASONS REVIEW SHOULD BE ACCEPTED

As Mr. Casares explained in his motion for reconsideration, Jorge's and Mr. Rosales's identifications are unreliable and therefore inadmissible, under a proper application of the Derri analysis, even if the appellate court considers only the information before the trial court at the suppression hearing. Mot. for Reconsideration at 9-13. The Court of Appeals concluded otherwise only because it ignored undisputed facts before the trial court at the suppression hearing, related to the "accuracy" of Mr. Rosales's evolving pre-montage descriptions,[4]

[4] As evidenced by the State's own trial briefing at the suppression hearing, Mr. Rosales was initially unable to provide any description of the shooter at all. CP 92. In a subsequent interview, with a different detective, he described the shooter as short, with short hair. CP 92. Finally, after being shown the suggestive montage, Mr. Rosales was interviewed by the parties and said he was confident he could identify the shooter if he saw him again. CP 92. These shifting descriptions, culminating in a confidence that developed only after exposure to the suggestive montage, weigh against a finding of reliability under Derri. The Court of Appeals refused even to acknowledge this evidence, inaccurately concluding that "[n]othing before the trial court indicated that Rosales's description was inaccurate, it simply was not detailed." Op. at 19.

and to Jorge's level of certainty.[5] Mot. for Reconsideration at 9-13.

But Division Three compounded these factual errors by refusing to consider any of the trial testimony. That refusal warrants review in this Court under RAP 13.4(b)(1) because it conflicts with this Court's decision in State v. Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009). It also merits review under RAP 13.4(b)(3) & (4) because it involves significant constitutional questions and issues of substantial public interest that this Court should determine. Division Three's analysis

[5] Division Three's opinion observes that, under Derri, a high degree of certainty "does not weigh in favor of reliability where the procedure was unnecessarily suggestive. . . . Rather, a low degree of certainty *would* weigh *against* reliability." Op. at 20 (citing Derri, 199 Wn.2d at 688-89) (emphases added). This is an accurate statement of the law, but a critically inaccurate recitation of the facts of this case. As Mr. Casares pointed out in his supplemental briefing, as the State conceded at the suppression hearing, and as Division Three's opinion elsewhere acknowledges, Jorge's out-of-court identification was not confident. Suppl. BOA at 18 (citing CP 92-93); Op. at 10 ("[Jorge] later expressed doubt about his choice after talking to his cousin").

renders Derri meaningless for defendants, like Mr. Casares, whose direct appeals were pending when the Derri decision issued.

Where a party makes a strategic decision to withhold material evidence at a suppression hearing, that party will generally have to live with that decision. But this rule should not apply where (1) the law changes as to a critical evidentiary issue during the pendency of the appeal and (2) the trial record is sufficient to decide the evidentiary issue under the current rule. Id.

This Court's decision in Koslowski, 166 Wn.2d 409, illustrates this point.

The defendant in Koslowski, was charged with several offenses stemming from two home invasion robberies. Id. at 412. One of the alleged victims died before the trial, and the State moved to admit her hearsay statements to the officers who responded to her 911 call. Id. at 412, 414. The trial court admitted these statements, finding they satisfied confrontation

clause standards under Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

While Mr. Koslowski's direct appeal was pending, the United States Supreme Court issued Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). These cases overturned Roberts and articulated a new test for determining whether a statement was "testimonial" for purposes of confrontation clause protections. Davis, 547 U.S. at 822; Crawford, 541 U.S. at 53-54.

When Mr. Koslowski's appeal reached this Court, this Court recognized the problem inherent in the evolving constitutional standards: Mr. Koslowski was entitled to the protections announced in Crawford and Davis, but trial counsel had had no notice of those standards. Koslowski, 166 Wn.2d at 422. The Koslowski Court wrote:

> [A]t the time this case was tried, Crawford and Davis had not been decided and the evidence submitted and the arguments to the trial court reflect

> the fact that Roberts controlled at the time. There is abundant evidence about [the victim's] emotional state, for example, which was highly relevant under Roberts. The same level of detail about circumstances that are relevant under Davis is lacking. For example, we do not know what questions, exactly, were asked and how they were answered, nor do we know when, in the course of the interrogation, certain questions were asked and answered, or how long a time had elapsed when certain statements were made.

Id. Nevertheless, this Court reviewed Mr. Koslowski's confrontation clause claim under the recently announced standard, "[g]iven what the record does reveal." Id.

Crucially, when it did so, this Court reviewed the entire record, including both "[t]he evidence submitted at Mr. Koslowski's trial *and* at the pretrial hearing addressing the State's motion to admit [the hearsay] . . . statements." Id. at 414 (emphasis added). This approach is the only fair and reasonable one where evolving constitutional protections are at stake.[6]

[6] There is dicta in Derri indicating that this Court limited its consideration to "the record before the trial court when it ruled on that motion." 199 Wn.2d at 664 n.4. See Op. at 15 (citing State v. Derri, 17 Wn. App. 2d 376, 395 n.3, 486 P.3d 901

It is particularly fair and reasonable in this case because the pre-Derri state of the law left Mr. Casares to litigate the questions of suggestiveness and reliability at trial. Thus, the State was not deprived of any opportunity to test Mr. Casares's arguments, or advance its own, on the reliability of the out-of-court identifications. By failing to consider the trial testimony, simply because Mr. Casares was tried before the Derri decision, Division Three worked a profound and needless injustice.

(2021)). But the parties to Derri did not dispute what facts were properly before the appellate court, so the scope of the record on review was simply not an issue in that case. See Supp'l Br. of Pet'r, State v. Derri, 100038-3 (filed Dec. 12, 2021); Supp'l Br. of Resp., State v. Derri, 100038-3 (filed Dec. 12, 2021) Pet. for Rev. State v. Derri, 100038-3 (filed July 28, 2021); Br. of Resp., State v. Derri, 80396-4-I (filed Sept. 3, 2020).

This injustice is compounded, in Mr. Casares's case, by the fact that the vast majority of the State's other evidence linked him not to the shooting, specifically, but only to the Norteño gang.[7] Thus, Mr. Casares was convicted almost entirely on the basis of evidence that case law treats with special skepticism: eyewitness identification evidence and gang affiliation evidence. See Derri, 199 Wn.2d at 673 ("[c]ourts have long recognized the potential unreliability of eyewitness testimony and the unique risks to reliability posed by suggestive police procedures"); State v. DeLeon, 185 Wn.2d 478, 491, 374 P.3d 95 (2016) (courts must use caution when considering admission of "generalized gang evidence," which is "often highly prejudicial, and must be tightly constrained to comply with the Rules of Evidence").

[7] The only other evidence linking Mr. Casares to the shooting was an in-court identification by Mr. Garcia-Guttierez. But the reliability of this identification was significantly undermined by the fact that Mr. Garcia-Guttierez did not make it until after he saw news reports of Mr. Casares's arrest. See RP 531-42.

The tactics law enforcement used in this case are precisely what the Brathwaite analysis was intended to prevent. But Brathwaite proved an ineffective safeguard. See Op. Br. at 28 (citing Gary L. Wells, Deah S. Qunlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 Law & Hum. Behav. 1 (2009)); Derri, 199 Wn.2d at 663 ("courts must consider new scientific research, developed after the 1977 Brathwaite decision, when applying that federal due process clause test"). If courts are permitted to apply Derri in the manner that Division Three did in Mr. Casares's case, it too will be ineffective.

