FILED
MAR 16 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 28222-8-III

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

STATE OF WASHINGTON,

Respondent/Cross Appellant,

v.

SAVADOR NAVA,

Appellant /Cross Respondent.

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

The Honorable Michael Schwab, Judge

REPLY BRIEF OF APPELLANT/ CROSS RESPONDENT

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TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The court erred in entering the written findings of fact and conclusions of law regarding the admission of the statements Maribelle Olivas, Andres Orozco and Maria Perez made to police. CP 92-95, 99-102, 110-114 (attached hereto as Appendix A and incorporated herein).

2. The court erred in entering written findings of fact and conclusions of law regarding the admission of ER 404(b) gang evidence. CP 106-109 (attached hereto as Appendix B and incorporated herein).

3. The court erred in entering finding of fact 3 and conclusions of law 3, 4 and 6 (findings of fact and conclusions of law on recorded recollection of Maribelle Olivas evidence rule 803(a)(5)). CP 99-102 (Appendix A).

4. The court erred in entering findings of fact 1 and 2 and conclusions of law 3, 4 and 5 (findings of fact and conclusions of law on recorded recollection of Andres Orozco evidence rule 803(a)(5)). CP 110-114. (Appendix A).

5. The court erred in entering conclusions of law 3, 5 and 6 (findings of fact and conclusions of law on recorded recollection of Maria Perez evidence rule 803(a)(5)). CP 92-95 (Appendix A).

6. The court erred in entering findings of fact 1,2,3 and 5 and conclusions of law 2,3,4,5 and 6 (findings of fact and conclusions of law on 404(B)) evidence. CP 106-109 (Appendix B).

Issues Pertaining to Supplemental Assignment of Errors

1. After appellant filed his Brief of Appellant (opening brief) the State presented written findings of fact and conclusions of law addressing the admission of the statements Maribelle Olivas, Andres Orozco and Maria Perez made to police. In his opening brief appellant argued the court erred in admitting those statements. The court entered those written findings of fact and conclusions of law without the State providing notice to appellate counsel and without the State's request the findings of fact and conclusions of law be entered under RAP 7.2(e). Where the late written findings of fact and conclusions of law were tailored to address appellant's assignments of error should this Court reverse appellant's convictions? Alternatively, should this Court refuse to consider the late written findings of fact and conclusions of law in its review?

2. After appellant filed his opening brief, the State presented written findings of fact and conclusions of law addressing the admission of the gang evidence. In his opening brief appellant argued the court erred in admitting that evidence. The court entered those written findings of

fact and conclusions of law without notice to appellate counsel and without the State's request the findings of fact and conclusions of law be entered under RAP 7.2(e). Where the late written findings of fact and conclusions of law were tailored to address appellant's assignments of error should this court reverse appellant's convictions? Alternatively, should this Court refuse to consider the late written findings of fact and conclusions of law in its review?

3. Did the court err in admitting the statements Maribelle Olivas made to police where its written findings of fact are not supported by substantial evidence and where the evidence and the law do not support its conclusions of law?

4. Did the court err in admitting the statements Maria Perez made to police where its written findings of fact are not supported by substantial evidence and where the evidence and the law do not support its conclusions of law?

5. Did the court err in admitting the statements Andres Orozco made to police where its written findings of fact are not supported by substantial evidence and where the evidence and the law do not support its conclusions of law?

6. Did the court err in admitting the gang evidence under ER 404(b) where its written findings of fact are not supported by substantial

evidence and where the evidence and the law do not support its conclusions of law?

Issues Pertaining to Respondent/Cross-Appellant's Challenge to Sentence

1. Did the court err in sentencing appellant to 280 months on the murder conviction in count one, which was computed by sentencing appellant to 220 months for the underlying offense and 60 months for the firearm enhancement, where the sentence was justified under the multiple offense policy?

2. Did the court err in ordering the sentences for appellant's assault convictions served concurrent where the sentence was justified under the multiple offense policy?

B. ARGUMENTS IN REPLY

1. THE STATE FAILED TO PROVIDE APPELLATE COUNSEL NOTICE OF THE PROPOSED WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW, FAILED TO REQUEST THIS COURT'S PERMISSION TO ENTER THE LATE WRITTEN FINDINGS AND CONCLUSIONS AND TAILORED THE WRITTEN FINDINGS AND CONCLUSIONS TO ADDRESS NAVA'S ASSIGNMENT OF ERRORS.

In his opening brief Nava argues the State failed to show that under the totality of the circumstances, but for different reasons, the statements Olivas, Orozco and Perez made to police were accurate or reliable under

the test in State v. Alvarado, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). Brief of Appellant (BOA) at 15-20. The State makes no attempt to reply to Nava's arguments that the statements were improperly admitted. Instead, the State directs this Court to the trial court's late written findings of fact and conclusions of law and argues because Nava did not assign error to those, they are verities on appeal and support the trial court's ruling admitting the statements. Brief of Respondent (BOR) at 3-6 (citing CP 89-102).[1] The State apparently believes this Court is obligated to independently review the trial court's findings and conclusions without the benefit of any analysis of the issue by the State. If this Court is inclined to find the State's brief satisfies its obligation to respond to the arguments raised by Nava, it should find Nava is prejudiced by the entry of the late findings and conclusions and either reverse his conviction or refuse to consider the late findings and conclusions.

Nava filed his brief on December 8, 2009. On January 7th and 22nd 2010 respectively, the court entered finding of fact and conclusions of law on the issue of admission of Orozco's and Olivas' statements. CP 99-102, 110-114. On February 3, 2010, almost three months after Nava's

[1] The State provides the findings and conclusion related to Olivas' statement to police in the body of its brief. BOR at 4-5. It merely references the findings and conclusions related to Perez by citing to the clerk's papers. BOR at 3. It failed to designate the findings and conclusions related to Orozco.

opening brief was filed, the trial court entered the findings of fact and conclusions of law on the issue of Perez's statements. CP 92-95.

The prosecution is required to provide notice to appellate counsel when presenting late findings and conclusions. State v. Pruitt, 145 Wn. App. 784, 791, 187 P.3d 326 (2008); State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003); State v. Corbin, 79 Wn. App. 446, 451, 903 P.2d 999 (1995). These cases confirm the obvious that notice is a fundamental component of due process. Counsel on appeal was not given notice the State intended to present the late findings and conclusion nor was counsel provided a copy of the proposed findings and conclusions prior to the State presenting those to the trial court.[2]

Under RAP 7.2(e), the trial court has authority to hear and determine post-judgment motions on cases before an appellate court. But if the trial court's determination will change a decision being reviewed by the appellate court, the trial court must obtain permission from the appellate court before formally entering its decision. RAP 7.2(e); Carpenter v. Elway, 97 Wn. App. 977, 988, 988 P.2d 1009 (1999), *review denied*, 142 Wn.2d 1005, 10 P.3d 403 (2000); Metropolitan Park Dist. v. Griffith, 106 Wn.2d 425, 439, 723 P.2d 1093 (1986); Marquis v. Spokane,

[2] The State appears to have notified trial counsel, whose signature appears on the findings.

