NO. 28222-8-III

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

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR NAVA

Appellant.

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

The Honorable Michael E. Schwab, Judge

BRIEF OF APPELLANT

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FEDERAL CASES

RULES, STATUTES AND OTHER

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting the recorded police interviews of three witnesses under ER 803(a)(5).

2. The court erred in admitting gang evidence when there was an insufficient showing of a nexus between appellant, gang activity and the crime.

3. The court erred in failing to give a limiting instruction.

4. Appellant was denied effective assistance of counsel where counsel failed to request a limiting instruction.

5. Prosecutor misconduct in closing argument denied appellant his right to a fair trial.

Issues Pertaining to Assignment of Errors

1. The proponent for admission of statements to police given by a witness who now claims not to remember the event must clear several hurdles before being permitted to introduce the statement as a recorded recollection under ER 803(a)(5). Did the trial court err by admitting the recorded police interviews of three witnesses where the State failed to meet its burden of showing the accuracy, truth and indicia of reliability of the statements the witnesses made in those interviews?

2. Evidence of gang activity is inherently prejudicial and only relevant and admissible if the State shows by a preponderance of the evidence a nexus between the gang evidence and the charged crimes. Where the State failed to establish by a preponderance of the evidence the existence of a gang, that appellant was a member of a gang, that the victim was a member of a gang or that the crime was gang related retaliation, did the court err in admitting evidence of gang activity?

3. When a trial court admits evidence for a specific purpose it is required to instruct the jury to limit its consideration of that evidence for the purpose for which it was admitted. Did the trial court err when it admitted gang evidence for the purpose of showing motive and premeditation but failed to instruct the jury to limit the evidence to those purposes? Alternatively, was appellant denied effective assistance of counsel for counsel's failure to request a limiting instruction?

4. Was appellant denied his right to a fair trial when the prosecuting attorney argued prejudicial facts not in evidence?

B. STATEMENT OF THE CASE

1. Procedural Facts

An amended information filed in Yakima County Superior Court charged Salvador Nava with first degree murder (Count 1), four counts of first degree assault (Counts 2, 3,4 and 5) and one count of second degree

unlawful possession of a firearm (Count 6). CP 76-79.[1] Additionally, the murder and assault charges alleged Nava was armed with a firearm. Id.; RCW 9.94A.125.

It was alleged the offenses occurred on May 13, 2001. CP 76-79. Nava was not arrested until July 2008. RP 550.[2] Trial began January 26, 2009. A jury found Nava guilty as charged. CP 62-73.

Nava was sentenced to 220 months on the murder conviction, 100 months for each of the four assault convictions and 43 months on the firearm conviction. CP 14-21. Nava was also sentenced to an additional 60-month firearm enhancement for the murder and assault convictions. Id. The sentences on all counts were ordered to run concurrent with the 220-month standard range sentence on the murder conviction. Id. The five 60 month firearm sentences, however, were ordered to run consecutive to the 220 month concurrent sentences, and consecutive to each other, making Nava's total sentence 520 months of confinement. Id.

2. Substantive Facts

On May 13, 2001, shortly after midnight, Mark Lewis, a reserve officer with the Tieton Police Department, was working traffic safety

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[1] Antone Masovero was the named victim in Count 1; Anthony Martinez the named victim in Count 2; Jesse Lopez the named victim in Count 3; Jose Belmonte the named victim in Count 4 and Peter Lopez the named victim in Count 5. CP 76-79.

[2] RP refers to the verbatim report of proceeding Volumes I through VII, which pages are sequentially numbered. All other references to the verbatim report of proceedings are cited as RP, the page number and the date.

control in the City of Yakima. RP 14. As Lewis walked back to his patrol car after completing a traffic stop he heard several gunshots. RP 15-16. Some shots sounded like they came from a .44 or .45 caliber gun and the others from a .22 or .25 caliber gun. RP 22.

Lewis turned towards the direction of the gunshots and saw muzzle flashes coming from near a taco vendor's truck in the Glesener's Market parking lot. RP 16, 33, 169. Lewis called the dispatcher and was driving towards the area when a car passed him and turned into the entrance to a fire station. RP 17. Lewis pulled in behind the car and ordered the occupants out and on the ground. RP 18. Antone Masovero was dead in the back seat of the car on the driver's side. His head and shoulders were covered with blood. RP 30, 169, 219, 289.

Masovero died from two gunshot wounds. RP 521. He was shot twice on the left side of his head near his left ear at a distance of about three feet. RP 420, 517-519. The bullets were fired from a .38 caliber revolver. RP 499. There were also .38 caliber bullet holes in the door of the driver's side of the car. RP 299-301, 501-503.

In the Glenser's Market parking lot, about 10 to 15 feet from where Lewis stopped the car, police found a .25 caliber automatic handgun. RP 303-304, 310-312, 405. The gun was inoperable when

examined by the firearm examiner. RP 505. In the parking lot police also found .45 caliber bullets. RP 306-308, 400-403.