E. CONCLUSION

This Court should grant review, correct the numerous errors in the Court of Appeals' analysis, and reverse Mr. Casares's convictions.

I certify that this document contains 4,558 words, excluding those portions exempt under RAP 18.17.

DATED this 21 day of September, 2023.

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

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RAYMUNDO CASARES, Appellant.	)	No. 37714-8-III ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING COURT'S OPINION FILED JUNE 13, 2023

THE COURT has considered the appellant's motion for reconsideration of the opinion, the record and file herein, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this Court's decision of June 13, 2023 is hereby denied.

IT IS FURTHER ORDERED the opinion filed June 13, 2023, is amended as follows:

On page 20, the second paragraph that reads:

> As to the timing of the identifications, Jorge identified Casares in the photo lineup five days after the shooting, and Rosales identified Casares two days after the shooting. In *Derri*, the court determined that an identification nine days after the incident weighed neither for nor against reliability noting that misidentifications substantially increase from 2 to 24 hours after an event. *Id*. at 689. Here, although it was still outside the 24-hour range, the time frame was significantly shorter, especially in the case of Rosales. Thus, this factor weighs slightly in favor of reliability.

shall be corrected to read:

As to the timing of the identifications, Jorge identified Casares in the photo lineup five days after the shooting, and Rosales identified Casares two days after the shooting. In *Derri*, the court determined that an identification nine days after the incident weighed neither for nor against reliability, noting that misidentifications substantially increase from 2 to 24 hours after an event. *Id*. at 689. While researchers have not pinpointed a precise time at which memory becomes unreliable, this temporal factor loses its value as time passes. *Id*. Here, the identifications were made within a significantly shorter time frame than those in *Derri*, especially in the case of Rosales. Nevertheless, since the identifications were made more than 24 hours after the crime, the factor is considered neutral in determining reliability.

The rest of the opinion shall remain as written.

PANEL: Judges Staab, Fearing, Pennell

FOR THE COURT:

George Fearing

GEORGE FEARING, Chief Judge

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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
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. RAYMUNDO CASARES, Appellant.	)))))))))	No. 37714-8-III UNPUBLISHED OPINION

STAAB, J. — In 2015, a man walked up to a trio of young men, pulled out a handgun and began shooting. Oscar Gutierrez was killed and his brother, Jorge Gutierrez, was struck by two bullets and paralyzed. Shortly after the shooting several witnesses were shown a photograph lineup of potential suspects. Two witnesses identified Ramundo Casares as the shooter. A jury found Casares guilty, and he was sentenced on one count of aggravated first degree murder, two counts of attempted first degree murder and one count of second degree unlawful possession of a firearm.

On appeal, Casares raises four main issues. He contends that: (1) the trial court abused its discretion by admitting pre-trial eyewitness identifications of Casares because the identifications were obtained using unnecessarily suggestive procedures and were not otherwise reliable, (2) insufficient evidence supported one count of attempted murder, (3)

the trial court improperly allowed ER 404(b) gang expert testimony, and (4) his counsel was ineffective in failing to strike certain evidence. Finding no error, we affirm.

BACKGROUND[1]

On May 9, 2015, Jorge Gutierrez and his brother, Oscar Gutierrez, were hanging out with their cousin, Oscar Garcia-Gutierrez in the parking lot of Jorge's apartment. Oscar Gutierrez was sitting in the passenger seat of his cousin's car, Jorge Gutierrez was standing outside the driver's door of the same car, and Oscar Garcia-Gutierrez was standing at the trunk. At the time, Jorge was wearing a significant amount of blue clothing: blue Vans shoes, blue Dickey pants and a blue Dodgers cap. As the group conversed, they noticed a car drive by slowly two times and then saw an individual approach the group.

Jorge later testified that the individual "just came to us throwing his—to be specific North Siders gang. . . . [H]e said North Side mother fuckers." Rep. of Proc. (RP) at 434-35. When the man asked, "you bang?" the group responded, "No, we don't. Why?" RP at 515.

Concerned there would be a fight, Jorge started to go around the car door when the individual pulled a hand gun wrapped in a red bandana from his waistband and started shooting. The first shot missed Jorge but he heard his brother, sitting in the passenger

[1] While we provide general background information here, we add relevant details in the analysis section of the opinion.

seat, say "no, no, no; don't shoot" before being struck by the second shot. Still standing by the trunk, Oscar Garcia-Gutierrez saw the second shot hit his cousin "and then he shot our way." RP at 515. As Jorge turned away, one bullet struck him in the back and another on the thigh. Oscar ran around the building without being hit.

Neighbors Francisco Rosales and Joyce Wassemiller both heard gun shots and saw a man running from the area with a gun. Brayan Gutierrez, then twelve years old, was playing in the backyard when he heard "more than 10" gun shots and ran toward his brothers. RP at 408. When he got out front, he saw the shooter run toward the corner.

As a result of the shooting Jorge was paralyzed and his brother Oscar Gutierrez died at the hospital.

The witnesses gave various descriptions of the shooter to police. Oscar Garcia-Gutierrez described the shooter as having a neck and face tattoo. Brayan Gutierrez also described the shooter as having a neck tattoo. Jorge described the shooter as having a distinctive face tattoo, with two lines and four dots. Francisco Rosales did not describe the shooter as having any tattoos.

Based on the descriptions given, police compiled a black and white photograph lineup of possible suspects. Each witness was presented with the same six pictures, shown in the same order, with Casares's picture placed fourth in the lineup. Two of the persons in the lineup had distinctive neck tattoos. Two persons in the lineup, including Casares, had face tattoos. Casares did not have a neck tattoo and was the only one in the

lineup with a face tattoo that had two bars and four dots. However, in the lineup photograph, Casares's face tattoo is indistinct and unrecognizable.

When presented with the photo lineup, Oscar and Brayan were unable to make an identification, but Jorge and Francisco Rosales both identified Casares as the shooter.[2]

Casares was arrested twelve days after the shooting in Snohomish County. At the time of his arrest, he was found in possession of a black duffle bag containing a revolver wrapped in a red bandana and a 9mm handgun with a loaded magazine.[3] In a separate bag, police found .38 caliber ammunition. Police also found various red clothing including a red Chicago Bulls baseball cap and plastic bag containing another red bandana. Also included in the bag was a picture of a deceased male in a casket, later identified as "Mr. Silent," a main "shot caller" for the Norteño gang in Yakima.

The State charged Raymundo Casares with one count aggravated first degree murder, one count second degree murder, two counts first degree attempted murder, two counts first degree assault, and second degree unlawful possession of a firearm. The second degree murder aggravator included intent to "directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for criminal street gang . . .

[2] Oscar Garcia-Gutierrez later conducted his own search of social media and, after seeing news reports of Casares's arrest, contacted police and indicated that he was sure Casares was the shooter. At trial, and without objection, Garcia-Gutierrez identified Casares as the shooter.

[3] The State did not allege that either of these firearms were used in the shooting.

. its reputation, influence, or membership." Clerk's Papers (CP) at 147. Additionally, the first degree murder aggravator alleged that the murder was committed "to obtain or maintain [ ] membership or to advance [ ] position in the hierarchy of an organization, association, or identifiable group." CP at 146.