76 Wn. App. 853, 862, 888 P.2d 753 (1995), *aff'd*, 130 Wn.2d 97, 922 P.2d 43 (1996). The State has not asked this Court for permission to formally enter the late findings and conclusions. The written findings and conclusions are not properly before this Court in light of RAP 7.2, which provides that a trial court has only limited authority to act after this Court accepts review. See e.g., City of Seattle v. Holifield, 150 Wn. App. 213, 223-25, 208 P.3d 24 (2009), *reversed on other grounds*, 170 Wn.2d 230, 240 P.3d 1162 (2010) (discussing RAP 7.2(e)); Pruitt, 145 Wn. App. at 793-94.

Generally, the failure to enter written findings and conclusions is a clerical error that may be corrected after an appeal is filed. State v. Pruitt, 145 Wn. App. at 794. But reversal is warranted if the defendant can show actual prejudice from belated entry of findings. Id. The defendant carries the burden to prove such prejudice and may do so "by establishing that the belated findings were tailored to meet the issues raised in the appellant's opening brief." Id; See, State v. Ritter, 149 Wn.App. 105, 109, 201 P.3d 1086 (2009) (same). A defendant is prejudiced if his liberty interest is adversely affected, or if the record reflects that the findings and conclusions were tailored to address the assignments of error raised on appeal. State v. Litts, 64 Wn.App. 831, 836-37, 827 P.2d 304 (1992)

In its response, the State claims, "[t]here are a few instances were a reviewing trial court[3] is presented with a ruling by the trial court that directly addresses an allegation raised on appeal. These findings and conclusions cite the applicable case law and then break down the analysis used step by step." BOR at 5.[4] The reason this may be one of those "few instances" where the written findings and conclusions "directly" address the issues on appeal and "break down the analysis step by step" is all to obvious. They were entered after Nava raised the issues in his opening brief and are tailored to meet those issues.

That the State's findings and conclusion are tailored is self-evident. Rarely does a trial court enter detailed written findings and conclusions following a ruling admitting or disallowing evidence unless written findings are required by court rule. There is no rule that requires the court enter written findings and conclusions following a decision to admit evidence under ER 803, unlike when the court rules on the admissibility of a defendant's statement or a motion to suppress evidence. See e.g., CrR 3.5(c) and CrR.3.6(b). That belated written findings and conclusions were

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[3] It is assumed the State did not intend to refer to a "reviewing trial court" but meant to refer to the appellate court.

[4] The State's claim the findings should be treated as verities on appeal because they are unchallenged is disingenuous. See, BOR at 6. It was impossible for Nava to assign error to the findings or conclusions in his opening brief when they had not yet been presented or filed.

even filed leads to the logical inference the State's intent was to tailor the findings to address the issues already raised and briefed on appeal.

The findings and conclusions were not only entered after Nava filed his opening brief, they cite to the verbatim report of proceedings which were filed October 29, 2009, months before the findings and conclusions were presented, and specifically cite the accuracy and reliability factors argued in Nava's opening brief. *Compare* BOA at 15-20 (addressing Alvarado factors with respect to each witness) *with* CP 93-94, 100-101 and 110-114 (addressing the same Alvarado factors with respect to each witness). They were specifically tailored to meet the issues raised in the opening brief.

In sum, because the State failed to provide appellate counsel a copy of the proposed findings and proper notice of presentation and because the belated findings were tailored to address the issues raised on appeal, this Court should find Nava was prejudiced and reverse his conviction. Alternatively, because the State did not seek permission to enter the belated findings under RAP 7.2(e), this Court should find they are not properly part of the record for purposes of this appeal and refuse to consider them.

2. THE LATE FINDINGS OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ADMISSION OF THE STATEMENTS MARIBELLE OLIVAS, ANDRES OROZCO AND MARIA PEREZ GAVE TO POLICE ARE UNSUPPORTED AND THE ADMISSION OF ANY ONE OF THOSE STATEMENTS IS REVERSIBLE ERROR.

If this Court determines the trial court's belated written findings and conclusions can be properly considered, Nava assigns error to those findings unsupported by the evidence and those conclusions unsupported by the findings or the law. Factual findings are erroneous where they are not supported by substantial evidence in the record. State v. Hill, 123 Wn.2d 641, 870 P. 2d 313 (1994). Findings are supported by substantial evidence only if the evidence is sufficient to persuade a fair-minded, rational person of the truth of the finding. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). The findings must, in turn, support the conclusions of law. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). The court reviews conclusions of law de novo. Mendez, 137 Wn.2d at 214.

A finding of fact is "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) (quoting, Leschi Improvement Council v. State Highway Comm'n,

84 Wn. 2d 271, 283, 525 P.2d 774 (1974)). A finding of fact that does not meet this test must be reviewed as a conclusion of law. State v. Hutsell, 120 Wn.2d 913, 918, 845 P.2d 1325 (1993).

Even if the court's belated written findings were not erroneously entered, they are not supported by substantial evidence. And, the court's conclusions of law are incorrect.

a. Maribelle Olivas

The court found Olivas did not remember whether her taped statement to police was accurate. CP 99-102 (finding 3). The evidence only partially supports that finding. Olivas actually testified 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. She also testified she was 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. When she spoke with police, Olivas initially denied she was even at the scene. RP 352. Moreover, she had a motive to lie to police and implicate Nava in the shooting to minimize any potential criminal liability because of her involvement.

Under the totality of the circumstances test, the State failed to show Olivas once had knowledge and her taped statement reflects her prior knowledge accurately. State v. Alvarado, 89 Wn. App. at 551-553.

Her testimony that 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 the accuracy of her statements in the interview. Id. The trial court's belated conclusions of law that Olivas once had knowledge of the event, her taped statement reflects that prior knowledge and she did not disavow her taped statement, are unsupported. CP 99-102 (conclusions of law 3 and 4.). The court's conclusion the taped statement was admissible under ER 803 is erroneous. Id. (conclusion of law 6).

b. Andres Orozco

The court's findings only selectively recount Orozco's testimony. CP 110-114 (findings 1 and 2).[5] The findings omit certain crucial parts of Orozco's testimony. Furthermore, the court's conclusions of law 3 and 4 are really findings of fact and are unsupported by substantial evidence. Id.; See, Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986) (regardless of labels, findings and conclusions are addressed based upon their correct designations).

[5] Although the State failed to designate the late findings and conclusions related to Orozco's statement, Nava has done so to facilitate this Court's review in the event this Court rejects Nava's argument that the findings and conclusions should not be considered.