At the time of the shooting, Guadalupe Tovar and her husband Angel Rojas were sitting in their parked car by the taco truck waiting for their children who were attending a Quinceanera[3] at the nearby Sundome. RP 65-67, 71-72. They saw two cars arrive, one white and one maroon. Tovar said two men from the white car walked over the maroon car and she heard gunshots. RP 67. Rojos, however, said only one man approached the maroon car and exchanged words with the people inside the car. RP 74-75. The man went back to his car and then returned to the maroon car. RP 75. The man put his hand inside the rear window of the maroon car and Rojos heard two gunshots. RP 75. The maroon car then sped away. RP 76.

On the night of the shooting, Alicia Velasquez, Maribelle Olivas, Sandra[4], Lance Nanamkin and Nava were together. RP 389. According to Velasquez, they went to a Quinceanera in Selah. When it was over they decided to go to the taco truck in the parking lot of Glesener's Market to get something to eat. RP 390. There, they met up with Marisa Perez and Perez's husband. RP 391. Velasquez was driving Olivas's car. RP 392.

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[3] A Quinceanera is a coming of age party celebrating a 15th birthday. RP 67.

[4] The transcripts indicate Velasquez said "Sandra." Given the other evidence it is likely she said "Andres." See, RP 368-370 (Olivas's statement).

Everyone except Olivas got out of her car to order food from the taco truck. RP 391. A car drove by and then returned and parked nearby. RP 392. Velasquez heard people who were standing in the parking lot arguing with the people in the car that has just parked. She then heard gunshots. RP 393. Velasquez got into Olivas's car with Olivas and left. RP 394. According to Velasquez no one else left with them. RP 394, 396. Velasquez did not see Nava with a gun and did not see Nava approach the parked car. RP 393-394.

Maribelle Olivas vaguely remembered being in the area at the time. She did not recall hearing any gunshots. RP 328. Police interviewed her sometime in May 2001 but she did not remember what she told police or if what she did tell police was true because she was drinking at the time. RP 327, 329.

Olivas's police interview was recorded. The State moved to admit the interview as a recorded recollection. Over defense counsel's objections, the court granted the motion and the interview was played for the jury. RP 362-363, 368-381.

In her interview, Olivas told police she, Velasquez, Andres Orozco, Nanamkin, and Nava went to a Quinceanera in Selah but it was over when they arrived so they drove to another they knew about. RP

368-370.[5] When they got there they decided to get something to eat at a nearby taco truck. RP 370. They parked behind the taco truck and everyone got out of the car except Olivas who moved over into the driver's seat. RP 371-372.

Olivas was talking to Velasquez, who was standing outside the car, when she had a funny feeling something was going to happen so she asked Velasquez to get the others so they could leave. RP 374. At about the same time Olivas saw Anthony Martinez's car drive through the parking lot. RP 374. She heard words exchanged between Nava and Nanamkin and the people in Martinez's car. RP 375. The driver of Martinez's car started to get out of the car and it looked like he was trying to pull out a gun. RP 374-375. Olivas then heard gunshots and Velazquez and Orozco jumped into her car and all three left together. Id. Olivas said she saw both Nava and Nanamkin with a gun and saw Nava pointing a gun at the Martinez car. RP 376-377.

On cross examination Olivas said she was in drug court at the time of the shooting and was drinking. She said she told police what she thought they wanted to hear to avoid a drug court violation. RP 383-384.

Andres Orozco testified he and Nava (who Orozco knew as Chava) were present when the shooting occurred but Orozco did not remember

[5] The contents of this and the recorded interviews of other witnesses that were also played for the jury were transcribed verbatim. Appellant cites to the transcription.

much because he was drunk and on drugs. RP 85-86, 165. He was interviewed by police about a month after the shooting but he was drunk then as well. RP 90-93. He said he lied to police when he gave his statement. RP 93-94, 165.

Orozco's police interview was recorded. RP 98-100. Over defense counsel's objections, the court allowed the State to play the recorded interview to the jury. RP 109-115, 130-131, 148-150.

Orozco told police he was with friends, including Nava and "Sleepy" (Nanamkin). RP 154-155. When the Quinceanera they were at was over, they left for another near Glesener's Market. RP 155. After they arrived and got out of the car a man started saying "shit." RP 155. Orozco confronted the man and the man ran. RP 155-156. Two other cars then arrived and started throwing "signs." RP 156-157. Orozco then saw Nava firing a revolver. RP 157-158.

Orozco did not hear Nava say anything. RP 160. He did not know where Nanamkin was when the shots were fired. RP 159. After the shots were fired, Orozco jumped in the car driven by Olivas and contrary to Velasquez's testimony, he said he and Olivas left alone. RP 160, 162. Orozco told police Nava probably shot at the car because he believed someone in the car was going to shoot him. RP 161.

Maria Perez was also near the taco truck with her husband but did not recall who fired the shots. RP 425-426. Police interviewed Perez in May 2001 and she consented to the interview because she was scared. RP 427, 451. She was scared because police told her that her husband would be jailed and her baby taken away. RP 427.

The State, as it did with the Olivas and Orozco interviews, moved to admit Perez's recorded interview to police. And again, over defense counsel's objection, the court admitted the interview. RP 459- 461.

Perez told police she, her husband and some friends were also at the Quinceanera in Selah when they decided to go to the taco truck. RP 466-467. Perez's husband, who was Nava's friend, called Nava and told Nava to meet them at the taco truck. RP 467-468. About 20 minutes later Nava arrived with two girls and two other men. Nanamkin was one of the two men who were with Nava. RP 468, 610.

