NO. 28222-8-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SALVADOR S. NAVA

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Special Deputy Prosecuting Attorney
Attorney for Respondent

JAMES P. HAGARTY
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
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A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

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2. Did the court err when it allowed testimony regarding gang activity?
3. Did the court err when a limiting instruction was not given regarding gang information?
4. Was the appellant denied effective assistance of counsel when trial counsel did not request a limiting instruction regarding the gang information which was admitted?
5. Was there prosecutorial misconduct?
6. Was the sentence imposed by the trial court was improper?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The trial court did not abuse its discretion when it admitted the statements of Olivas, Perez and Orozco. There was a proper foundation laid by the State and the court addressed the issue based on current case law.
2. The court did not err when it allowed the admission of a testimony regarding gang affiliation and connections amongst witnesses, the victim and the defendant.
3. A limiting instruction was not necessary nor requested. Further this issue was not raised or preserved at the trial court. Counsel was not ineffective.

4. The record supports that statements made by the Deputy Prosecutor in his closing argument. Therefore there was not misconduct on his part.

5. The trial court erred when it sentence the defendant to a term in count one which was below the standard range.

II. STATEMENT OF THE CASE

The Statement of Facts contained in Nava's opening brief are generally accurate. Therefore as needed throughout this brief the State shall refer to specific sections of the record or if areas of testimony are lengthy the State shall attach them as appendices.

III. ARGUMENT

1. The trial court's decision to admit the recorded statements of several witnesses was proper and well-founded.

ER 803 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

> (a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (5) Recorded Recollection. 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.

Specific Findings and Conclusions were entered regarding the admission of the recorded statements for Marisa Perez, Peter Lopez and Mariblle Olivas. It

must be noted for the record that the findings of fact and conclusions of law set forth at CP 89-102 were not a portion of the record at the time the appellant perfected the record on appeal.

State v. White, 152 Wn. App. 173, 215 P.3d 251 (2009):

> Admission is 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's memory; and (4) the record reflects the witness's prior knowledge accurately. *State v. Mathes,* 47 Wash.App. 863, 867-68, 737 P.2d 700 (1987). The admission of statements under ER 803(a)(5) is reviewed for an abuse of discretion. *State v. Castellanos,* 132 Wash.2d 94, 97, 935 P.2d 1353 (1997); *State v. Strauss,* 119 Wash.2d 401, 417, 832 P.2d 78 (1992). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *State v. Huelett,* 92 Wash.2d 967, 969, 603 P.2d 1258 (1979).
>
> In *State v. Alvarado,* this court held that the requirement that a recorded recollection accurately reflect the witness's knowledge may be satisfied without the witness's direct verification of accuracy at trial. 89 Wash.App. 543, 551, 949 P.2d 831 (1998).[1]
>
> Therefore, " [t]he court must examine the totality of the circumstances, including (1) whether the witness disavows accuracy; (2) whether the witness averred accuracy at the time of making the statement; (3) whether the recording process is reliable; and (4) whether other indicia of reliability establish the trustworthiness of the statement." *Id.* at 551-552, 949 P.2d 831.

The trail court addressed this issue with regard to each witness now challenged in the following manner the totality of findings for this allegation are found at CP 89-102

1. On February 2, 2009. Maribelle Olivas was called as a witness in this care 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 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 200 1. (02-02-09 RP 337).

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). Sgt. Salinas testified that he took a statement from Ms. Olivas on May 18, 2001, at 1255 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 6' Amendment of the U.S. Constitution and Article I, section 22 of the Washington State Constitution, was protected by the fad 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).

3. The foundational requirements for past recollection recorded under ER 803(a)(5) are set forth *Stare v. Alvarado*, 9 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 R P 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. (03-02-09 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 343).
> 6. The past recollection recorded of Maribelle Olivas is admissible pursuant to ER 803. (02-02-09 RP 363).

(CP 99-101)

There are few instances were a reviewing trial court 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. Clearly indicating what facts were to come to the conclusion by the court that the admission of these tape recorded statements were justified and proper under existing case law.

The court took this exact action with regard to each of the three witnesses whose statements were played for the jury. The appellant has challenged the action of the trial court on all three. These findings and conclusions are found in the record at CP 89-102.