The court found when Orozco made the statement to police he had a memory of the event and his taped statement accurately reflects his prior knowledge of the event. CP (conclusion of law 3). The court also found Orozco did not want to testify and claims drug use affected his memory and his statement regarding the weapon was corroborated because the weapon was a revolver. Id. (conclusion of law 4). Those findings are unsupported.

Orozco never asserted he did not want to testify. Orozco did not remember the incident because he was drunk and on drugs at the time of the shooting and drunk when police interviewed him. RP 85-86, 90-93, 165. He disavowed his statement, admitting he lied to police. RP 145. In addition, witnesses placed Orozco at the scene engaged in a verbal altercation just before the shooting. He had every incentive to lie to police and name someone else as the shooter to divert police attention away from him. Although the weapon used was likely a revolver, Orozco's rendition of some of the events was inconsistent with the rendition of other witnesses (Orozco told police after shooting he jumped in the car driven by Olivas and the two of them left alone. Olivas, however, told police Velasquez was also in the car). RP 139, 141, 377.

Orozco disavowed his statement to police and the State failed to show the statements were accurate or had an indicia of trustworthiness or

reliability. Alvarado, 89 Wn. App. at 551-52. The court's conclusion Orozco's taped statement was admissible under ER 803 is erroneous. CP 114 (conclusion of law 5).

c. Maria Perez

Similar to the court's findings regarding Olivas and Orozco's statements to police, its findings regarding Perez's statement suffer from the same infirmities. They are selective and omit critical evidence.

Police searched Perez's home found handguns and drugs. RP 209. Perez then agreed to talk to police because she scared her husband was going to go to jail and her baby taken from her. RP 427. Perez believed her husband was a suspect in the shooting and she was trying to protect her husband when she made her statement. RP 452.

Perez told police 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. BOA at 20.

Based on these facts, the court's finding that Perez's statement accurately reflects her prior knowledge is unsupported. CP 92-95 (conclusions of law 3). Its finding there was indicia of reliability supporting her knowledge of the event and accuracy of her statement is likewise unsupported. Id. (conclusion of law 5). Under the totality of the circumstances, Perez's statements to police at the interview were neither accurate nor have an indicia of reliable. The court erroneously concluded Perez's taped statement was admissible under ER 803. Id., (conclusion of law 6).

The State does make any substantive arguments in its response. It relies solely on the belated findings and conclusions to contend the statements Olivas, Orozco and Perez made to police were admissible under ER 803. Those findings and conclusions, however, do not support the court's ruling admitting those statements. For the reasons in Nava's opening brief and for the above reasons, this Court should hold the court erred in admitting the statements and reverse Nava's conviction. BOA at 20-22.

3. THE LATE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE ADMISSION OF GANG EVIDENCE WERE ENTERED WITHOUT NOTICE TO COUNSEL, WITHOUT THIS COURT'S PERMISSION AND TAILORED TO ADDRESS NAVA'S ASSIGNMENTS OF ERROR.

Two days after Nava filed his opening brief, the court entered findings of fact and conclusions of law addressing its decision to admit the gang evidence testimony. CP 106-109. [6] As with the State's belated ER 803 findings and conclusions, these findings and conclusions were entered without notice to appellate counsel and they are tailored to address Nava's argument the court erred in admitting gang evidence testimony.

In his opening brief Nava argued, in part, the State failed to show the existence of a gang, that Nava was a member or linked to a gang, that Masovero was a member of a gang or that the shooting was a gang retaliation. BOA at 26-29. Nava also argued admission of the evidence was unfairly prejudicial and outweighed its probative value, assuming there was any probative value. Id. at 29-30. The State's belated findings and conclusions address each of these arguments. CP 106-109 (findings 1, 3, conclusions of law 2, 4 and 5). Because the late findings and

[6] The State failed to designate these late written findings and conclusions as well. Nava has designated them to facilitate this Court's review in the event this Court rejects Nava's argument that the late findings and conclusions should not be considered.

conclusions were tailored to address Nava's issues on appeal, this Court should reverse his conviction. Alternatively, because the State did not seek permission to enter the belated findings under RAP 7.2(e), this Court should find they are not properly part of the record for purposes of this appeal. See, Argument 1 above.

4. THE LATE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW ADDRESSING THE ADMISSION OF THE GANG EVIDENCE ARE UNSUPPORTED AND THE ADMISSION OF THE IRRELEVANT AND UNFAIRLY PREJUDICIAL GANG EVIDENCE DENIED NAVA HIS RIGHT TO A FAIR TRIAL.

If this Court determines it is appropriate to consider the belated findings and conclusions presented by the State, it should find those findings and conclusions do not support the ruling admitting the gang evidence because they are either unsupported by the evidence or are legally insufficient. This Court should hold the gang evidence was inadmissible and reverse Nava's convictions.

The courts findings of fact in support of its ruling admitting the gang evidence rests entirely on Salinas's testimony. CP 106-109 (findings of fact 1,2,3,4 and 5). His testimony does not establish by a preponderance of the evidence the existence of a "Soreno" gang, that Nava

was "linked" to or a member of that gang or that the shooting was linked to gang rivalry.

The court found Salinas identified Perez, Orozco, Nanamkin and Nava as linked to the "Soreno" gang and Masovero and the others in his car were members of the "Nortenos" gang. CP (finding of fact 1). Salinas's opinion that Masovero was member of the Norteno gang was based on the number 14 on the belt Masovero was wearing. BOA at 27. 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. 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. See, State v. Asaeli, 150 Wn. App. 543, 579, 208 P.3d 1136 (2009) (court held the officer's gang testimony was not probative because it was general and conclusory).

Salinas's opinion that Nanamkin was linked to the "Soreno" gang was based on what Salinas claimed were drawings and "other items" indicating his affiliation with the "Soreno" gang and Nanamkin was distraught over Serrano's death. RP 13 (1/26/2009). Salinas, however, does not identify anything about the "drawings" or "other items"[7] that would even support an inference Nanamkin was a member of a gang

[7] Salinas does not even identify the "other items."

called the "Soreno" nor does his testimony establish there was a group or gang involved in criminal activity called "Soreno." Likewise the State does not point to anything in the record that shows there is a "Soreno" gang. That finding is unsupported by substantial evidence.

The court also finds that "during the investigation the two groups exchanged both hands signs and verbal statements that are typically found in a gang style confrontation." CP 106-109 (finding of fact 2). The State does not point to anything in the record that supports that finding. In addition, there is nothing in the record that shows any "hand signs" or words were related to a gang called "Soreno." That finding too is unsupported by substantial evidence.