According to Perez, at some point Nava began arguing with people in another car. RP 471. That car parked and the car's driver threatened to shoot. RP 472. A person in the back seat of the car had a weapon so Nava went to the car he came in and got a gun. Meanwhile, Nanamkin threw a beer can at the car. RP 472-473. Nava returned with a gun, fired at the car and the car left. RP 473. Perez said Nanamkin shot at the car as well but his gun did not fire. RP 479.

Peter Lopez was Masovero's friend and was in the car when Masovero was shot. RP 219, 221. Police also interviewed Lopez after the shooting. He did not remember the interview. RP 220, 222. His recorded interview was also played for the jury. RP 240-242.

Lopez told police he was riding around on the night of the shooting with Jose Belmonte, Anthony Martinez, who was driving the car, Jess Lopez, who was in the front seat with Martinez and Masovero, who as sitting next to Lopez in the back seat behind Martinez. RP 245-246. At some point, they decided to get something to eat at the taco truck by Glesener's Market. RP 248-249. When they arrived Lopez was about to get out of the car when he heard two gunshots. RP 249-250. He dropped down and told Martinez to drive. RP 250. When police stopped the car, Lopez looked over and saw that Masovero had been shot in the head. RP 250-251. Lopez said nothing about an argument prior to the shooting.

Lopez said that Masovero had talked to him about an incident a week earlier where a person named Victor Serrano was shot in front of Masovero's mother's house. RP 251. Masovero was not worried about the Serrano shooting, however he could not believe it happened in front of his mother's house. RP 251, 255.

Jose Belmonte testified Martinez was driving a gold sedan. RP 260. When the group arrived at the taco truck, someone shot at the car

near the back passenger window. RP 263. Belmonte ducked and felt a bullet whiz through his jacket. RP 263. He too saw that Masovero had been shot in the head. RP 264. Belmonte said nobody was arguing before the shots were fired. RP 267.

In July 2008, Nava was arrested in El Paso Texas on a Washington State warrant as he entered the United States from Mexico. RP 571-574, 627. When questioned by El Paso police, Nava denied any involvement in the shooting. RP 576. Nava told police he was working in the fields in Mexico and decided to move back to the United States to work with his father so he could make more money. RP 629.

3. Gang Evidence

Yakima police Sergeant Joe Salinas was allowed to testify he had contact with Masovero in connection with the murder of Victor Serrano, who went by the tag name Smurf. That murder occurred about a week before Masovero was shot. RP 197-198, 625. Salinas testified that murder was "linked" to the Masovero shooting. RP 197.

According to Salinas, Masovero was wearing a red belt with the number 14 on it when he was shot. Salinas said the "Norteno" gang claims affiliation with the color red and the number 14 means the letter "N" because it is the 14th letter in the alphabet. RP 204.

A few days after the shooting police searched Nanamkin's home. RP 421. Police testified they found what they termed "gang" graffiti and paraphernalia in Namanking's bedroom. RP 421, 613.[6] In the room was written "VSL" that Salinas opined was a "Sureno" group and meant "Varrio Surenos Lokata" RP 613. Police also found a photograph of Serrano in Nanamkin's bedroom. RP 422, 613.

In her interview with police, Olivas said she had heard Nanamkin, Nava and Orozco were involved in gangs, although she did not "see it." RP 372-373. She said there was a war between the reds and blues because of a previous shooting a week earlier. RP 373. She believed Nava, Nanamkin and Orozco were associated with the blues. Id. In her interview Perez referred to the men in Masovero's car as "Nortenos." RP 477-478.

C. ARGUMENTS

1. THE COURT ERRED WHEN IT ADMITTED THE HEARSAY STATEMENTS OLIVAS, PEREZ AND ORZOCO MADE TO POLICE UNDER ER 8.3(a)(5).

The court admitted the police interviews with Olivas, Orozco and Perez under ER 803(a)(5). Defense counsel objected to each arguing and counsel was granted a continuing objection for each of the witnesses. RP

[6] The graffiti was described as the words "Sleepy" , "VSL" and "13th Street." RP 422.

52. Those interviews were improperly admitted because the test for admission under ER 803(a)(5) was not met.

The proponent of a recorded recollection must satisfy a series of tests under ER 8.3(a)(5) before getting past the general rule against admission of hearsay. Although hearsay, ER 803(a)(5) permits admission of statements of "recorded recollection:"

A recorded recollection is defined as:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. See, State v. Castellanos, 132 Wash.2d 94, 97, 935 P.2d 1353 (1997); 5B Karl B. Tegland, Wash. Practice § 368 at 186 (3rd ed.1989); State v. Strauss, 119 Wash.2d 401, 416, 832 P.2d 78 (1992). Admission is only proper when the following factors are met: (1) the record pertains to a matter about which the witness once had knowledge; (2) the witness has an insufficient recollection of the matter to provide truthful and accurate trial testimony; (3) the record was made or adopted

by the witness when the matter was fresh in the witness' memory; and (4) the record reflects the witness' prior knowledge accurately. State v. White, 152 Wn. App. 173, 183, 215 P.3d 251 (2009); State v. Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998); State v. Mathes, 47 Wn. App. 863, 867-68, 737 P.2d 700 (1987).