State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994):

> Generally, findings are viewed as verities, provided there is substantial evidence to support the findings. State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Halstien, at 129.
> ...
> Within our appellate court system there is no reason to make a distinction between constitutional claims, such as those involved in a suppression hearing, and other claims of right. The trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying. See Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 405, 858 P.2d 494 (1993); Fisher Properties, Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990). This remains true regardless of the nature of the rights involved.

At the time this brief was submitted to the court there had been no challenges to these findings and conclusions, either at the trial court or in this court. At the time of entry the findings and conclusions indicate that above counsels signature "Notice of presentation waived " State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (2007) "Because the Defendant fails to challenge any of the findings of fact entered after the suppression hearing, they are treated as verities on appeal. State v. Gentry, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995). Additionally, the trial court's findings are supported by the evidence."

2. The court did not err when it allowed the admission of a testimony regarding gang affiliation and connections amongst witnesses, the victim and the defendant.

Appellant objected to the admission of the gang related evidence however his counsel acknowledged the relevance of this evidence.

> Counsel of Nava: "... just on the record I am objecting to any reference to gangs in this case. I know that it appears to be part and parcel of the

motive in this case because of a prior gang killing two weeks prior to this incident and a revenge type thing. I think it can be brought out in this case without gangs because gangs -- any sign of a gang puts a pallor on the whole case because of the gang activity in this area. I know that people are very, you know, fed up with the gangs and all that and it could just, you know, taint this whole jury."

The State presented outside the presence of the jury and offer of proof. This consisted of testimony from Yakima Police Sergeant Joe Salinas. There was testimony connecting this crime with a previous homicide as well as general information provided to the court regarding gangs and the actions a gang takes when a committing a crime especially a retaliatory crime. This Sergeant had been an officer for nineteen years and had been involved with gangs and gang activity since 2001 when this crime occurred. Sgt. Salinas was the investigative officer on the homicide that was the basis for this retaliatory homicide. (01/26/09, RP 11-17)

Evidence of gang affiliation is admissible as evidence of other crimes or bad acts under ER 404(b) as proof of premeditation, intent, motive and opportunity. In applying ER 404(b), a trial court is required to engage in a three-step analysis: (1) determine the purpose for which the evidence is offered; (2) determine the relevance of the evidence; (3) balance on the record the probative value of the evidence against the prejudicial effect. State v. Campbell, 78 Wn.

App. 813, 821, 901 P.2d 1050 (1995), *citing* State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). An appellate court will review a trial court's ER 404(b) for abuse of discretion. Id. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In Campbell, the Court of Appeals affirmed the trial court's conclusion that gang evidence was highly probative of the State's theory, namely that Campbell was a gang member who responded with violence to challenges to his status. Campbell, 78 Wn. App. at 822. Admission of gang evidence that was probative of motive, premeditation, as well as *res gestae*, was likewise held to be no abuse of discretion in State v. Boot, 89 Wn. App. 780, 789-90, 950 P.2d 964 (1998).

Admission of gang-related evidence was affirmed, as well, in State v. Yarbrough, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009), where the evidence was relevant to prove the defendant's motive and mental state with respect to a charge of first degree murder.

Nava claims in his brief that there is no indication that Nava was a gang member, it would appear that his trial counsel did not agree:

> MR. COTTERELL: Well, Your Honor, I think that it is possible. The gang aspect is intertwined, there's no about -- in this case.." (RP 48)

The trial court considered the statements of Sgt. Salinas and the proffer by the State regarding the basis for admission and found the following;

> THE COURT: But I'm inclined to find that gang affiliation and gang activity as it -- specific to this case, not general, is relevant to this case and the charges and it explains the motive and premeditation intent and it's more probative than prejudicial. I've already said it's clearly prejudicial, it tends to portray the defendant as a law breaker, an outlaw, criminal that in minds of local people is a big problem and so if we allow that to come in then it has some prejudicial impact but the probative value to explain what happened here far outweighs the prejudicial impact. So, I'm going to find that the gang issue is relevant and can come in.

The claim by appellant that there was no evidence from Olivas that there was gang activity and that the defendant was involved is incorrect. If her statement is read in its entirety it is very clear that she personally was very aware of the actions that were going and that there was a war going on over the previous shooting. This is exactly what the States theory was and the basis for moving for the admission of this information.