In his opening brief, Nava claims the State failed to prove by a preponderance of the evidence the "Soreno" gang exists, citing State v. Asaeli, 150 Wn. App. 543, 208 P.3d 1136 (2009). BOA at 27-30. In Asaeli, the State presented evidence gang colors where displayed at the scene of the murder, there was testimony two of the defendants were members of a gang called the Kushmen Blokk, on one of the defendant's cell walls police found gang related graffiti, including the phrases "Kushmen Blokk 73rd," and "Brown Flag Gangsta," 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. Asaeli, 150 Wn. App. at 559, 574-575. The Asaeli court held the evidence was insufficient to show by a preponderance of the evidence that Kushmen Blokk was a gang. Id. at 577-578.

In its response, the State does not even mention the Asaeli case, much less attempt to distinguish it. The State instead cites State v. Yarbrough, 151 Wn.App. 66, 210 P.3d 1029 (2009), in support of its argument the gang evidence was relevant to show the "defendant's motive and mental state". BOAR at 8. Yarbrough does not support the State's argument.

In Yarbrough the court found sufficient evidence of a gang and defendant's membership in the gang where the defendant frequently spoke about his membership in the Hilltop Crip 16 gang. And, in the defendant's house, police found numerous gang-related items such as (1) a foot stool inscribed with gang insignia, (2) two black handkerchiefs, (3) a cell phone with video clips showing the defendant flashing gang signs, (4) a photograph of the defendant flashing a gang sign, and (5) a shoebox containing a blue bandana and a loaded .22 caliber semiautomatic pistol. Id. at 78-79.

Here, there was less evidence of the existence of a gang then in Asaeli and there was no evidence close to the quality or quantity in Yarbrough. BOA at 29. The State ignores Asaeli because it stands for the proposition there must be more evidence than a police officer's conclusory opinion and vague references to a number on a belt, drawings and "other items" to show by a preponderance of the evidence that a gang exists.

The State also argues Olivas' statement to police "tied together" with Salinas' testimony. That argument has no merit.

First, the State correctly agrees the court did not admit Olivas' statements regarding what she heard or what she read. BOR at 10. Her statements regarding alleged gang activity was based on things she heard and cannot be tied to Salinas' testimony. BOA at 26-27.[8]

Second, her statements, even if admissible and "tied" to Salinas' testimony do not establish that a "Soreno" or Nortenos" gang existed. Nowhere in her statement does she mention either alleged gang.

Third, nowhere in its argument does that State discuss the court's written findings. It fails to do so because neither the court's oral ruling or

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[8] 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.

its written findings mention Olivas' statement as a basis for admitting the gang evidence.

The State also argues Perez's statement to police, that Nava said "that was for my homie Smurf" established the link between the crime and gang retaliation. BOR at 13. That argument too is without merit. If Nava made that statement it shows he might have blamed Masovero for "Smurf's" murder, which occurred in front of Masovero's mother's house. It does not show Nava was a member of a gang or the shooting was connected to gang rivalry.

There was insufficient evidence to show by a preponderance that "Soreno" was a gang. Similarly, there was insufficient evidence to show "Nortenos" was gang. There was insufficient evidence to show Nava was linked to or a member of a gang or that the shooting was related to gang rivalry. The court's findings that Masovero was a member of the "Nortenos" gang or that Nava was linked to the "Soreno" gang are not supported by substantial evidence.

The court's conclusions that Salinas' testimony was probative and relevant to show motive, intent and premeditation and therefore admissible is likewise unsupported. CP 106-109 (conclusions of law 2,3, 4 and 6). The court's conclusion that while the gang evidence was prejudicial because it portrayed Nava as a lawbreaker and criminal its probative value

nonetheless outweighed the prejudice is unsupported because the evidence failed to establish a nexus between Nava, gangs and the shooting and thus it had little if any probative value. Id. (conclusion of law 5). Admission of the gang evidence was an abuse of discretion. State v. Asaeli, 150 Wn. App. at 578.

The State appears to argue that even if the gang evidence was improperly admitted, it was harmless. BOR at 12-13. The State contends because of Nava's "confession" and Olivas' testimony she saw Nava fire at the car with the only working gun the jury would have reached the same verdict. Id.

The State's argument is unsupported by the facts. The State does not cite to any evidence showing Nava confessed because there is no such evidence. Olivas told police she saw both Nava and Nanamkin with a gun and saw Nava pointing a gun at the Martinez car but not that she saw Nava fire the gun at the car. RP 376-377. Moreover, Olivas' credibility was questionable, she admitted she was drunk and on drugs at the time and her account of the event differed from the other witnesses.

The gang evidence materially effected the outcome of the trial. Its admission was reversible error. BOA at 30-31.

5. TRIAL COUNSEL'S FAILURE TO REQUEST A LIMITING INSTRUCTION DEPRIVED NAVA OF HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Nava concedes that under the Washington Supreme Court's recent decision in State v. Russell, __Wn. 2d ____ (2011 WL 662927) at 3, decided after Nava filed his opening brief, a trial court is not required to sua sponte give a limiting instruction if one is not requested. Although the trial court was not required to give a limiting instruction, counsel's failure to request one was ineffective.

The State argues trial counsel's failure to request an instruction limiting the gang evidence for the purposes of its admission was tactical because counsel did not want to emphasize the gang evidence. BOR at 16. See, State v. Barragan, 102 Wn.App. 754, 762, 9 P.3d 942 (2000) (failure to request a limiting instruction can be a tactical decision not to emphasize damaging evidence). The record belies that argument..

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The failure to request a limiting instruction was not a legitimate trial tactic. Counsel fought to exclude the evidence because it allowed the jury to infer Nava as gang member living outside the law. Nava's defense was that the State failed to prove Nava was the shooter. Thus, there was no

legitimate tactical reason for not wanting to ensure the jury limited its consideration of the gang evidence for the sole purposes of showing the shooter's motive and premeditation and not for the more prejudicial purpose of inferring that Nava was a gangster. The State fails to make persuasive argument that failure to request a limiting instruction was a legitimate trial tactic.

The State also appears to argue Nava was not prejudiced by counsel's failure to request a limiting instruction because the evidence was overwhelming. BOR at 16. Again the State relies on the statements others made to police that Nava had a gun and shot into the car. Id. Given the credibility problems with those witnesses the jury resolved any doubts that Nava was the shooter against Nava because it used the evidence to infer Nava was a gangster to conclude despite the conflicting evidence, he likely committed the crime.

Counsel was ineffective for failing to request a limiting instruction and Nava was prejudiced by counsel's failure. Nava's conviction should be reversed. BOA at 34.

C. ARGUMENT IN RESPONSE TO STATE'S CROSS APPEAL

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED NAVA TO 520 MONTHS UNDER THE MULTIPLE OFFENSE POLICY.