Motion to Suppress pre-trial identifications

Prior to trial, Casares moved to suppress the pre-trial identifications made by Jorge Gutierrez and Francisco Rosales. Casares argued that the photographs were unduly suggestive and the identifications were not otherwise reliable. The State filed a response and attached the pre-identification admonitions given to each witness along with the photographs shown to the witnesses. The State also produced a video taken at the hospital showing Jorge as he viewed the photograph lineup. Casares did not call any witnesses or produce evidence in support of the motion to suppress.[4]

Based on the record before it, the trial court found that Casares's photograph was suggestive. The court noted that Casares' face tattoo, while indistinct and difficult to see, could draw a witness's attention to his photograph. The court also noted that Casares' photograph was framed differently than the others, and included his chest whereas the

[4] Casares moved in limine to admit the expert testimony of Dr. Geoffrey Loftus at trial and proffered that he would testify about the fallibility of eyewitness identifications. The motion was not decided, and it does not appear that Dr. Loftus testified at trial. Casares did not introduce or proffer any of the evidence in support of his motion to suppress.

other photographs were headshots. Nevertheless, after applying the *Biggers*[5] factors, and considering the totality of circumstances, the court determined the identifications were reliable and admissible.

Motion to Allow Gang-Related Expert Testimony

The State filed a pre-trial motion to allow Officer Jim Ortiz of the Sunnyside Police Department to testify at trial as a gang expert, and specifically about the Norteño and Soreño gangs in the Yakima area. The State argued that the evidence was relevant to show that the crime was gang related, Casares was a member of the Norteño gang, and he had a motive to shoot at the group of men. Casares raised several objections to the proposed testimony.

At the pre-trial hearing, Officer Ortiz provided a foundation for his proposed trial testimony. He testified about his qualifications and experience working with the Norteño and Soreño gangs in Yakima. He provided testimony on the meaning of certain colors, symbols and tattoos in the gang culture. He provided an opinion based on the evidence in the case that the shooting was gang related, Casares was a member of the Norteño gang, and the victims wearing blue clothing could be mistaken for rival gang members.

The trial court originally reserved ruling on the motion to see what evidence would come in during the trial to support Officer Ortiz's opinions. At trial, the State

[5] *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972).

presented additional evidence to set the foundation for Officer Ortiz's opinions and support the State's theory of the case.

Ultimately, the court excluded specifics about prior contacts with Casares, but allowed Officer Ortiz to testify that Casares was affiliated with the Norteño gang based generally on prior contacts as well as evidence discovered in this case. The trial court found that the statements "North Sider," "you bang" and the red bandana-wrapped murder weapon were evidence that the crime was gang-related, and that expert testimony would be helpful to a jury because the meaning of these things are not common knowledge. The purpose of admission was motive tethered to the specifics of the case. Officer Ortiz testified at trial consistent with his pre-trial testimony.

At trial, Jorge Gutierrez and Oscar Garcia-Gutierrez identified Casares as the shooter; the neighbor, Francisco Rosales, despite his earlier identification, did not identify Casares.

The jury returned guilty verdicts on all counts and aggravating circumstances. The trial court vacated and dismissed counts 2, 4, and 6 on double jeopardy grounds. In the end, Casares was sentenced for aggravated first degree murder, two counts of attempted first degree murder, and second degree unlawful possession of a firearm.

Casares timely appealed.

ANALYSIS

PRE-TRIAL IDENTIFICATIONS

The first issue we address is whether the trial court abused its discretion by admitting the pre-trial identifications made by Jorge Gutierrez and Francisco Rosales. Casares contends that the trial court violated his due process rights by admitting unreliable eyewitness identifications. Specifically, Casares assigns error to the court's finding that indicia of reliability surrounding the identifications was sufficient to overcome suggestive procedures used by law enforcement. For the first time on appeal, Casares argues that the federal test for determining reliability has been undermined by decades of empirical research, and we should hold that the Washington Constitution requires a greater showing of reliability.

We stayed our opinion in this case pending the Supreme Court's decision in *State v. Derri*, 199 Wn.2d 658, 511 P.3d 1267 (2022), after which the parties provided supplemental briefing. In *Derri* the Court held that when the federal due process clause is properly raised and developed on the record, the clause requires courts to apply relevant and widely accepted modern science on eyewitness identifications in determining whether the procedures used were suggestive and whether the identifications were otherwise reliable. *Id*. at 674-75.

In light of *Derri's* holding and Casares' failure to raise the state constitutional issue below, we decline to consider whether the state constitution provides greater

protection and instead decide this issue under the federal due process clause as interpreted by *Derri*. *See* RAP 2.5(a). On the record developed by the parties below, we hold that the trial court did not abuse its discretion by concluding that, under the totality of circumstances, the identifications were not "so unnecessarily suggestive as to create 'a very substantial likelihood of irreparable misidentification.'" *Id*. at 685-86 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)) (internal quotation marks omitted).

A. Preliminary Issues

We invited the parties to submit supplemental briefing to address *Derri*'s application to the issues raised in this case. In his supplemental brief, Casares raises five new assignments of error. The State correctly points out that supplemental briefs cannot raise new assignments of error. RAP 10.3(a)(4). *See State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994) (denying review of constitutional claim raised for the first time in supplemental brief). In Casares' original brief, he assigned error to the findings that Jorge and Mr. Rosales' identifications were reliable because their initial descriptions were accurate, the witnesses were confident, and the timing was short. Accordingly, these are the issues that we will address.

B. Additional Relevant Facts

Shortly after the shooting, four witnesses provided descriptions of the shooter. Based on these descriptions, police put together a photograph lineup of six men who

matched the general description. As noted above, two of the persons in the lineup had distinctive neck tattoos. Two persons in the lineup, including Casares, had face tattoos. Casares was the only one in the lineup with a face tattoo that had two lines and four dots. Two of the witnesses, Jorge Gutierrez and Francisco Rosales identified Casares as the shooter.

Jorge Gutierrez was standing near the driver's door of a car when the shooter approached. Jorge was shot twice as he ran away. He described the shooter as having a "14" tattooed on the left side of his face using a combination of lines and dots. Otherwise, he described the shooter as light skinned, short hair, wearing shorts and a black shirt. Five days after the shooting, he was presented with the photograph lineup while still in the hospital, and the procedure was recorded with video and audio. When Jorge was handed the photograph of Casares, he paused for a long period and held on to the photo. After viewing the rest of the photographs, Jorge went back to Casares' photograph and "definitely" picked Casares as the shooter, indicating "it was this fool," and began to cry. CP at 92. He later expressed doubt about his choice after talking to his cousin Oscar Garcia-Gutierrez.

Neighbor Francisco Rosales heard gun shots and saw the shooter running toward him. He initially told police that he could not provide a description of the shooter but in a subsequent interview described the shooter as shorter than Detective Prieto (who is five feet nine inches), with shorter hair. He did not describe the shooter as having a tattoo.

Two days after the shooting, Francisco was shown the photo lineup and was "100 percent certain" that Casares was the shooter. CP at 95. When interviewed later by the parties, Francisco stated that he was confident he could identify the shooter if he saw him again.