This was, as most homicides are, a senseless act, however the State had the right and requirement to introduce information with regard to the element of premeditation. If the State had not presented this information the defendant could have argued that he was acting in self-defense or just reacting to the actions of the driver of the car within which the victim was riding. Olivas' own testimony was that she saw a gun or thought that she saw the driver trying to get a

gun then she saw and heard the Nava shooting. She states that she thought at first that the person who had been shout was the driver of the car, based on her observations of his gun. Therefore the State had to show the act Nava was gang related as was also mentioned by Olivas. Appellant correctly indicates the court limited some of the information that was stated by Olivas because it was from "what she had heard" or "was in the papers" however the vast majority of what she stated clearly indicated that this was an act of retribution for the prior crime. For example;

> DETECTIVE SALINAS: So the first thing that you thought something bad was going to happen because of the gang activity that was -- kind of gone on the week before or the previous homicide or --
> MS. OLIVAS: Yeah, because everybody was out for revenge. It's basically that there was a war going on between them.
> DETECTIVE SALINAS: The two sides?
> MS. OLIVAS: Yeah.
> DETECTIVE SALINAS: The blues and the reds?
> MS. OLIVAS: Yeah.
> DETECTIVE SALINAS: And the guys that you were with, what group did they belong to or what color would they belong to?
> MS. OLIVAS: I believe that they belonged to the blue. (RP 373)
> ...
> MS. OLIVAS: He opened the door in kind of like a -- I think he had a gun pulled out and that's when the shots rang out and then I thought that he was the one that got shot.
> DETECTIVE SALINAS: What caused the shot? Who shot a gun?
> MS. OLIVAS: I heard just one echo of shots and I think it was Chava but then later on I read in the paper that Lance had admitted that his gun got jammed, so apparently it's Chava the one that shot.
> DETECTIVE SALINAS: So you saw both of them holding guns?
> MS. OLIVAS: I seen Chava but I didn't see Lance.
> DETECTIVE SALINAS: You didn't see Lance holding a gun?
> MS. OLIVAS: Huh-uh, I see he had one on him but I guess kind of shadowy, kind of dark and I seen both of them right there and

then I just heard the one echo of shots.
DETECTIVE SALINAS: But you saw Lance with a gun?
MS. OLIVAS: Yeah, but I don't know if he -- if he had shot.
DETECTIVE SALINAS: You don't know if he shot.
MS. OLIVAS: Hm-uh, but later on the papers he admitted to saying that, yeah, he was there, but his gun had jammed.
DETECTIVE SALINAS: Okay, so the shots that were fired, you saw Chava fire (inaudible) shots into the car?
MS. OLIVAS: I didn't see him, but I heard the shots. I seen him like that.
DETECTIVE SALINAS: You saw him -- so you're indicating with your hands and pointing like you're holding a gun?
MS. OLIVAS: Yeah, I seen him.
DETECTIVE SALINAS: So, he's started pointing the gun?
MS. OLIVAS: Uh-huh, but --
DETECTIVE SALINAS: And then you heard the shots.
MS. OLIVAS: And Lance was next to him but I couldn't see Lance just dark, I seen shadows, so I didn't see if Lance had shot, too, or anything. And then I looked to see --
DETECTIVE SALINAS: So you saw Chava pointing the gun at the car --
MS. OLIVAS: Yeah.
DETECTIVE SALINAS: -- and then you heard the shots?
MS. OLIVAS: Yeah.
(RP 376-77)
...
DETECTIVE SALINAS: And you indicated earlier when I was talking to you that both of them were pointing guns at the car but you only heard one series of shots?
MS. OLIVAS: Uhm-hm.
DETECTIVE SALINAS: Is that what you're saying?
MS. OLIVAS: Yeah, I just heard one like one series that just went pop, pop, pop, pop and then like a little bit then pop, pop, pop, pop, pop, pop.
DETECTIVE SALINAS: So you would have heard different --
MS. OLIVAS: No.
DETECTIVE SALINAS: -- (inaudible) tell the different sounds?
MS. OLIVAS: Yeah.
DETECTIVE SALINAS: But you knew that the shots you heard only came from --
MS. OLIVAS: One gun.