What exactly the State is arguing is unclear. In that section of its brief entitled Answers to Assignments of Error the State identifies the error as follows: "The trial court erred when it sentence (sic) the defendant to a term in count one which was below the standard range." BOR at 2 (number 5). Count one is the murder the conviction. In its argument section, however, the State opines "It is beyond comprehension how this court [referring to trial court] could list the facts and factors surrounding this crime then determine that not only should there a downward departure form (sic) the standard range but also that the trial court would find that these crimes, mandated to run consecutive, should be run concurrent." BOR at 21.

Although the State only assigns error to the sentence related to the murder conviction, the last quoted sentence might be read as a challenge to the sentences in the other counts (assault convictions) and not just the murder count (Count one), notwithstanding the State's only claim the trial court erred when it sentenced Nava to below the standard range in Count one. Because it is unclear what the State argues, Nava will address the

entire sentence, however, this Court should only review the sentence for the murder conviction as it is the only sentence the State assigns error to.

The standard range for the first degree murder (Count 1), based on an offender score of 3, is 271-361 months. The standard range for each of the four first degree assault convictions (Counts 2-5) is 93-123 months. There is a 60 month firearm enhancement attached to each count (1-5).

Nava was sentenced as follows: (1) 220 months on the first degree murder with an additional 60 month firearm enhancement for a total of 280 months and (2) 100 months on each of the four assault convictions with an additional 60 month firearm enhancement for a total of 160 months for each count. CP 14-21.

The trial court ran all the firearm enhancements consecutive but ordered the four assaults served concurrent with the 280 month murder sentence based on the multiple offense policy. The court also found the multiple offense policy justified an exceptional sentence below the standard range for the murder conviction. Consequently the court imposed a sentence on that offense of 220 months as opposed to the minimum standard range sentence of 271 months. Nava was sentenced to

a total term of confinement of 520 months for the murder and assaults.[9] CP 14-21.

The State complains the 520 month sentence (43 years) for the assaults and murder was an abuse of the court's discretion. BOR at 20. Although the State does not clearly articulate whether it challenges the assault sentences, it states the court's failure to order the sentences for the assaults and murder consecutively and failure to sentence Nava to the 271 month standard range sentence on the murder (excluding the 60 month firearm enhancement), which according to the State would have yielded a minimum 943 month sentence (78.5 years), was unjustified. BOR at 22-23. The State, however, fails to show the court's sentence was an abuse of its discretion.

The Sentencing Reform Act of 1981 (SRA) requires the trial court to exercise its sentencing discretion in light of the unique facts of each case. State v. Fisher, 108 Wn.2d 419, 431, 739 P.2d 683 (1987). "[T]he purpose of the [SRA] is to retain the sentencing court's discretionary ability to tailor punishment to individual situations." Id. at 431.

[9] Nava was sentenced to a standard range sentence of 43 months on the illegal possession of a firearm conviction (Count VI). That sentence was ordered served concurrent with the 520 month term for the murder and assaults. CP 14-21.

Nava was convicted of first degree murder and fours counts of first degree assault. First degree murder and first degree assault are "serious violent offenses" under RCW 9.94A.030(44). RCW 9.94A.589(1)(b) provides that when a person is sentenced for two or more serious violent offenses arising from separate and distinct criminal conduct, the sentences "shall be served consecutively to each other."

The trial court also imposed consecutive five year firearm enhancements for each offense under RCW 9.94A.510. That statute provides that five years shall be added to the standard sentence range for felony crimes if the offender is armed with a firearm. RCW 9.94A.510(3)(a). The statute also mandates that "[n]otwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter." RCW 9.94A.510(3)(e).

The SRA accords the trial court discretion to depart from the standard felony sentencing ranges if the court finds "substantial and compelling" reasons to justify the exceptional sentence. RCW 9.94A.505; RCW 9.94A.535; State v. Alexander, 125 Wn.2d 717, 722, 888 P.2d 1169 (1995). Under RCW 9.94A.535, the court has discretion to depart from

the standards in RCW 9.94A.589 -- governing whether sentences are to be served consecutively or concurrently -- if the "multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010." RCW 9.94A.535(1)(g). Accordingly, the court has the discretion to impose concurrent sentences as an exceptional sentence. In re Personal Restraint of Mulholland, 161 Wn.2d 322,331, 166 P.3d 677 (2007). The court properly exercised its discretion in finding this is one such case.

The purposes of the SRA include ensuring punishments that are proportionate to the seriousness of the offense and the offenders criminal history, promoting respect for the law by providing punishment which is just, encouraging commensurate punishments for offenders who commit similar offenses, protecting the public, offering the offender an opportunity for self-improvement and making frugal use of the States resources. RCW 9.94A.010. The trial court reserves broad discretion to decrease a sentence if the operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the SRA's purpose. State v. Smith, 124 Wn. App. 417, 102 P.3d 158 (2004) *aff'd*, 159 Wash.2d 778, 154 P.3d 873 (2007).

The court found the nature of the convictions, Nava's prior record, age, background, the impact on public safety and his experience with other

similar cases, justified the 520 month sentence. RP 24-25. The court properly exercised its discretion.

Here, the murder and assault charges were one transaction -- firing at the murder victim. This was not a random shooting. The State's theory was the shooting was directed at Masovero, the murder victim, in retaliation for Serrano's killing, which occurred in front of Masovero's mother's house. Although there were four other people in the car besides Masovero, and two were seated in the front seats, the shots were all directed towards the back passenger area where Masovero was seated. RP 263. There was no evidence the shooter intended to shoot anyone else in the car and nobody else in the car was injured. Because there were four others in the car, however, the offenses were not the same criminal conduct, which put RCW 9.94A.589(1)(b) into play. RCW 9.94A.589(1)(a). Although the assaults were serious, there were few cumulative effects from all four assault charges. See, State v. Hortman, 76 Wn.App. 454, 463,-464, 886 P.2d 234 (1994), *review denied*, 126 Wash.2d 1025, 896 P.2d 64 (1995) (a presumptive sentence calculated in accord with the multiple offense policy is clearly excessive if the cumulative effects of the subsequent criminal acts is nonexistent, trivial or trifling).

In addition, the court also found the mandatory sentences for the firearm enhancements likewise supported a sentence below the standard range. RP 24-25. Under RCW 9.94A.510((3)(c) Nava will be required to serve 300 months on the firearm enhancements alone, even though all the offenses were committed with one gun during one transaction. The cumulative effects of the firearm enhancements are nonexistent.

Nava's prior criminal record, age and background also support the court's decision. Nava's prior record consists of juvenile non-violent offenses, he was relatively young when these offenses occurred (19 years old). If Nava had only been charged and convicted of the murder, he would have had to have an offender score of 9 to receive a standard range of 520 months. RCW 9.94A.510. Moreover, Nava was 27 years old when he was sentenced. If he is ever released from prison he will be an elderly man. If the offenses were all run consecutive, as the State argues they should be, Nava will certainly die in prison making his sentence the equivalent of a life sentence without the possibility of parole, a sentence only reserved for the most heinous murders.