Before being shown the photo lineup, each witness was read a standard admonishment. Each witness was shown the same six black and white photographs sequentially in the same order. Casares' photograph was placed fourth in the lineup. Although not argued below, the State conceded at oral argument that police did not employ a double-blind procedure when presenting witnesses with the photographs.

In reviewing the lineup, the court noted that several of the photographs contained persons with tattoos. Casares' facial tattoo was "very indistinct," and difficult to even see, but could be discerned if a witness had seen the defendant previously. The court was more concerned that Casares' picture had different framing and showed Casares from the mid-chest up instead of headshots like the other photographs.

Ultimately, given Casares' unique facial tattoo and the framing of his photograph, the court concluded that "photograph number 4, is suggestive." CP at 226. Nevertheless, in applying the totality of circumstances to the *Biggers* factors, the court concluded that the identifications by Jorge Gutierrez and Francisco Rosales were sufficiently reliable to overcome any suggestiveness.

Specifically, the court found that Jorge had the opportunity to observe the shooter, he had a significant degree of attention, his identification was accurate, his level of certainty was extremely high, and he made the identification within a week.

The trial court also found that Rosales' photomontage identification was reliable. It supported this conclusion by each *Biggers* factor. The court found that Rosales had the opportunity to observe the shooter, had a significant degree of attention, his identification was accurate, his certainty was 100 percent, and he made the photomontage identification within two days.

C. Standard of Review

We review a trial court's decision to admit evidence for abuse of discretion. *State v. Kinard*, 109 Wn. App. 428, 435, 36 P.3d 573 (2001). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *Id.* at 435. We consider whether the challenged findings of fact are supported by substantial evidence and whether those findings support the court's conclusions. *Derri*, 199 Wn.2d at 676.

D. Due Process Prohibition Against Admitting Unreliable Evidence

Casares raises two related issues concerning the trial court's admission of the eyewitness's pre-trial identifications. First, he challenges the trial court's conclusion that the identifications were sufficiently reliable to overcome the suggestive procedures employed by law enforcement. Second, he argues that our state constitution provides more protection and requires a heavier burden to overcome a suggestive procedure.

Due process bars the admission of eyewitness identification obtained through unnecessarily suggestive procedures unless the identification is nevertheless reliable under the totality of the circumstances. *Id.* at 663. In 1977, the United States Supreme Court identified several factors to consider in determining whether a police procedure was unnecessarily suggestive. *Manson*, 432 U.S. at 114. In *Derri*, our state Supreme Court held that the federal due process clause requires trial courts to apply widely accepted modern science on eyewitness identification during each step of the *Brathwaite* test: when determining if a procedure is unnecessarily suggestive and when determining if the identification was otherwise reliable. *Derri*. 199 Wn.2d at 675.

The defendant bears the burden of establishing, by a preponderance of the evidence, that the police used unnecessarily suggestive identification procedures. *Id*. at 674. Where a defendant meets their burden of demonstrating that procedures employed were unnecessarily suggestive, the court must then consider whether the identification still possesses sufficient aspects of reliability so that the identifications do not violate due process. *Id.* at 674-75. This test requires the court to weigh the aspects of reliability against the corrupting effects of the suggestive procedure. *Id*. at 675. The court considers the totality of the circumstances to determine whether "the unnecessarily suggestive procedure created 'a very substantial likelihood of irreparable misidentification.'" *Id.* at 674 (quoting *Brathwaite*, 432 U.S. at 116) (internal quotation marks omitted).

Suggestive Procedure

Since *Brathwaite*, a significant amount of additional research has been conducted on suggestive procedures and factors that tend to support the reliability of eyewitness identifications. *Derri*, 199 Wn.2d at 675. In *Derri*, the court held that trial courts considering whether an identification should be suppressed must consider not only historical factors on suggestiveness and reliability, but also modern scientific data that has been widely accepted. *Id*. For instance, widely accepted research has concluded that:

> identification procedures should be administered in double-blind fashion, meaning the administrator does not know who the suspect is. Police should give preidentification admonitions informing the witness that the perpetrator may or may not be in the montage and the witness should not feel compelled to make a selection. They should never show the same suspect to the same witness over the course of multiple identification procedures. They should construct a photomontage in such a way that the suspect is not the only individual pictured who closely matches the description of the perpetrator. And they should avoid giving feedback to witnesses that might inflate confidence levels

Id. at 677.

In this case, the police employed several techniques to reduce the suggestiveness of the lineup. They read each witness an admonition that the perpetrator may or may not be in the lineup and the witness should not feel compelled to make a selection. The photographs were shown to each witness in sequential order as opposed to being presented as a montage. There is no evidence that Casares' photograph was shown to the witnesses multiple times. And there is no indication that police gave any feedback to the

witnesses about their identifications. Nevertheless, the trial court found that Casares' photograph was unduly suggestive.

Understandably, Casares does not challenge the trial court's finding that his photograph was suggestive, but he does argue that the trial court did not give the suggestive procedures enough weight when balancing them against aspects of reliability. In his motion below, Casares argued that his photograph was unduly suggestive because he was the only person in the lineup with a distinctive face tattoo. He did not submit any additional evidence or expert testimony in support of his motion. The State argues that the scientific evidence Casares refers to on appeal was not presented to the trial court and should not be considered on appeal.

Casares had the burden to fully develop the record before the trial court on factors that indicate suggestiveness. *Id*. at 674. In considering whether the trial court abused its discretion, we consider only the factual record that was before the court when it ruled on the motion to suppress. *State v. Derri*, 17 Wn. App. 2d 376, 395 n.3, 486 P.3d 901 (2021). We do not consider evidence that was presented later during trial or on appeal. We note, however, that the scientific evidence considered in *Derri* not only changed the factors to consider but also the weight assigned to various factors. To the extent that the trial court made findings on relevant factors here, we can consider the findings in light of *Derri*. But where the record is insufficient to consider a particular factor, we will not make independent findings on disputed facts. *See Derri*, 199 Wn.2d at 679 (finding that

the record was insufficient to consider whether suspect's photograph with a neck tattoo increased suggestiveness when none of the witnesses described the suspect as having a neck tattoo).

While Casares' photograph was suggestive, the level of suggestiveness for each of the two witnesses varies because each witness gave different descriptions of the suspect. Jorge Gutierrez described the shooter as having a "14" tattooed on the left side of his face using a combination of lines and dots. He described the shooter as light skinned with short hair. Francisco Rosales described the shooter as shorter than the detective, but did not describe any tattoos.

A photo lineup can be suggestive when it "'directs undue attention to a particular photo.'" *Derri*, 199 Wn.2d at 678 (quoting *State v. Eacret*, 94 Wn. App. 282, 283, 971 P.2d 109 (1999) (per curiam)). This rule is generally applied when a witness describes a suspect with a distinctive feature and the defendant is the only person in the lineup with that distinctive feature. *Id*. However, this rule does not necessarily apply when a witness does not describe the suspect with a distinctive feature. *Id*. at 678-79.

Here, the trial court noted that several of the persons in the photo lineup had distinctive tattoos. Two other people had neck tattoos and one other person had a face tattoo near his eye. While Casares is shown with a face tattoo that matched the description given by Jorge Gutierrez, the tattoo is indistinct in the black-and-white photographs shown to the witnesses unless a person knew the tattoo was there. Casares'

indistinct face tattoo makes his photograph suggestive as to Jorge Gutierrez but not as to Francisco Rosales.