DETECTIVE SALINAS: -- one gun.
MS. OLIVAS: Yeah, not two guns.
DETECTIVE SALINAS: Okay.
(RP 379)

This was tied together by the testimony of Sgt. Salinas who informed the court at the initial hearing about the interconnection of these two crimes. Thereby allowing the trial court to come to the correct decision that the gang information was admissible. Credibility determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

In reviewing the sufficiency of the evidence, an appellate court need not be convinced of guilt beyond a reasonable doubt, but must determine only whether substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied* 119 Wn.2d 1003, 832 P.2d 487 (1992).

Further, appellant says that evidence which was presented was minimal and without the gang information the jury would not have convicted, that in essence jury convicted Nava because he was a gang member and he was there. This ignores the confession statement made by the Nava himself while he was in Texas, the eye-witness testimony of Olivas which placed the defendant at the

scene with the only gun that worked. She states that she saw him kill the victim. These facts alone are overwhelming. The additional information, as indicated above, did not convict Nava, it did however allow the jury to consider the fact that this was not a reactive crime but one of premeditation. (Olivas identified the appellant/defendant as "Salvador" and then as "Chava", RP 369, Alicia Velasquez identified Nava in court as "Chava" RP 389) He, Chava admitted that he was present. (RP 576)

The court did allow the connection to be made between this homicide and the previous killing. This was tied together and explained the premeditation element by the testimony of Sgt. Salina who stated that the "tag" name of the previous victim was "Smurf" and the testimony of Perez who when questioned by Det. Tovar

> Q. Did Chava or Lance yell anything out to the Nortenos as the shooting happened?
> A. No, just that was for my homie Smurf (this is now a part of the corrected record)
> Q. Who said that?
> A. Chava.
> Q. Chava said that?
> A. Yes.
> (RP 197-8, amended 480)

This is exactly the reason the State needed the admission of the gang information. The trial court did not allow nor did the State attempt to elicit some generalized information about gangs and the overall aspect of that subculture. This was very specifically information which could only be explained to a lay

jury by the testimony of Salinas and the other witnesses who could explain this culture and the actions which arise in that culture which would "justify" this premeditated act on the part of "Chava."

State v. Saenz, 156 Wn. App. 866, 872-73, 234 P.3d 336 (Div. 3 2010):

> *ER 404(b)* . Mr. Saenz asserts that the trial court erred by admitting evidence of gang affiliation and witness intimidation. Washington courts have repeatedly held that gang affiliation evidence is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See State v. Yarbrough, 151 Wash.App. 66, 210 P.3d 1029 (2009); State v. Boot, 89 Wash.App. 780, 950 P.2d 964 (1998); State v. Campbell, 78 Wash.App. 813, 901 P.2d 1050 (1995).
>
> The decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Stenson, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). The trial court abuses its discretion if its decision is based on manifestly unreasonable or untenable grounds. State v. Stein, 140 Wash.App. 43, 65, 165 P.3d 16 (2007).
>
> Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence is admissible; irrelevant evidence is not admissible. ER 402.

3. A limiting instruction was not necessary nor requested. Further this issue was not raised or preserved at the trial court. Counsel was not ineffective.

Nava did not request a limiting instruction and now for the first time on appeal alleges that this was a manifest error because the court failed to give such an instruction. It is not the job nor duty of the trial court propose such an instruction and it is therefore not error when this type of instruction is not given. They must request it as indicated in appellants brief. Appellant now states this

was error or that is it was not error because he had to ask for it then it was ineffective assistance of counsel. State v. McDaniel, 155 Wn.App. 829, 856, 230 P.3d 245 (2010):

> But absent a claim of constitutional magnitude, we may refuse to address on appeal any specific claim of error that a party did not raise in the trial court. RAP 2.5(a). A party objecting to a jury instruction must "state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused." CrR 6.15(c). Where objection to "a proposed instruction fail[ed] to advise the trial court of any particular point of law involved," we will not consider those arguments on appeal. *State v. Scherer,* 77 Wash.2d 345, 352, 462 P.2d 549 (1969).