The court's reasons justified imposing an exceptional sentence under RCW 9.94A.535 (1)(g). Given that all the charges stemmed from one transaction that resulted in one death, the multiple firearm enhancements, and Nava's criminal history of non-violent offenses, it

cannot be said the 520 month sentence is not proportionate to the offenses and his criminal history. Further, the sentence is just and promotes respect for the law. The sentence advocated by the State would ensure Nava is never released from prison. Such a sentence is not commiserate with the sentences received by others who commit first degree murder and given the extraordinary length of Nava's current sentence the punishment takes into account the four others in the car could have been injured or killed. The sentence protects the public because Nava will serve 43 years and with the possibility he will be released before he dies, it provides Nava with the opportunity and incentive for self-improvement and is a more frugal use of the State's resources than if Nava were incarcerated until he dies in prison.

The court also found the multiple offense policy justified sentencing Nava to 220 months straight time for the murder conviction. The State asserts that part of the sentence contravenes RCW 9.94A.540. BOR at 24. Under that provision, an offender convicted of first degree murder "shall be sentenced to a term of total confinement not less than twenty years" RCW 9.94A.540(1)(a). Nava was sentenced to 280 months for the murder conviction (220 months straight time and 60 months for the firearm enhancement). The sentence is within the statutory minimum of 240 months and does not violate RCW 9.94A.540(10(a). However, if this

Court finds the statute requires a minimum sentence of 240 months straight time, that does not effect the court's exceptional sentence on the assault convictions and it should remand instructing the trial court to impose the additional 20 months on only the murder conviction sentence.

The trial court correctly found the multiple offense policy resulted in a sentence that was clearly too excessive in light of the purposes of the SRA. It also properly sentenced within the 240 month statutory minimum sentence for first degree murder. This Court should affirm the trial court's reasoned decision and the sentence.

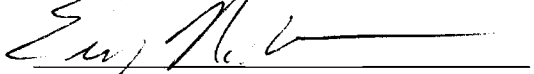
D. CONCLUSION

For the above reasons and the reasons in Nava's opening brief, this Court should reverse Nava's conviction. Alternatively, this Court should affirm the sentence.

DATED this 14 day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX A

CP 92-95

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2010 FEB -4 PM 12:22

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, Plaintiff, vs. SALVADOR NAVA, Defendant.	NO. 01-1-00902-3 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON RECORDED RECOLLECTION OF MARISA PEREZ EVIDENCE RULE 803(a)(5)

THIS MATTER having come before the Honorable Michael E. Schwab, as a hearing for consideration of the admissibility of past recollection recorded. The plaintiff being represented by Kenneth L. Ramm, Deputy Prosecuting Attorney for Yakima County; the defendant being present and represented by counsel, Timothy Cotterell; and the court having heard the testimony of Marisa Perez and Sgt. Joe Salinas, heard outside the presence of the jury on February 3, 2009. The court having heard testimony of the witnesses herein and having heard the arguments of counsel now makes the following findings and conclusions:

FINDINGS OF FACTS

1. On February 3, 2009, Marisa Perez was called as a witness in this case. She was sworn in as a witness by Judge Michael Schwab. (02-03-09 RP 424). Ms. Perez was asked whether she had a memory of the events of May 13, 2001. (02-03-09 RP 427).

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97

Ms. Perez stated that she did not have a clear recollection of the events of that time. (02-03-09 RP 429). Ms. Perez remembered giving a taped statement to Detective Salinas back in May of 2001. (02-03-09 RP 428).

2. That even after hearing her statement that she gave to the police, Ms. Perez did not recall the events. (02-03-09 RP 451).
3. Ms. Perez thought that she might have been trying to protect her husband. (02-03-09 RP 451-52).
4. Within the taped statement Ms. Perez acknowledges that the information in the statement is true to the best of her knowledge and that there was no force used or threat or promise made to get here to make her statement. (02-03-09 RP 450-51).
5. Sgt. Salinas testified that he took a statement from Ms. Perez on May 16, 2001. (02-03-09 RP 454). Sgt. Salinas testified that the tape recording process functioned properly and that the recording was accurate. (02-03-09 RP 457).

CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter and over the parties herein.
2. The defendant's right to confront adverse witnesses as provided by the 6th Amendment of the U.S. Constitution and Article I, section 22 of the Washington State Constitution, was protected by the fact that the witness, Marisa Perez, was sworn in as a witness and the defense was given the opportunity for effective cross examination of the witness regarding her statement and her memory of the event pursuant to *State v. Price*, 158 Wn.2d 630, 648-49, 146 P.3d (2006).
3. The foundational requirements for past recollection recorded under ER 803(a)(5) are set forth in *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). The State has satisfied the foundation requirements as to the admissibility of the taped statement

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of Marisa Perez made to YPD Sgt. Joe Salinas. Sgt. Salinas questioned her concerning the events of May 13, 2001 on May 16, 2001, which was at a time when she had the matters fresh in her mind. (02-03-09 RP 461). The recording made during the interview pertains to a matter about which the witness once had a memory. At the time of her testimony at this trial she had insufficient recollection to provide truthful and accurate trial testimony. The recording accurately reflects the witness' prior knowledge. (02-03-09 RP 461).

4. During the recording on May 16, 2001, the witness, Marisa Perez, was asked whether the information was correct, and she acknowledged on tape that the information was true to the best of her knowledge. (02-03-09 RP 450).

5. She does not disavow the accuracy of the recorded statement. Other indicia of reliability also support admission. Her statement is consistent with that of other witness accounts and the physical evidence. Additionally, Sgt. Salinas overheard her conversation with her husband where she stated she had told the truth. (02-03-09 RP 454, 456, 461).

6. The past recollection recorded of Marisa Perez is admissible pursuant to ER 803. (02-02-09 RP 461).

DONE this 3RD day of FEBRUARY, 2010

JUDGE

Presented by:

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Deputy Prosecuting Attorney

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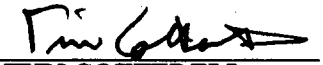

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CP 99-102

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2010 JAN 22 PM 4:51

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, **Plaintiff,** **vs.** **SALVADOR NAVA,** **Defendant.**	**NO. 01-1-00902-3** **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON RECORDED RECOLLECTION OF MARIBELLE OLIVAS EVIDENCE RULE 803(a)(5)**

THIS MATTER having come before ~~the before~~ the Honorable Michael E. Schwab, as a hearing for consideration of the admissibility of past recollection recorded. The plaintiff being represented by Kenneth L. Ramm, Deputy Prosecuting Attorney for Yakima County; the defendant being present and represented by counsel, Timothy Cotterell; and the court having heard the testimony of Maribelle Olivas and Sgt. Joe Salinas, heard outside the presence of the jury on February 2, 2009. The court having heard testimony of the witnesses herein and having heard the arguments of counsel now makes the following findings and conclusions:

FINDINGS OF FACT$

1. On February 2, 2009, Maribelle Olivas was called as a witness in this case. She was sworn in as a witness by Judge Michael Schwab. (02-02-09 RP 326). Ms. Olivas was asked whether she had a memory of the events of May 13, 2001. (02-02-09 RP

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326). Ms. Olivas stated that she did not remember the events of that time. (02-02-09 RP 326-27). Ms. Olivas remembered giving a taped statement to Detective Salinas back in May of 2001. (02-02-09 RP 327).