The trial court also found Casares' photo was suggestive because it was framed differently than the others; from a wider angle than the close-up head shots of the other five photographs. Casares does not defend this finding on appeal, and the State does not challenge it. We note that Casares' photograph is framed slightly different than the other photographs. For purposes of this appeal, we accept the trial court's finding that the framing was somewhat suggestive.

Casares argues for the first time on appeal that the lineup procedure was suggestive because it was not conducted in a double-blind fashion. Although this factor was not raised below, the State conceded at oral argument that a double-blind procedure was not used. We accept this concession and consider this factor in determining whether the trial court abused its discretion by denying Casares' motion to suppress the eyewitness identifications.

In sum, the lineup procedures were unduly suggestive because Casares' photograph was framed differently and police did not employ a double-blind procedure. Additionally, Casares was the only person in the lineup with the unique face tattoo described by Juan Gutierrez. We turn to whether the identifications possessed sufficient aspects of reliability and weigh them against the suggestive procedures.

Aspects of Reliability

When a defendant meets their burden of showing that procedures employed were unnecessarily suggestive, the court considers the totality of the circumstances as it balances the suggestive procedure against aspects of reliability. *Derri*, 199 Wn.2d at 674. The United States Supreme Court has determined that the "aspects of reliability" to be considered include the five factors laid out in *Biggers*:

> (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness' prior description of the criminal, (4) the level of certainty demonstrated at the procedure, and (5) the time between the crime and the identification procedure.

Id.

In addition to the *Biggers* factors, courts should also consider any relevant "estimator variables" that may affect reliability. *Id*. at 686. "'Estimator variables' are environmental or individual variables not under the control of the police but 'equally capable of affecting an eyewitness' ability to perceive and remember an event.'" *Id.* at 676 (quoting *State v. Henderson*, 208 N.J. 208, 27 A.3d 872 (2011)). Distance, lighting, witness characteristics, stress, presence of a weapon, and duration of observation are all examples of estimator variables. *Id.* at 686, n.23.

Here, the trial court entered findings on each of the *Biggers* factors. The trial court found that, as a direct victim of the shooting, Jorge had a significant opportunity to see the assailant's face. The trial court also determined that Rosales had been able to see

the assailant's face because he was "face on" with the assailant as he fled the scene. RP at 397. Both of these facts weigh in favor of reliability.

The trial court also found that both Jorge and Rosales paid a high degree of attention during and after the shooting and were able to provide accurate descriptions of the assailant prior to the photo lineup. Jorge was able to specifically describe the tattoo on the assailant's face. Rosales described the shooter as shorter than the detective interviewing him and having shorter hair. The trial court noted that although Rosales' description was limited, Rosales also said he was confident that he would be able to identify the shooter if he saw him again. Nothing before the trial court indicated that Rosales' description was inaccurate, it simply was not detailed.

In *Derri*, the court indicated that the accuracy of a prior description should be given limited weight. If the witness's later identification differs from their initial description, then the difference weighs against a reliable identification. Otherwise, a consistent description and identification have limited value. *Id.* at 688.

Citing *Derri*, Casares also argues that each witness's degree of attention was impacted by the stressful situation, including the presence of a weapon. In support of his contention that the witnesses experienced stress, Casares points to their trial testimony. This particular factor was not raised during the motion to suppress. Evidence on this factor was not presented to the trial court, and the trial court made no findings on this factor. Thus, the record is insufficient to consider this factor on review. *See Id.* at 677.

The trial court also found that the level of certainty for both Jorge and Rosales at the time of their identification was extremely high. However, under *Derri*, this does not weigh in favor of reliability where the procedure was unnecessarily suggestive. *Id*. at 688-89. Rather, a low degree of certainty would weigh against reliability.

As to the timing of the identifications, Jorge identified Casares in the photo lineup five days after the shooting, and Rosales identified Casares two days after the shooting. In *Derri*, the court determined that an identification nine days after the incident weighed neither for nor against reliability noting that misidentifications substantially increase from 2 to 24 hours after an event. *Id*. at 689. Here, although it was still outside the 24-hour range, the time frame was significantly shorter, especially in the case of Rosales. Thus, this factor weighs slightly in favor of reliability.

Finally, we note that the fact that both Jorge Gutierrez and Francisco Rosales independently identified Casares renders the identifications more reliable. *See Id.* at 690.

On this record, we conclude that the trial court did not abuse its discretion by denying Casares' motion to suppress the pre-trial identifications made by Juan Gutierrez and Francisco Rosales. The suggestiveness of the procedures was not significant and does not outweigh the indicators of reliability. Under the totality of the circumstances presented here, the identification procedures were not so unnecessarily suggestive as to

create "'a very substantial likelihood of irreparable misidentification.'" *Id*. at 685-86 (quoting *Brathwaite*, 432 U.S. at 116).[6]

IN-COURT IDENTIFICATION BY OSCAR GARCIA-GUTIERREZ

For the first time on appeal, Casares challenges the in-court identification made by Oscar Garcia-Guiterrez. Garcia-Guiterrez is Jorge Guteirrez's cousin and was standing by the trunk of the car when the shooter approached and began shooting. When shown the photograph lineup, he did not make an identification. Later, after conducting his own investigation, Garcia-Gutierrez was certain that Casares was the shooter and identified him as such during the trial.

We decline to address this issue because it was not preserved below, the record is not sufficiently developed, and the trial court made no findings or conclusions with respect to Garcia-Gutierrez's in-court identification. RAP 2.5(a)(3).

SUFFICIENCY OF EVIDENCE FOR ATTEMPTED MURDER CONVICTION

Casares challenges the sufficiency of evidence to support his conviction for attempted murder in count 5 against Oscar Garcia-Gutierrez.[7] Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence and inferences in

[6] Casares also challenges Jorge Gutierrez's in-court identification, arguing that it is tainted by the inadmissible pre-trial identification. Because Gutierrez's pre-trial identification was admissible, it did not impermissibly taint his in-court identification.

[7] In his opening brief, Casares also challenges count 6, first degree assault, but the trial court vacated this charge at sentencing.

the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When a defendant challenges the sufficiency of the evidence, he or she admits the truth of all of the State's evidence. *Id.* Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, we must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). In determining the sufficiency of the evidence, we do not consider circumstantial evidence any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

That jury was instructed: "To convict the defendant of the crime of attempted murder in the first degree in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) That on or about May 9, 2015, the defendant did an act that was a substantial step toward the commission of murder in the first degree by shooting at Oscar Garcia-Gutierrez; (2) That the act was done with the intent to commit murder in the first degree; and (3) That the act occurred in the State of Washington." CP at 189.

The evidence was sufficient to support the conviction of attempted murder against Oscar Garcia-Gutierrez. At trial, Garcia-Gutierrez testified and drew a diagram showing that he was within a few feet of his cousin, Jorge Gutierrez, when the shooting began.