This is not a case where the trial was replete with hours of testimony that this was a gang killing. It was a portion of the trial, however it was not the continuous theme of this trial. What was indicated by numerous witnesses is that this was a gang crime. There is no other way to describe what occurred. The defendant's own counsel acknowledged that this case was interwoven with gang related information. To present this case without the use of this gang information would have been purely and simple a matter of the parties presenting a lie to the jury. The reality, the fact is that there is in our society today groups which have a sworn purpose to kill and assault each other. This is not a portion of "normal" society. To present this case without any information coming in about the gang affiliations of the victim as well as Nava would be like trying to try a domestic case without explaining the "domestic" relationship between the parties.

Nava now claims that his social organization "gang" should not be used

against him and yet he tries to use this also as a sword to indicate that the mere fact that it was mentioned that this was gang activity shall predispose the jury to find him guilty of anything that is place before them. That is patently absurd. The jury was charged to listen to all of the fact, all of the testimony and the evidence, direct and circumstantial and come to a just verdict based on the totality of that information and that is what they did.

The use of or the request for the use of a limiting instruction can clearly be seen as a trial tactic by this obviously experience litigator.

Often times in a trial the use of an instruction is waived because the mere us of that document, one which the jury will be allowed to take into deliberations with them which will be read and reread that sets out in black and white that which you want limited can be perceived to have the opposite effect. They look at that instruction "take the information regarding gangs and gang affiliation for the sole purpose of... and it is there to emphasize the very fact that the defendant does not want emphasized.

Nava was allowed to argue his case; the State at no time used the gang information to beat out a verdict. The information supplied this jury was overwhelming. They were presented with eyewitness testimony of Nava taking a gun and shooting into the car where the victim was found dead. Statements from the defendant at the time that this was for his "homie." and he was positively identified by one of the witnesses at the scene in a photo montage just after the

commission of the crime and the fact that he, a US citizen, fled to Mexico to work in the fields and last but not least he admitted to Det. Ruiz that he was there.

The tactic used by counsel should not be second guessed by this court. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982):

> Defendant next claims he was deprived of a fair trial because his trial counsel was ineffective. The test in Washington is whether "[a]fter considering the 'entire record', can it be said that the accused was afforded an 'effective representation' and a 'fair' and 'impartial' trial". State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). This court has refused to find ineffective assistance of counsel when the actions of counsel complained of go to the theory of the case or to trial tactics. State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980); see also State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961).
>
> While it is easy in retrospect to find fault with tactics and strategies that failed to gain an acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. Both defense counsel and the defendant felt that to take a polygraph examination and stipulate its admission was the proper course of action. When the results of the polygraph test proved to be against the defendant, counsel simply tried to make the best of a bad situation and to use the defendant's failure of the polygraph examination to his advantage. Likewise, after he failed in his pretrial motion to exclude the prior conviction, counsel seized the offensive and raised the subject himself in an effort to downplay the importance that might be attached to it. Neither course of action can be said as a matter of law to constitute error.

A party bringing an ineffective assistance of counsel claim must show that the attorney's conduct was not due to legitimate trial strategy or tactics. State v. Summers, 107 Wash.App. 373, 382, 28 P.3d 780 (2001) (citing McFarland, 127 Wash.2d at 336, 899 P.2d 1251).

State v. Gallagher, 112 Wn. App. 601, 611-12, 51 P.3d 100 (2002):

> To establish ineffective assistance of counsel, a defendant must demonstrate both that his or her counsel's representation was deficient and that the defendant was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The reviewing court indulges in a strong presumption that counsel's representation falls within the wide range of proper professional assistance. State v. Lord, 117 Wash.2d 829, 883, 822 P.2d 177 (1991). To overcome this presumption, the defendant must show that counsel had no legitimate strategic or tactical rationale for his or her conduct. State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that but for counsel's deficient performance, the result would have been different. State v. McNeal, 145 Wash.2d 352, 362, 37 P.3d 280 (2002).

It is likely that Nava's trial attorney, who readily admitted that there fact that gangs were involved was woven throughout this case did not ask for the limiting instruction because he believed that the amount of this type of information which had come into the trial was minimal. That in asking for this instruction he would be "ringing the bell" over and over in the jury room by placing this instruction in the packet.

Nava has not demonstrated to this court a basis to allow him to get around the fact that he did not ask for this instruction and further, he has not met the test that would prove this action was anything but a trial tactic.