2. She testified that it was more clear back then, but now it is just a repressed memory. (02-02-09 RP 327). That even after hearing her statement that she gave to the police she did not recall the events. (02-02-09 RP 3330-346).
3. Ms. Olivas did not remember whether the information that she gave to the police was accurate. (02-02-09 RP 329).
4. Within the taped statement Ms. Olivas acknowledges that the information in the statement is true to the best of her knowledge. (02-02-09 RP 345).
5. Sgt. Salinas testified that he took a statement from Ms. Olivas on May 18, 2001, at 12:55 p.m. Sgt. Salinas testified that the tape recording process functioned properly and that the transcript was accurate. (02-02-09 RP 349). Sgt. Salinas further testified that Ms. Olivas indicated that the statement was true to the best of her knowledge and that no threats or promises were made to her in order to get her statement. (02-02-09 RP 349).

CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter and over the parties herein.
2. The defendant's right to confront adverse witnesses as provided by the 6th Amendment of the U.S. Constitution and Article I, section 22 of the Washington State Constitution, was protected by the fact that the witness, Maribelle Olivas, was sworn in as a witness and the defense was given the opportunity for effective cross examination of the witness regarding his statement and his memory of the event pursuant to *State v. Price*, 158 Wn.2d 630, 648-49, 146 P.3d (2006).

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3. The foundational requirements for past recollection recorded under ER 803(a)(5) are set forth in *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). The State has satisfied the foundation requirements as to the admissibility of the taped statement of Maribelle Olivas made to YPD Sgt. Joe Salinas. Sgt. Salinas questioned her concerning the events of May 13, 2001 on May 18, 2001, which was at a time when she had the matters fresh in her mind. (02-02-09 RP 362). The recording made during the interview pertains to a matter about which the witness once had a memory. At the time of her testimony at this trial she had insufficient recollection to provide truthful and accurate trial testimony. The recording accurately reflects the witness' prior knowledge. (02-02-09 RP 362).
4. During the recording on May 18, 2001, the witness, Maribelle Olivas, was asked whether the information was correct, and she acknowledged on tape that the information was true to the best of her knowledge. (02-02-09 RP 363).
5. She does not disavow the accuracy of the recorded statement. (02-02-09 RP 363).
6. The past recollection recorded of Maribelle Olivas is admissible pursuant to ER 803. (02-02-09 RP 363).

DONE this 22nd day of January, 2010.

JUDGE

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Presented by:

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CP 110-114

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CLERK OF SUPERIOR COURT YAKIMA COUNTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, **Plaintiff,** **vs.** **SALVADOR NAVA,** **Defendant.**	**NO. 01-1-00902-3** **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON RECORDED RECOLLECTION OF ANDRES OROZCO EVIDENCE RULE 803(a)(5)**

THIS MATTER having come before the before the Honorable Michael E. Schwab, as a hearing for consideration of the admissibility of past recollection recorded. The plaintiff being represented by Kenneth L. Ramm, Deputy Prosecuting Attorney for Yakima County; the defendant being present and represented by counsel, Timothy Cotterell; and the court having heard the testimony of Andres Orozco and Officer David Cortez, heard outside the presence of the jury on January 29, 2009. The court having heard testimony of the witnesses herein and having heard the arguments of counsel now makes the following findings and conclusions:

FINDINGS OF FACTS

1. On January 29, 2009, Andres Orozco was called as a witness in this case. He was sworn in as a witness by Judge Michael Schwab. (01-29-09 RP 83). Mr. Orozco was asked whether he had a memory of the incident involved in this case. Mr. Orozco stated that he was "trying to remember" but stated that he could no longer

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remember. (01-29-09 RP 85). When asked whether he was present during a shooting that occurred down by the fairgrounds, Mr. Orozco acknowledged that he was there. When asked who he was there with, he replied that he couldn't remember, but that he was there with a lot of people. (01-29-09 RP 85). He could not name the people he was with at that time. (01-29-09 RP 85). Mr. Orozco was asked whether he knew Mr. Nava, he replied that he did. When asked how he knew him, he replied that he knew him from the streets. (01-29-09 RP 85).

2. Mr. Orozco was asked whether Mr. Nava was present at that time, Mr. Orozco replied "I guess, yeah." (01-29-09 RP 85). When asked whether he was present when the shots were fired, Mr. Orozco replied that "I was right there at the place but I can't remember. I was drunk. Drunk. I can't remember nothing." (01-29-09 RP 86). When asked what he had been drinking, Mr. Orozco replied "[b]eer, tequila, whatever, doing drugs." (01-29-09 RP 86). When asked whether he recalled what took place there in the parking lot, Mr. Orozco shook his head no and stated "I don't think so, no." (01-29-09 RP 86). When asked whether he recalled other people present he replied "I don't remember nothing." (01-29-09 RP 86).

3. Officer David Cortez of the Yakima Police Department testified regarding the taped statement of Andres Orozco Contreras which occurred on June 17, 2001, in an interview room at the Yakima Police Department Detectives Division. (01-29-09 RP 118-119). Officer Cortez testified that he assisted Detective Mike Tovar in his interview of Mr. Orozco, noting that usually in homicide cases there will be two detectives present during an interview. (01-29-09 RP 119).

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4. Officer Cortez reviewed the interview he was present at to refresh his recollection. (01-29-09 RP 119). Officer Cortez did not believe that Mr. Orozco was under the influence at the time he gave his taped statement regarding the shooting, since he felt that that was something he would have remembered had he been intoxicated since persons under the influence are difficult to interview. (01-29-09 RP 119-120).

5. Officer Cortez noted that the interview went as smooth as you could ask for, that there wasn't any time during the interview where Mr. Orozco didn't understand what he was being asked. Mr. Orozco didn't give any indication that he was tired, or under the influence or that he couldn't remember something because of the fact that he was under the influence. (01-29-09 RP 120).

6. During the interview Officer Cortez noted that Andres Orozco was able to describe the scene and place the vehicles where they were located in regards to the crime scene as well as the direction that they were facing. He was also able to recall the defendant shooting into the vehicle and could recall the type of weapon used, a revolver. (01-29-09 RP 121).