The fourth factor was the subject of much discussion in Alvarado, supra. Rather than requiring direct assertion of accuracy at trial, courts must consider the totality of circumstances, including (1) whether the declarant disavows accuracy; (2) whether the witness claimed accuracy when she made the statement; (3) whether the recording process was reliable; and (4) whether other indicia of reliability establishment the accuracy of the statement. Alvarado, 89 Wn. App. at 551-52; State v. White, 152 Wn. App. at 184; State v. Derouin, 116 Wn. App. 38, 46, 64 P.3d 35 (2003).

In Alvarado, supra, an eyewitness to a murder gave police three statements. Alvarado, 89 Wn. App. at 446. In his first statement the witness denied all knowledge of the crime. Id. at 553. The witness, however, asserted his next two statements were accurate. Id. at 552. In addition, the later two statements were consistent and reflected a detailed knowledge of the crime. Id. Although the witness's testimony differed from the statements, the court held the statements admissible under ER

803(a)(5), because the witness did not disavow their accuracy and the circumstances, including the consistent details, indicated the statements were reliable. Id. at 552-53.

In Derouin, supra, the court also discussed the fourth factor of the test. There, the witness, a domestic violence victim, gave a written statement to police. At trial the witness testified that she did not recall giving the statement and did not recall anything about the incident. Derouin, 116 Wn. App. at 41. The Derouin court held the trial court erred in not admitting the statement as a prior recorded recollection because the witness never disavowed the accuracy of the prior statement---she only denied any recollection of it. Id. at 46.

Here, the recorded police interviews of each witness were played for the witness outside the presence of the jury. After listening to their recorded interview, each witness was examined on the circumstances surrounding the interview.

Maribelle Olivas

Olivas only vaguely remembered being in the area and did not recall hearing any gunshots. RP 328. Police interviewed her shortly after the shooting, but she did not remember what she told police or if what she did tell police was true because she was drinking at the time. RP 327, 329.

Olivas could discern from listening to her recorded interview that she was hung over at the interview. RP 360. She testified she was also in court ordered treatment at the time and did not want to get into trouble so she merely told police what she thought they wanted to hear. RP 360.

Defense counsel objected to the admission of the interview because Olivas was drinking at the time of the incident and she disavowed the accuracy of her statements. RP 360.

Under the Alverado totality of the circumstances test, the State failed to meet the first factor, that the record pertains to a matter about which the witness once had knowledge and it reflects the witness' prior knowledge accurately. Olivas's testimony she told police what she thought they wanted to hear because she was in court ordered treatment at the time and did not want to get in trouble with the court was a disavowal of her statements in the interview.

The State also failed to meet the fourth Alverado factor. Olivas admitted she was intoxicated. Intoxication can affect a person's memory of an event. See, State v. Kendrick, 47 Wn. App. 620, 634, 736 P.2d 1079 (1987) (in murder prosecution evidence the defendant had used cocaine and alcohol that night "substantially" impeached his recollection of the events). Although at the end of the interview Olivas indicated her answers to the questions she was asked during the interview were truthful (RP

349), that was only after she initially denied she was even at the scene. RP 352. Her initial denial shows Olivas is willing to lie to police. Moreover, Olivas had a motive to lie to police and implicate Nava in the shooting to minimize any potential criminal liability because of her involvement.

Under these facts, the record does not show the statements made by Olivas during here recorded interview with police were accurate or had the indicia of reliability. Because the State failed to show the accuracy or reliability of Olivas's statements, the interview was improperly admitted.

Andres Orozco

Orozco did not remember the incident because he was drunk and on drugs at the time. RP 85-86, 165. He was also drunk when police interviewed him. RP 90-93. The police officer who recorded Orozco's interview said Orozco spoke coherently but did not recall if Orozco was drunk or on drugs. RP 120.

After listening to the interview, Orozco said he lied to police. RP 145. In addition, his rendition of some of the events was inconsistent with the rendition of other witnesses. Orozco, for example, told police after shooting he jumped in the car driven by Olivas and the two of them left alone. RP 139, 141. Olivas, however, told police Velasquez was also in

the car. RP 377. According to Velasquez she and Olivas left alone. RP 394, 396.

Defense counsel objected to the admission of the interview. Defense counsel argued, in part, Orozco was drunk, admitted he lied and under the totality of the circumstances the statement did not have an indicia of truth or reliability. RP 109-115, 130-131, 148-149.

Although, Orozco indicated during the interview that his answers to police questions were true (RP 122), Orozco explicitly disavowed the statements he made at the interview, admitting they were lies. The State failed to meet the first factor of the Alverado test.

Orozco also admitted he was drunk and on drugs when the shooting occurred and when he was interviewed by police. His intoxication militates against a finding that he had an accurate memory of the event. Furthermore, Orozco had an even greater motive to lie to police than did Olivas. Witnesses placed Orozco at the scene and he was engaged in a verbal altercation just before the shooting. Orozco had every incentive to name someone else as the shooter to divert police attention away from him. Thus, the State failed to meet the third and fourth Alverado factors.

The State failed to show Orozco's statements to police were accurate or had an indicia of trustworthiness or reliability. Orozco's interview with police too was inadmissible.