This case was replete with evidence of Nava's guilt the tactic used by Nava to prove to the jury that he was not the shooter failed no more no less. The actions of his attorney were more than adequate.

4. Was there prosecutorial misconduct?

This issue is moot. The State moved this court for correction of the record. That record is now before this court. In the corrected record the statement before the jury was as state by the Deputy Prosecutor. Perez did in fact state that she overheard Nava aka "Chava" state, as he shot the victim dead "that was for my homie Smurf." (Corrected RP 480)

Therefore there was no misconduct on the part of the Deputy Prosecutor who tried this case.

IV. ALLEGATION ON CROSS-APPEAL

The State challenged the trial courts findings and decision at the time of sentencing. (RP 5/12,15/2009 2-34) The trial court did not enter written findings of fact and conclusions of law to support this decision to impose the exceptional sentence downward.

State v. Alexander, 125 Wn.2d 717, 722-31, 888 P.2d 1169 (1995):

> In reviewing a challenge to an exceptional sentence imposed pursuant to RCW 9.94A.120(2), this court applies a three-prong test. /9
> First, we examine whether the record supports the findings of fact used to justify the exceptional sentence. RCW 9.94A.210(4)(a). Appellate courts ordinarily review a finding of fact to see whether the finding is "clearly erroneous". State v. Estrella, 115 Wn.2d 350, 355, 798 P.2d 289 (1990) (citing State v. Pennington, 112 Wn.2d 606, 608, 772 P.2d 1009 (1989)).
> ...
> Second, we examine whether each factual finding constitutes a "substantial and compelling" reason for departing from the standard range as a matter of law. RCW 9.94A.210(4)(a); RCW

> 9.94A.120(2); State v. Allert, 117 Wn.2d 156, 168, 815 P.2d 752 (1991).
> ...
> When the question is properly raised, the final step of the 3-part statutory analysis leads us to examine whether the resulting exceptional sentence is "clearly too lenient". RCW 9.94A.210(4)(b). A sentence will be deemed clearly too lenient only if the trial court abused its discretion in establishing the precise length of the sentence. An abuse of discretion exists only where no reasonable person would take the position adopted by the trial court. State v. Nelson, 108 Wn.2d 491, 504-05, 740 P.2d 835 (1987).
>
> 9 RCW 9.94A.210(4) provides: "To reverse a sentence which is outside the sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing judge are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient."
> (Some footnotes omitted.)

This court has noted in man other matters that, an "abuse of discretion" has is considered to have occurred when the discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons". State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)

In this case the court decided on a sentence then forced the sentence to fit that into the law. If this court reads the entire sentencing the trial court judge takes more time to set forth what would appear to be factors which would support at least the standard range mandated by law and yet in the end, twice actually, the court determines that the sentence as set forth by the legislature is wrong.

The court determined that Nava's crimes were separate acts that he fired a gun into a car loaded with people and he discharged that weapon at a minimum of five times resulting in the death of one man. This was a premeditated act done to avenge the death of Nava's "homie, Smurf."

The law allows a trial court great discretion when determining a sentence, however that court must stay within the guidelines unless there is a basis for a reduction. It is beyond comprehension how this court could list the facts and factors surrounding this crime then determine that not only should there be a downward departure form the standard range but also that the trial court would find that these crimes, mandated to run consecutive, should be run concurrent.

The argument that this man, "Chava", the man who shot dead one man in retaliation and then fled the country for years should have a break so the he "at least he can see the end of the tunnel here or some light at the end of the tunnel." The victim will never "see the light at the end of the tunnel."

State v. Sanchez, 69 Wn. App. 255, 262, 848 P.2d 208 (1993) discusses the use of this policy in terms of a drug buy. It is applicable here and points out with terminology that is fitting that the idea is that the court will reduce the amount of time using this statute if the matters adjudicated were such that the was in effect a stacking of charges, that clearly did not happen in this instance. The State set forth the charges which were appropriate the acts of Nava were

neither trivial nor trifling. The State is at a total loss how the trial court can address the factors in RCW 9.94A.010 as it did and then determine that the sentence in this case should be reduce by half. If the minimum sentences would have been imposed and run as mandated by statute Nava would have been required to serve four terms of 93 months consecutive to each other, 372 months, and; to the minimum for the murder of 271 months; plus the mandatory 300 months for the weapons enhancements. This using simple math would lead to a sentence of 943 months. To be sure this is an extremely long sentence.