Testimony indicated that after Jorge's brother, Oscar Gutierrez, was struck once in the car's passenger seat, "he shot our way" meaning toward Jorge and Garcia-Gutierrez. Jorge stated in his interview that "he was gonna shoot my cousin too," meaning Oscar Garcia-Gutierrez. At least two shots struck Jorge and the shooter kept firing and a total of nine shell casings were found. The proximity of the persons present and the number of gun shots fired at them are a substantial step toward causing death. The evidence also implies intent to kill all three men around the car.

EXPERT TESTIMONY ON GANG CULTURE AND AFFILIATION

Next, Casares raises several challenges to the trial court's decision to allow Officer Ortiz to testify that Casares was a gang member. He contends that Officer Ortiz's opinion was too generalized, based on evidence that was too attenuated in time to be relevant, and unhelpful to the jury. As we noted above, we review a trial court's evidentiary rulings for manifest abuse of discretion. *Kinard*, 109 Wn. App. at 435.

A. Additional Relevant Facts

The State moved in limine to admit the testimony of Officer Jim Ortiz as an expert on local gang culture. Casares objected under ER 702 and 404(b). During a pre-trial hearing, Officer Ortiz answered the State's proposed trial questions establishing his experience and qualifications working with the Norteño and Soreño gangs in Yakima Valley. He interpreted the meaning of evidence related to specific numbers and colors, indicating that the Norteño gang was associated with the number 14 and the color red,

whereas the number 13 and the color blue was associated with the Soreño gang. He also testified that the two gangs are "mortal enemies" and "[i]f they see each other a confrontation is going to happen," often times with violent outcomes. RP at 15. Under the current gang structure, members of both gangs increase their status or hierarchy by perpetrating acts of violence. The greater the violence and the more time put into it, the higher up a member's status will move. Officer Ortiz testified that members of both gangs usually move to Snohomish or Skagit Counties "whenever something major happens." RP at 34.

Officer Ortiz provided evidence to support the State's theory that the shooting was gang related and the shooter was a Norteño gang member. Officer Ortiz testified that the term "North sider" was used by Norteños to identify themselves, and the question "you bang?" was said by one gang member to another before an assault. Colored bandanas are used by the two gangs as "flags," and wrapping a gun in their gang's flag was normal behavior. Moreover, a victim wearing predominantly blue clothing could be mistaken for a Soreño gang member.

When Officer Ortiz testified that Casares "is" a gang member, the court sustained defense counsel's objection. Officer Ortiz clarified that the items found in Casares' possession at the time of his arrest were "associated with a Norteño gang member." RP at 755. These included red clothing, a gun wrapped in a red bandana, and a picture of a deceased gang leader. Additionally, Casares' facial tattoo, with two bars and four dots,

was a symbol for the number 14, associated with the Norteño gang. Based on Casares' possessions and tattoos, Officer Ortiz opined that Casares was a Norteño.

The trial court reserved ruling on the motion to see if the specific evidence supporting Officer Ortiz's opinions would be admitted at trial.

When the motion was readdressed, the trial court made specific findings under ER 404(b) that the gangs existed in Yakima Valley and that Casares was a member of the Norteño gang. The court found that Officer Ortiz's opinions were tethered to the specific evidence in this case and relevant to show motive. The court also found the testimony helpful as the information provided was not common knowledge. Finally, the court determined that the narrowly-tailored opinions of Officer Ortiz were more probative than prejudicial.

The court allowed Officer Ortiz to provide his opinion testimony so long as it stayed specific to the evidence in this case and did not wander into the realm of generalized opinions on gangs. The court also limited testimony about details of prior contacts with Casares except for "sanitize[d]" statements as to awareness of his affiliation. RP at 81-83. Ultimately, the court allowed Officer Ortiz to provide an opinion that the shooting was gang related, the shooter was most likely a member of the Norteño gang, and Casares was a member of the Norteño gang.

During cross-examination, Officer Ortiz admitted that he had not seen Casares in years, did not know what Casares had been doing with his life, and had not seen him on

the date of the shooting. Officer Ortiz also admitted that it is possible for gang members to leave a gang, move away, and lead a normal life.

B. Analysis on Admissibility of Gang Expert Testimony

On appeal, Casares challenges several aspects of Officer Ortiz's testimony. He contends that the trial court abused its discretion by allowing Officer Ortiz to testify that Casares was a Norteño gang member because there was no evidence that he was a gang member at the time of the shooting, the evidence was inadmissible to prove identity, and inadmissible to prove motive because motive was not an issue. We disagree.

Under ER 404(a), evidence of prior acts is inadmissible to show that a person possessed a particular character and acted in conformity with that character. In a criminal case, character evidence cannot be introduced to show that a defendant is generally a dangerous person or has a general propensity to engage in criminal behavior. ER 404. However, evidence of prior acts can be introduced for other purposes, such as proving motive, intent, and identity. ER 404(b).

When the State proposes evidence of prior acts, the trial court is required to determine the conduct occurred, identify the purpose of the proposed evidence, determine whether the evidence is relevant and necessary, and conclude that the probative value outweighs the prejudicial effect. *State v. Arredondo*, 188 Wn.2d 244, 257, 394 P.3d 348 (2017).

Evidence of gang affiliation is inherently prejudicial and should be addressed with caution:

> In the context of a criminal trial, gang evidence is a double-edged sword. On the one hand, such evidence can help jurors understand relationships between defendants and how various symbols and terminology suggest motive and intent. But on the other hand, gang evidence can be problematic. Merely suggesting an accused is a gang member raises the concern he or she will be judged guilty based on negative stereotypes as opposed to actual evidence of wrongdoing. Accordingly, the State's use of gang evidence requires close judicial scrutiny.

State v. Mancilla, 197 Wn. App. 631, 637, 391 P.3d 507 (2017).

"Mere evidence of gang affiliation is not sufficient to meet the State's burden" under ER 404(b), especially when used to show a person's general beliefs or associations. *State v. Arredondo*, 188 Wn.2d at 258 (citing State v. Asaeli, 150 Wn. App. 543, 578, 208 P.3d 1136 (2009)); *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). But evidence of gang affiliation can be helpful when tied to the specifics of the case and used to show motive and intent. *Mancilla*, 197 Wn. App. at 637. In order to introduce evidence of gang affiliation, the State must show a nexus between the crime and the gang membership. *See State v. Campbell*, 78 Wn. App. 813, 822, 901 P.2d 1050 (1995).

In *Mancilla*, this court largely upheld Officer Ortiz's testimony about the local Norteños and Sureños gang culture in Yakima. We noted in that case that Officer Ortiz's testimony was helpful in explaining the relevance of specific evidence, including blue graffiti and the colors worn by the defendants when they were arrested. 197 Wn. App. at

644. We held that Officer Ortiz's testimony was directly related to the evidence admitted in the case and "supplied the jury with the tools necessary to interpret this evidence and understand the State's theory of the case." *Id*.

In *Arredondo*, the Supreme Court upheld the trial court's decision to allow evidence that the defendant, a known Norteño gang member, was involved in a prior drive-by shooting involving a Soreño house because it demonstrated the defendant's particular animosity toward rival gang members. 188 Wn.2d at 259. "This animosity goes beyond the routine friction between gangs, or even the 'history of bad blood' between these particular gangs." *Id*. Instead, it tended to show that the high degree of animosity that the defendant held toward members of the Soreño gang. *Id*. at 260-61. Notably, the Court went on to find that the evidence was insufficient to show identity because the two incidences of drive-by shooting were not sufficiently similar to show a unique modus operandi. *Id*. at 261.