Maria Perez

A few days after the shooting police executed a search warrant to search for drugs at Perez's home. RP 208-209. Police found handguns and drugs. RP 209. Perez was scared because police told her that her husband was going to go to jail and her baby taken from her. Id.; RP 427. When police threatened to arrest her, she started crying and told police she would talk to them about the shooting. RP 458.

Perez did not remember much about the shooting or what she told police. RP 429. After listening to her interview, Perez testified she was trying to protect her husband. RP 452.

Perez's statements at the police interview lack an indicia of reliability. First, she only acquiesced to the interview in response to her fear her husband would be jailed and her baby taken from her.

Second, her rendition of events contradicts the statements or testimony of other witnesses. Perez said her husband called Nava and told him to meet them at the taco truck. None of the other witnesses who were with Nava that evening mentioned anything about Nava receiving a phone call. Perez also told police Nava went and got a gun from the car he was

riding in. Again, none of the other witnesses, including Olivas who never left the car, said anything about Nava retrieving a gun from the car. Perez said Nava was arguing with the people in Martinez's car before the shooting, however, the witnesses who were in Martinez's car testified there was no argument.

Third, Perez had a clear motive to lie to police. Nava's head was shaved and he was dressed in the same clothing as Perez's husband. According to Perez, people believed her husband was the shooter and she received death threats directed towards her and her husband. RP 441-442, 476. Perez believed her husband was a suspect in the shooting and was trying protect her husband when she spoke with police. By telling police Nava was the shooter, it is reasonable to infer Perez hoped it would dispel the suspicion of police and others that her husband was the shooter.

The State failed to meet the fourth Alverado factor. Under the totality of the circumstances, Perez's statements to police at the interview were neither accurate nor have an indicia of reliable. Perez's statements, like the statements made by Olivas and Orozco were improperly admitted.

Reversible Error

A non-constitutional evidentiary error requires reversal "if the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wash.2d 109, 127, 857 P.2d 270 (1993).

This means the error is deemed harmless only "if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole." State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The erroneous admission of the police interviews of Olivas, Orozco and Perez materially affected the outcome of the trial. These three were the only witnesses who, in their interviews, claimed Nava either had a gun or shot at the Martinez car.

Even if the statements of only one of these witnesses had not been admitted, it is likely the outcome of the trial would have been different because the credibility of each was questionable. Olivas and Orozco admitted to being drunk, on drugs, or both when the shooting occurred. Orozco admitted he was intoxicated when he was interviewed and that he lied to police. Olivas admitted she told police what she thought they wanted to hear. Perez only spoke to police because they threatened to jail her husband and take her baby and when she spoke to police she was trying to protect her husband. And, all three gave differing accounts of what occurred.

It is likely the jury disregarded any doubts it had about each witness's credibility, however, because each either put a gun in Nava's hands or named him as a shooter. Thus, the statements of each witnesses bolstered the others on the critical issue of whether Nava had a gun. If any

one of the statements had been excluded, therefore, there is a reasonable probability the jury's verdict would have been different.

The error in admitting anyone of the above interviews with police was not harmless. Nava's convictions should be reversed.

2. THE IMPROPER ADMISSION OF GANG EVIDENCE DENIED NAVA HIS RIGHT TO A FAIR TRIAL.

The State moved to admit evidence of gang activity based on a theory Masovero was shot to avenge Victor Serrano's murder a few weeks earlier. RP 6 (1/26/2009). Its theory was that Masovero and Serrano were members of different gangs. Nava and Nanamkin were members of Serrano's gang and Nava shot Masovero because Masovero was involved in Serrano's murder.

The State's offer of proof for admission of the gang evidence consisted of the testimony of Yakima Police Sergeant Joe Salinas. Salinas investigated Serrano's murder. He said Serrano's street name was "Smurf" and Serrano was a "Soreno" and claimed the color "blue." RP 11 (1/26/2009). Salinas said Masovero was a "Norteno" and claimed the color "red." Id. Salinas could not recall but he thought Masovero was at the scene when Serrano was shot. RP 13 (1/26/2009).

Salinas said that when police searched Nanamkin's home, they found drawings and "other items" indicating his affiliation with the Soreno

gang and Nanamkin was distraught over Serrano's death as well. RP 13 (1/26/2009). And, Nanamkin pleaded guilty to manslaughter in connection with Masovero's death. Id.

Defense counsel argued gang evidence was irrelevant because there was no evidence the shooting was gang related and if the evidence was relevant, the prejudicial effect of any gang evidence outweighed any relevancy. RP 48-49 (1/26/2009).

The court granted the motion to admit the gang evidence. It found the gang evidence was relevant to show motive and premeditation and its probative value outweighed its prejudicial effect. RP 49 (1/26/2009).

The State, however, failed to show a nexus between the shooting and gang activity. The court erred in admitting the gang evidence and the error requires the reversal of Nava's convictions.

Interpretation of an evidentiary rule is a question of law reviewed de novo. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law. State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Failure to adhere to the requirements of an evidentiary rule can be considered an abuse of discretion. Foxhoven, 161 Wn. 2d at 174.