7. At the end of the recorded interview, the witness, Andres Orozco, acknowledged that the information that he provided was the truth. (01-29-09 RP 121).

CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter and over the parties herein.
2. The defendant's right to confront adverse witnesses as provided by the 6th Amendment of the U.S. Constitution and Article I, section 22 of the Washington State Constitution, was protected by the fact that the witness, Andres Orozco, was sworn in as a witness and the defense was given the opportunity for effective cross examination

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of the witness regarding his statement and his memory of the event pursuant to *State v. Price*, 158 Wn.2d 630, 648-49, 146 P.3d (2006).

3. The foundational requirements for past recollection recorded under ER 803(a)(5) are set forth in *State v. Alvarado*, 89 Wn. App. 543, 548, 949 P.2d 831 (1998). The State has satisfied the foundation requirements as to the admissibility of the taped statement of Andres Orozco made to YPD Officers Tovar and Cortez. They questioned him concerning the events of May 13, 2001 on June 17, 2001, which was at a time when he had the matters fresh in his mind, within a month of the incident. (01-29-09 RP 149, 150). The recording made during the interview pertains to a matter about which the witness once had a memory. (01-29-09 RP 149, 150). At the time of his testimony at this trial he had insufficient recollection, intentionally or otherwise, to provide truthful and accurate trial testimony. (01-29-09 RP 149). The recording accurately reflects the witness' prior knowledge. (01-29-09 RP 150).
4. Although he doesn't acknowledge the accuracy of the recorded statement, the court finds that the defendant was evasive in this answers. That he doesn't want to testify and claims that drug use has affected his ability to remember. (01-29-09 RP 149). At the time that Mr. Orozco made the statement to the detectives on June 17, 2001, he affirmatively asserted its accuracy at the time. (01-29-09 RP 143). Other indicia of reliability also support admission. As testified by Officer Cortez, the witness, Andres Orozco described the events in chronological order and in detail. He never recanted or changed his statement during the course of the interview. Further, his statement regarding the type of weapon used was corroborated by the physical evidence at the scene, or lack thereof in that the weapon used was a revolver, and there were no spent shell cases of the caliber weapon used to kill Antonio Masovero.

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5. The past recollection recorded of Andres Orozco is admissible pursuant to ER 803. (01-30-09 RP 149-50).

DONE this 7th day of January, ~~2009~~ 2010

JUDGE

Presented by:

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APPENDIX B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON, **Plaintiff,** **vs.** **SALVADOR NAVA,** **Defendant.**	**NO. 01-1-00902-3** **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON 404(B) EVIDENCE**

THIS MATTER having come before the before the Honorable Michael E. Schwab, as a hearing for consideration of the admissibility of testimony about gang and gang activity. The plaintiff being represented by Kenneth L. Ramm, Deputy Prosecuting Attorney for Yakima County; the defendant being present and represented by counsel, Timothy Cotterell; and the court having heard the testimony of Sergeant Joseph Salinas was heard outside the presence of the jury on January 26, 2009. The court having heard testimony of the witnesses herein and having heard the arguments of counsel now makes the following findings and conclusions:

FINDINGS OF FACTS

1. Sergeant Joseph Salinas of the Yakima Police Department was assigned to the detectives division in 2001 at the time of this homicide. (01-26-09 RP 11). That as a

ORIGINAL

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93

street level officer, he knew who the gang members were based upon his experience. (01-26-09 RP 16) He specifically testified about the gang membership of persons who were present at the scene of the homicide of Antone Masovero, including Cesar Perez, Andres Orozco, Lance Nanamkin, and the defendant Salvador Nava. (01-26-09 RP 11-12). Sergeant Salinas identified those individuals as being linked to Soreno gangs, whereas the the Antone Masovero and the people with him in the vehicle were all affiliates or members of the Norteno gang, which claims the color red. (01-26-09 RP 12).

2. That during the investigation the two groups exchanged both hand signs and verbal statements that are typically found in a gang style confrontation. (01-26-09 RP 12).

3. Sergeant Salinas, during his investigation of this case, contacted the mother of Lance Nanamkin, and he went to his room and observed drawings and other items that indicated his affiliation with the Soreno gang and his mother indicated to Sergeant Salinas that Lance Nanamkin was very distraught over the death of his friend, Victor Serrano. (01-26-09 RP 13).

4. Antone Masovero was present at the scene of the previous homicide of Victor Serrano, as were a large number of other individuals. (01-26-09 RP 13-14). That investigation was transferred to Sergeant Salinas after the original detective left the department. (01-26-09 RP 13).

5. Sergeant Salinas testified that in the gang world, when acts occur involving rival gangs they are followed by acts of retaliation, which is what Sergeant Salinas believed occurred here. (01-26-09 RP 14).

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CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter and over the parties herein.
2. The testimony of Sergeant Salinas regarding gangs and gang activity specifically as it pertains to this case regarding the prior homicide of Victor Serrano and the affiliation of those persons involved in that homicide and those present during the homicide of Antone Masovero. This information is probative and relevant to the issues and charges brought by the State. This information is helpful to the triers of fact as important background information regarding the particular activities that gave rise to the charges. (01-26-09 RP 49).
3. The testimony of Sergeant Salinas and other witnesses is admissible to show proof of motive, intent, and premeditation. (01-26-09 RP 49).
4. The testimony established by a preponderance of the evidence that the homicide of Antone Masovero was tied to the earlier homicide of Victor Serrano, and that the membership or affiliation of persons involved in those incidents are relevant to the issues in this case.
5. The testimony from witnesses will have a prejudicial impact on the defendant Salvador Nava because it tends to portray the defendant as a law breaker or criminal. However, the probative value of the testimony far outweighs the prejudicial impact since its value will place in context what happened during the incident. (01-26-09 RP 49).
6. The testimony of Sergeant Salinas and other witnesses regarding the gang issue is relevant and is admissible. (01-26-09 RP 49).

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DONE IN OPEN COURT this 10th day of DECEMBER, 2009.

JUDGE

Presented by:

KENNETH L. RAMM
Deputy Prosecuting Attorney
WSBA #16500

Copy received,
Notice of Presentation Waived:

TIMOTHY COTTERELL
Attorney for Defendant
WSBA # 19380

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

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 14TH DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPPELLANT/CROSS APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID TREFRY
P.O. BOX 4846
SPOKANE, WA 99220-0846

[X] JAMES HAGARTY
YAKIMA COUNTY PROSECUTOR'S OFFICE
128 N. 2ND, ROOM 329
YAKIMA, WA 98901

[X] SALVADOR NAVA
DOC NO. 331749
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MARCH, 2011.

x Patrick Mayovsky