C. Application

In this case, the trial court made specific findings under ER 404(b) and 403, and then limited the testimony that would be admitted at trial. After the State laid its foundation, Officer Ortiz's testimony explained the relevance of otherwise innocuous evidence such as the statements made by the shooter, the relevance of a gun wrapped in a red bandana, the colors worn by the victims, Casares' tattoos, and the items found in his possession when he was arrested. Based on this evidence, Officer Ortiz testified that the

shooting was gang related, the shooter was a member of the Norteño gang, and Casares was a member of the Norteño gang.

Casares argues that Officer Ortiz's expert testimony was irrelevant because there was no evidence that he was a gang member at the time of the shooting. Relying on *State v. Everybodytalksabout*, 145 Wn.2d 456, 468, 39 P.3d 294 (2002), he contends that Ortiz's opinion was based on contacts from years prior and was too attenuated to be relevant.

In *Everybodytalksabout*, a detective was allowed to testify that in his past encounters with the defendant and alleged accomplice, the defendant acted as a leader between the two. *Id*. at 468. The State relied on this evidence to argue that given this generalized leadership role, the defendant likely encouraged the accomplice to murder the victim. *Id*. at 464-65. The court held that this testimony was not relevant to the current charges of murder because the detective was not present at the time of the killing, his testimony did not relate to the specific incident leading up to the crime, and his observations were based on previous contacts too remote in time to be relevant. *Id*. at 468. In addition, the evidence was propensity evidence prohibited by ER 404(b). It was introduced to show the defendant was the leader between the two and likely acted in conformity with this quality at the time of the murder and therefore must have participated in the murder with the accomplice. *Id*.

Casares argues that like *Everybodytalksabout*, in this case, Officer Ortiz's opinion of his gang affiliation was based on contacts from several years prior and too attenuated in time to be relevant. We disagree. While Officer Ortiz's opinion was based in part on prior contacts, the trial court carefully excluded evidence of prior police contacts exactly along the lines of *Everybodytalksabout*. Instead, Officer Ortiz's opinion at trial was based on prior contacts plus Casares' current tattoos and the items in his possession when he was arrested. Officer Ortiz explained the significance of this evidence and testified the evidence supported his opinion that Casares was a member of the Norteño gang at the time he was arrested. Unlike in *Everybodytalksabout*, Officer Ortiz's testimony was based on evidence that was temporally relevant and specific to the case.

Casares also contends that Officer Ortiz's opinions were too generalized to be relevant. Casares contends that there was no evidence that he was a member of any particular subgroup that required violence in order to increase status. While Officer Ortiz testified that there are smaller subgroups within the two gangs, his testimony was about the culture of violence related to the two larger gangs. Casares contends that this testimony was irrelevant because Officer Ortiz failed to connect Casares with any specific sub-group that operated on a culture of violence. In support of his argument, Casares contends that there is a great deal of variety among gang subgroups and relies on evidence that was not introduced at trial.

While the evidence and arguments that Casares makes on appeal may be relevant on cross-examination and may have supported his opposition to the testimony, these arguments and evidence were not raised below. We therefore decline to consider them on appeal. RAP 2.5(a). Officer Ortiz's opinions were sufficiently specific to provide the necessary nexus to the evidence in this case. He testified that Casares was a member of the Norteño gang, that the Norteño and Soreño gangs operated on a culture of violence, and any smaller groups would identify with one of the larger gangs.

Casares also challenges Officer Ortiz's testimony that members of the Norteño and Soreño gangs tend to move to Snohomish and Skagit Counties when "something happens." RP at 753. He continuously claimed this evidence was generalized propensity evidence to explain why he would be living in Snohomish County when arrested. This argument fails as well.

First, as the State notes, despite Casares' claims on appeal, there is no evidence in the record that Casares was living with his girlfriend in Snohomish County. Instead, the only evidence is that he was arrested at his girlfriend's residence in Snohomish County. Second, the testimony was tied to the specific evidence in this case and would have helped explain why a member of the Norteño gang would be found in Snohomish County after being involved in a shooting against a suspected rival gang member.

Next, Casares argues that evidence of his gang membership was improperly admitted to prove identity. He contends that the testimony identifying him as a Norteño

was used by the State to argue that since a Norteño member was responsible for the shooting and he was a Norteño member, Casares must have been the shooter. But the expert testimony on gang affiliation was not introduced to prove identity. Instead, the court stated that the purpose of Officer Ortiz's testimony was to show motive: to show why Casares would walk up to a random group of men and start shooting. Casares' identity as the shooter was proved through the eyewitness identifications.

Citing *State v. Saltarelli*, 98 Wn.2d 358, 359, 655 P.2d 697 (1982), Casares argues that the expert testimony should not have been allowed to prove motive because motive was not an issue at trial. Instead, he argues that the only issue was the identity of the shooter. In *Saltarelli*, the defendant was charged with rape and conceded the act of intercourse, contesting only the existence of consent that rendered the issue of intent inconsequential by admission. *Id*. This case is distinguishable from *Saltarelli* in two ways: first, Mr. Casares has not admitted the shooting; second, motive was not at issue in *Saltarelli*. Even where the act of shooting proved the existence of intent sufficiently to render intent immaterial, the motive evidence here explaining why a shooting would occur does not become unnecessary merely because the defendant focused his theory on identity.

Finally, Casares argues that Officer Ortiz's testimony exceeded the bounds of ER 702 and crossed the line into improper fact testimony. The trial court found that Officer Ortiz was qualified as an expert on gang culture and his proposed testimony would be

helpful to the jury under ER 702. Relying on *State v. McDaniel*, 155 Wn. App. 829, 230 P.3d 245 (2010), Casares contends that given Ortiz's prior testimony about colors, numbers, and tattoos, the jury could reach its own conclusion on whether Casares was a member of the Norteño gang. Moreover, Officer Ortiz's testimony that Casares was a "documented" gang member was factual and not an opinion.

In *McDaniel*, the court addressed the intersection between expert testimony that can be based on evidence outside the record and expert testimony that violates the confrontation clause. The *McDaniel* court, quoting *United States v. Mejia*, 545 F.3d 179 (2d Cir. 2008), held that when an expert on gang activity simply repeats statements he has heard from others instead of piecing together and analyzing relevant information for himself, the expert testimony is inadmissible as hearsay in violation of the confrontation clause. *McDaniel*, 155 Wn. App. at 849. In *Mejia*, the federal court recognized that while helpful in decoding gang culture and communications, gang experts can stray from the scope of their expertise by testifying as to the meaning of general conversations that do not include code words, or by interpreting the meaning of specific slang terms based on their interview during the case rather than referencing the fixed meaning of terms in the narcotics world. *Mejia*, 545 F.3d 192-93.

Casares acknowledges that Officer Ortiz's testimony about colors, numbers, tattoos and gang culture was admissible under these cases, but claims that his opinion that Casares was a Norteño went beyond what was helpful under ER 702. The cases he cites

do not support his argument. Casares is not claiming that Officer Ortiz's opinion of his gang membership is based on the hearsay statements of non-testifying witnesses. Nothing in *McDaniel* or *Mejia* precludes an expert witness from providing an opinion on gang membership based on physical evidence. In addition, as the State points out, Ortiz's comment about Casares' gang membership being "documented" was elicited during cross-examination and not challenged by defense counsel.