The purpose of the rules of evidence is to secure fairness and to ensure that truth is justly determined. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). To secure fairness and the truth, ER 404(b) prohibits evidence of past misconduct to show a criminal propensity. Id. at 336. Introduction of other acts of misconduct inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference. State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997). A court may admit such evidence for other purposes "such as proof of motive, plan, or identity." State v. Foxhoven, 161 Wn.2d 168 at 175. But, before admitting evidence for those other purposes, "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect." State v. Pirtle, 127 Wash.2d 628, 648-49, 904 P.2d 245 (1995).

Moreover, only relevant evidence is admissible. ER 402. To be relevant to prove an element of the crime, evidence must meet two requirements: (1) it must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context

of the other facts and the applicable substantive law (materiality). State v. Rice, 48 Wn. App. 7, 12, 723 P.2d 726 (1987); ER 401.

Even if evidence is relevant under ER 402 and falls under an exception to ER 404(b) it may be excluded if its probative value is outweighed by the danger of unfair prejudice. ER 403; State v. Hanson, 46 Wn. App. 656, 661, 731 P.2d 1140, *review denied*, 108 Wn.2d 1003 (1987). In doubtful cases, the issue should be resolved in favor of the defendant and the evidence excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Evidence of gang affiliation is prejudicial. State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136, 1155-1156 (2009). Because of the grave danger of unfair prejudice, evidence of gang affiliation is inadmissible unless the State establishes a sufficient nexus between the defendant's gang affiliation and the crime charged. State v. Scott, 151 Wn. App. 520, 526, 213 P.3d 71 (2009) (citing Dawson v. Delaware, 503 U.S. 159, 166, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992)); State v. Campbell, 78 Wn. App. 813, 823, 901 P.2d 1050, *review denied*, 128 Wn.2d 1004 (1995).

When the preponderance of the evidence does not show a defendant's gang affiliation, the existence of a gang or a connection between a defendant's gang affiliation and the offense, admission of the gang evidence is prejudicial error. State v. Asaeli, 150 Wn. App. at 577;

State v. Ra, 144 Wn. App. 688, 701, 175 P.3d 609, *review denied*, 164 Wash.2d 1016, 195 P.3d 88 (2008). A preponderance of the evidence means that considering all the evidence, the proposition asserted must be more probably true than not. State v. Ginn, 128 Wn. App. 872, 878, 117 P.3d 1155 (2005).

a. The Gang Activity Evidence Was Inadmissible.

Here, the gang evidence was irrelevant and inadmissible under ER 402 and ER 404(b) because there was an insufficient nexus between the crime and any gang activity. The trial court abused its discretion when it admitted the gang evidence.

First, there was no evidence Nava was a member of a gang. The State attempted to link Nava to a gang through Olivas's statements in her interview with police. Olivas told police she "heard" Nanamkin, Nava and Orozco were involved in gangs, although she did not "see it." RP 372-373. She said there was a war going on between the "reds" and "blues" because of a shooting the week before and she believed Nava, Nanamkin and Orozco belonged to the "blues." RP 373.

The court, however, ruled that anything Olivas said in her statement to police based on what she heard was "objectionable" hearsay and instructed the jury to disregard it. RP 367. Because there was no other evidence that showed Nava was a gang member--there was no

evidence Nava belonged to a gang, much less a particular gang or a gang that included Serrano. Moreover, even if Olivas's statement was proper evidence, it did not establish Nava was a member of gang because her belief was nothing more than speculation based on something she heard from some unidentified source.

Second, assuming for the sake of argument the evidence showed Nanamkin was a gang member, which it does not, it does not show Nava was likewise a member merely because he was with Nanamkin and it does not show that the crime was connected to gang affiliation. See, State v. Scott, 151 Wn. App. at 528 (defendant was the only person identified as a gang thus the evidence did not show that joint gang affiliation was a reason for the three men to attack the victim).

Third, there was insufficient evidence that Masovero or the other men in his car were gang members. In her interview to police Perez referred to the men in the car as "Nortenos" (RP 476) and Salinas testified the belt Masovero was wearing was red and stamped with the number 14, which Salinas opined meant the 14th letter of the alphabet, N, and referenced "Nortenos." There was no evidence, however, to show the basis of Perez's claim. There was no evidence to show Salinas's opinion or interpretation of the meaning of Masovero's belt was based on anything more than a hunch or imagination. There was no evidence that even if

there was a group that called itself "Nortenos" and Masovero was a member of that group, that the group was a gang involved in criminal activity.

Fourth, there was no evidence Serrano was a member of a gang. Salinas testified that Serrano's murder was "linked" to the Masovero murder but there was no evidence establishing a link related to gang activity or that Serrano was a member of a gang, other than Salinas's opinion.

In State v. Asaeli, supra, there was no obvious motive for the shooting so, like here, the State theorized the murder was gang related. State v. Asaeli, 150 Wn. App. at 551-552.[7] In support of its theory, the State presented evidence that people present at the scene of the shooting displayed gang colors; the "victim's associates" knew one of the defendants was a member of a group called Kushmen Blokk, which some said was a gang; two of the defendants were members of the Kushmen Blokk; the defendants and victim were referred to by street names; the Kushmen Blokk color was brown and people at the scene covered their faces with brown rags; the defendants and their friends arrived at the scene as a group and the victim himself was a member of a gang. Id. at 574-575.

[7] The State's trial theory was that the defendants had ties to Kushmen Blokk, a purported Blood gang set, and that they planned to confront the victim, who had connections to a Crip gang set about his behavior a week before the fatal shooting and to either assault or kill him. State v. Asaeli, 150 Wn. App. at 551-552.

Additionally, on one of the defendant's cell walls police found gang related graffiti, including the phrases "Kushmen Blokk 73rd," and "Brown Flag Gangsta." State v. Asaeli, 150 Wn .App. at 559.

The Asaeli court nonetheless held the evidence was insufficient to show a connection between the crime and gang activity because the State failed to show by a preponderance of the evidence that Kushmen Blokk was a gang. State v. Asaeli, 150 Wn. App. at 577-578. The court also noted that even if the evidence had established that Kushmen Blokk was a gang, evidence the defendants were associated with the gang was thin but extremely and unduly prejudicial. Id. at 578, n. 36.

Here, there was far less evidence a gang existed or that Nava or his friends were members of a gang than there was in Asaeli. There is also scant evidence Masovero was a member of a gang, which is equally important to support a finding of a nexus between the crime and gang activity. Here, like in Asaeli, the State failed to show by a preponderance of the evidence a connection between the crime and gang activity. Thus, the gang related evidence was improperly admitted.

Improper admission of gang evidence is reversible error if within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected. State v. Asaeli, 150 Wn. App. at 579 (citations omitted). The danger of unfair prejudice exists when

evidence is likely to stimulate an emotional rather than a rational response. State v. Powell, 126 Wash.2d 244, 264, 893 P.2d 615 (1995). The implication that the defendant is a member of a gang has virtually no probative value and carries a high potential for prejudice because it allows the jury to infer guilt by association. See, United States v. Roark, 924 F.2d 1426 (8th Cir. 1991) (in narcotics prosecution, government attempted to tie the defendant's guilt to his membership in Hells Angels motorcycle club; reversed).

The sole issue was whether Nava was the shooter. The State used the gang evidence to argue Nava was a member of a gang that included Serrano and he shot Masovero to avenge Serrano's murder. RP 680, 684-85, 689. There was no physical evidence, however, linking Nava to the shooting. The only witnesses who claimed Nava had a gun or shot at Martinez's car were Olivas, Orozco and Perez. The impermissible gang evidence painted Nava as criminal and allowed the jury to infer that Nava was the shooter by dispelling any doubts it would have had given the serious credibility problems with Olivas, Orozco and Perez. The erroneous admission of the evidence allowed the jury to base its verdict on its emotional response to gangs and gang violence instead of the law and the facts. The admission of the gang evidence materially affected the outcome of the trial.

Because the gang evidence was irrelevant and unfairly prejudicial, Nava was denied his right to a fair trial. Thus, his convictions should be reversed.

b. The Court Erred in Failing to Give the Jury a Limiting Instruction.

The trial court found the gang evidence admissible for the purpose of explaining motive and on the issue of premeditation. RP 49 (1/26/2008). It did not instruct the jury the evidence was limited to those issues and defense counsel did not request such an instruction.

When evidence is admitted for a limited purpose, a limiting instruction is both mandatory (when requested) and of vital importance to the defense. State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (citing ER 105). A juror's natural inclination is to reason that if involved in criminal or bad acts, the accused is likely to have done so again or has a general propensity for crime. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). A defendant has the right to a limiting instruction to minimize the damaging effect by explaining the limited purpose to the jury. State v. Donald, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). A limiting instruction must be given to the jury if evidence of other crimes, wrongs, or acts is admitted. Foxhoven, 161 Wn.2d at 175. Failure to give a limiting instruction allows the jury to consider bad acts as evidence of

propensity, giving rise to the danger that the jury will convict a defendant because he has a bad character.

The trial court failed to instruct the jury that it could only consider the gang evidence on the issues of motive and premeditation. Nava was unfairly prejudiced by the failure because the jury as free to consider the gang evidence to infer Nava was a gangster and therefore had the propensity to engage in crimes, like the murder of a rival gang member. See, Micro Enhancement Int l, Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002) (absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others.). Thus, despite the weakness of the State's case, including the credibility issues surrounding the State's main witnesses and the lack of any physical evidence implicating Nava as the shooter, it is likely the jury convicted Nava because they used the gang evidence to infer he was a gangster, had a criminal propensity and therefore was the shooter as alleged.

c. Alternatively, Counsel Was Ineffective in Failing to Request a Limiting Instruction.

If this Court finds counsel waived the instruction issue because counsel did not request a limiting instruction, counsel's failure to do so constituted ineffective assistance.

Every criminal defendant is guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P. 2d 816 (1987). Defense counsel is ineffective where (1) the attorney s performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). To demonstrate prejudice, the defendant need only show a reasonable probability that, but for counsel s performance, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Under certain circumstances, courts have held lack of request for a limiting instruction may be legitimate trial strategy because such an instruction would have reemphasized damaging evidence to the jury. See, e.g., State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize

damaging evidence). But that theory is inapplicable here. Counsel fought to keep out the gang evidence so Nava had nothing to lose from an instruction telling the jury the evidence could not be used to infer bad character or a propensity to violate the law. Furthermore, the court would have likely granted such a request. When it made its decision to admit the gang evidence, it recognized the evidence was "clearly prejudicial." RP 49 (1/26/2009). A limiting instruction would have minimized the prejudice the court recognized.