Here, expert testimony was used to explain the relevance of particular evidence that may seem otherwise innocuous and inform the jury why a gang member carrying a gun wrapped in a red bandana would shoot at three strangers, one wearing blue, seemingly unprovoked. The trial court's decision to admit this evidence was not an abuse of discretion.

INEFFECTIVE ASSISTANCE OF COUNSEL

Casares contends that his attorney was ineffective for failing to move to strike evidence after objections were sustained and for failing to object to Officer Ortiz's testimony that Casares was a "documented" gang member.

We review claims of ineffective assistance of counsel on a de novo standard of review. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Under *Strickland v. Washington*,[8] Mr. Casares bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness based on consideration of

all the circumstances and, if so, (2) there is a reasonable probability that but for counsel's poor performance the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A defendant must affirmatively prove prejudice, not simply show that "the errors had some conceivable effect on the outcome." *State v. Crawford*, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation. *Id.* "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Kyllo*, 166 Wn.2d at 863.

Whether to object or not is a "classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). In the context of objections, Washington courts presume "that the failure to object was the product of legitimate trial strategy." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). The failure to object to

[8] 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

evidence that may be inadmissible can be a legitimate trial strategy to avoid highlighting certain evidence. *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021). Counsel may legitimately decide that objecting to inadmissible but low-value evidence may do more harm than good. *See generally id*. at 248-49. For this reason, "[a] few or even several failures to object are not usually cause for finding that an attorney's conduct has fallen below the objective standard of conduct." *Id*. at 250.

When an objection is sustained with no further motion to strike the testimony and no further instruction for the jury to disregard the testimony, the testimony remains in the record for the jury's consideration. *State v. Swan*, 114 Wn.2d 613, 659, 790 P.2d 610 (1990). While there are no published Washington cases that consider whether the failure to move to strike can be deficient, several unpublished cases have held that absent direct evidence to the contrary, the decision is considered strategic to avoid highlighting unfavorable testimony. *See State v. Kolb*, No. 46497-7-II, slip op. at *5-6 (Wash. Ct. App. Mar. 8, 2016) (unpublished), www.courts.wa.gov/opinions/pdf/D2%2046497-7-II%20Unpublished%20Opinion.pdf; *State v. McNicholas*, No. 49363-2-II, slip op. at *10 (Wash. Ct. App. May 30, 2018) (unpublished), www.courts.wa.gov/opinions/pdf/D2%2049363-2-II%20Unpublished%20Opinion.pdf.

Casares identifies three instances where counsel did not move to strike evidence after defense counsel's objections were sustained. All three instances occurred during Officer Ortiz's testimony. These include testimony that:

(a) "violence is just automatic" for gang members [RP at 734];
(b) face tattoo means "He's a Norteno" [RP at 741]; and
(c) Casares "is" a Norteño gang member meaning currently [RP at 754].

For each of these statements, the trial court sustained objections, and the State moved on with its questioning.

Casares also contends his attorney was deficient for failing to object to Officer Ortiz's comment that Casares' gang membership was "documented." During cross-examination of Officer Ortiz, counsel questioned Ortiz on the basis of his opinion about Casares' gang status, suggesting that Ortiz's information was stale. Officer Ortiz responded:

> [Defense Counsel]: Okay. So when you testify about your opinion, what you can say is at some point in his life he was associated with the Norteno gang, right?
>
> [Officer Ortiz]: I don't think he was associated. He was a member.
>
> [Defense Counsel]: He told you that?
>
> [Office Ortiz]: We have it documented.
>
> [Defense Counsel]: He's told you that?
>
> [Officer Ortiz]: He hasn't told me.
>
> [Defense Counsel]: Okay. He hasn't told you he was a gang member. You haven't seen him in years. The best you could say is [at] one point you think he was a gang member?

[Officer Ortiz]: Based on all our criteria, yes.

RP at 759-60.

On appeal, Casares fails to demonstrate why defense counsel's decisions could not be strategic. Instead, Casares suggests that the failure to move to strike after a successful objection is categorically deficient. We decline to adopt this holding. The decision not to strike or not to object could be strategic in order to avoid highlighting unfavorable testimony. It is also reasonable that counsel chose instead to discredit the information through effective cross-examination. On this record, Casares has not demonstrated that his attorney's decisions were not strategic and has thus failed to show deficient performance.

CUMULATIVE ERROR

Casares argues that the cumulative errors of admitting unreliable eyewitness identification testimony and prejudicial evidence that Mr. Casares was a "documented" gang member deprived him of a fair trial. Since we find no error, we determine there is no cumulative error. *See State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (Even where individual non-constitutional errors standing alone would otherwise be considered harmless, cumulative error may warrant reversal).[9]

[9] In his statement of additional grounds, Casares points to particular evidence in the record suggesting the evidence is relevant to our analysis of the eyewitness identification issue, but he does not otherwise articulate any additional issues with the noted evidence.

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.

Staab, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

No. 37714-8-III

FEARING, C.J. (concurring) — I disagree with one of the majority's rulings. I conclude that trial counsel performed ineffectively when failing to move to strike testimony ruled inadmissible.

The trial court sustained defense counsel's objections to Officer Jose Ortiz testifying that violence is automatic for gang members, a face tattoo means Raymundo Casares is a Norteño, and Casares is a Norteño gang member. Nevertheless, before counsel objected, Officer Ortiz uttered these harmful answers. Therefore, the court's sustaining of the objection posed no impediment to the jury considering these three remarks by Ortiz. *State v. Swan*, 114 Wn.2d 613, 659, 790 P.2d 61 (1990). It was as if the court overruled the objection. Because Ortiz already uttered the answer, counsel should have moved to strike the testimony and garnered an instruction from the trial court to the jury that it must not consider the testimony.

Trial counsel served no rational purpose by failing to move to strike the inadmissible testimony. The majority deems the failure to move to strike the evidence as a strategic decision. The record does not suggest such a strategy, but a strategy still needs to be reasonable. *State v. Vazquez*, 198 Wn.2d 239, 255, 494 P.3d 424 (2021). Trial

counsel had already drawn attention to the testimony by objecting. Asking the court to strike the testimony from the record would cause no further damage. Under the majority's theory of the case, defense counsel should have never objected to the testimony in the first place, because the objection drew attention to the answer.

In another context, the State typically contends that a jury follows a jury instruction directing the jury to consider evidence for one purpose but not for another purpose. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). This court acts inconsistently when agreeing with the State, under the context of this appeal, that the jury will ignore an instruction to disregard harmful testimony.

I realize that sometimes questions and answers come with such speed that defense counsel cannot timely object to inadmissible testimony. But counsel must be nimble and be quick. More importantly, counsel must recognize the rule that the jury may consider inadmissible evidence without a motion to strike.

To prevail on a claim of ineffective assistance of counsel, the accused must not only show that counsel performed ineffectively but also he suffered prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Based on the strength of other evidence, I conclude that the outcome of the trial would not have changed if the trial court had struck the inadmissible evidence.

I concur:

Fearing, J.

Fearing, C.J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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