Nava was prejudiced by counsel's failure to request an instruction because there is a reasonable probability counsel's failure affected the outcome of the trial for the reasons explained above. Permitting the jury to engage in the all-to-human but forbidden and highly prejudicial inference Nava was a gangster engaging in criminal acts was ineffective assistance. Thus, this Court should reverse Nava's conviction.

3. PROSECUTOR MISCONDUCT IN CLOSING ARGUMENT DENIED NAVA HIS RIGHT TO A FAIR TRIAL.

Prosecutors have a duty to seek verdicts free from appeals to passion or prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). In closing argument, a prosecuting attorney has wide latitude to draw and express reasonable inferences from the evidence. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). A prosecutor

commits misconduct, however, when he argues facts not in evidence. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432, 442 (2003); State v. Perkins, 97 Wn. App. 453, 459, 983 P.2d 1177 (1999), *review denied*, 140 Wn. 2d 1006 (2000). State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968) (improper for prosecutor to argue, without supporting evidence, that the defendant was trying to frame the victim's ex-husband for murder), *cert. denied*, 393 U.S. 1096 (1969); State v. Case, 49 Wn.2d 66, 68-70, 298 P.2d 500 (1956) (prosecutor's unsupported assertions during closing argument constituted reversible misconduct).

If a court finds a prosecutor committed misconduct, then the misconduct is reviewed to determine whether it prejudiced the defendant. State v. Thomas, 142 Wn. App. 589, 593, 174 P.2d 1264, *review denied*, 164 Wn.2d 1026 (2008). Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. Thomas, 142 Wn. App. at 593. In determining prejudice, the court weighs the seriousness of the misconduct against the strength of the State s case. State v. Avendano-Lopez, 79 Wn. App. 706, 712, 904 P.2d 325 (1995), *review denied*, 129 Wn.2d 1007 (1996).

During closing argument the prosecutor told the jury that Perez told police that Nava said "that was for my homie, Smurf" after he fired into Martinez's car. RP 684-685. That evidence was not presented at

trial.[8] Defense counsel did not object to the prosecutor's unsupported accusation. Reversal is nevertheless required if the prosecutor's remarks were so flagrant and ill- intentioned they could not have been cured by a jury instruction. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

The improper argument was ill-intentioned and unfairly prejudicial. If the State could connect the shooting to Serrano's death and then connect Nava to Serrano's alleged gang, it could provide the jury with a reason to believe Olivas, Perez and Orozco, despite the serious problems with their credibility, their motives to lie and the inconsistencies in their statements to police. If said, the statement was the link between Serrano's murder, Nava and the shooting. Thus, the prosecutor's remark was ill-intentioned.

Moreover, the remark could not have been cured by a jury instruction. The jury was already exposed to the inadmissible gang evidence so it would have been difficult if not impossible for the jury to disregard the remark because it supplied an important but missing link between Serrano's murder and this offense. And, it bolstered the theory Nava was the shooter. Here, a curative instruction would have been futile because "'[t]he bell once rung cannot be unrung.'" State v. Trickel, 16 Wn.

[8] Perez's interview is found at RP 483-484 and RP 531-533.

App. 18, 30, 553 P.2d 139 (1976), *review denied*, 88 Wash.2d 1004 (1977).

On its own the improper argument was unfairly prejudicial and requires reversal. The State's case was weak. Ultimately, the State's rested entirely on the statements Olivas, Orozco and Perez made to police. Particularly the statements made by Orozco and Perez who both said they saw Nava fire at Martinez's car. Because they were the State's main witnesses and they lacked credibility, there is substantial likelihood the prosecutor's improper remark affected the verdict because by putting those words in Nava's mouth it lent an aura of credibility to the witnesses.

The prosecutor's improper argument, however, does not stand in isolation. It is coupled with the inadmissible gang evidence. Combined trial errors can deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). If not alone, together, the improper remark and gang evidence unfairly prejudiced Nava, for the reasons previously explained, denying him a fair trial.

D. CONCLUSION

It is respectfully requested that Nava's convictions be reversed for any or all of the above reasons.

DATED this 8 day of December, 2009.

Respectfully submitted,

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By: _____

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 28222-8-III
	)	
SALVADOR NAVA,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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[X] SALVADOR NAVA
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WASHINGTON STATE PENITENIARY
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SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF DECEMBER, 2009.

x Patrick Mayovsky

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

STATE OF WASHINGTON,	)	
	)	
Respondent/Cross Appellant,	)	No. 28222-8-III
	)	
vs.	)	
	)	
SALVADOR NAVA,	)	
	)	STATEMENT OF
Appellant/Cross Respondent.	)	ADDITIONAL
	)	AUTHORITIES

Appellant/Cross Respondent, Salvado Nava, by and through counsel of record, Nielsen, Broman & Koch, P.L.L.C., submits the following statement of additional authorities pursuant to RAP 10.8:

State v. Statler, __Wn. App. __, __ P.3d__, 2011 WL 873438 (2011) (Mitigated Exceptional Sentence).

DATED THIS 24TH day of March, 2011.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, v. SALVADOR NAVA, Appellant.	)	COA NO. 28222-8-III

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **STATEMENT OF ADDITIONAL AUTHORITIES** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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