The court does not state that Nava's past history was a basis, it does not address how this fifty percent reduction will "promote respect for the law by providing punishment which is just" nor does the court state that others who have shot five times into a car filled with five people in retaliation for the murder of another gang member, a crime that there was never even an allegation that this victim participated in, nor how the public will be "protected" by allowing this cold blooded killer to be released from the non-weapons sentence after just 18 years which does not factor in good time which can easily reduce this sentence to a mere fifteen years, nor how this will allow the offender to improve himself, or how the resources of this State will be "frugally" used by allowing a person who has already shown total and complete disregard for the safety of the society within which he resides and lastly how this reduction might possibly reduce the risk of re-offense by offenders in the community.

The State has included the majority of the courts ruling with regard to this sentence in an appendix attached to this brief. The reasoning found in that opinion does not meet the standards set the revised code, nor the case law cited herein.

All the court's reasoning was or appears to be is that this sentence is what the court believed was appropriate. Not only did the court remove the 271 months that would have been served based on the mandate of the legislature's requirement that these acts be run consecutively but the court also arbitrarily reduced the standard range on a premeditated homicide by 51 months, the court took a minimum sentence of 271 months and based on faulty reasoning made that 220 months. Four and a quarter years off of a twenty-two and a half year sentence.

Nava has already been afforded the benefit of RCW 9.94A.589. Consecutive or concurrent sentences which in effect drastically reduces the total number of points which can be counted in a case such as this because Nava committed a series of serious violent crimes. Although the logic of the legislature in granting this boon is beyond the State it is the law:

> (1) (b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other

serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under (b) of this subsection shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

If the law allowed the convictions for the four Assaults in the first degree convictions to count for scoring purposes Nava's offender score would have been 11, a basis on its own for an exceptional sentence upward. If Nava would have convicted of Assault in the Second degree once again the State would have had to score this Murder out at 11 points with a standard range in excess of 400 months.

Further, when the SRA was established the legislature set forth in RCW 9.94A.540. **Mandatory minimum terms**;

(1) Except to the extent provided in subsection (3) of this section, the following minimum terms of total confinement are mandatory and shall not be varied or modified under RCW 9.94A.535:

(a) An offender convicted of the crime of murder in the first degree shall be sentenced to a term of total confinement not less than twenty years.(Emphasis mine.)

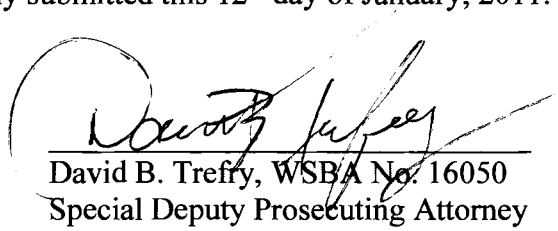
Not only is the sentence ordered in this case an abuse of discretion it would also appear to be in direct violation of this statute. This trial court did not have legal authority to reduce the murder charge to a term less than 240 months, 20 years.

The trial court abused its discretion when it imposed a sentence which was both clearly too lenient and not based upon any valid basis as well as actually violating RCW 9.94A.540.

V. CONCLUSION

Based upon the foregoing argument, this Court should affirm the conviction and remand this case with and order to the trail court to impose a sentence in accord within the statutorily mandated sentence range as well as impose the consecutive sentences also mandated by the legislature.

Respectfully submitted this 12th day of January, 2011.



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Appendix

THE COURT: But the defendant stood there with a gun and pulled the trigger multiple times. Is there any doubt about that?
MR. COTTERELL: No, there's no doubt that --
THE COURT: I asked Mr. Ramm how many bullets were fired.
MR. RAMM: It appears to be between five and six, either five or six.
THE COURT: That's my recollection.

...

THE COURT: Which means that Salavador stood there outside the car and pulled the trigger and at least five bullets were fired at that car.

...

THE COURT: But they were human beings sitting in the car.
MR. COTTERELL: Yes, they were. There's no doubt about that, Your Honor, and -- but in order to get a just sentence here, Your Honor, for this young man, I'm asking to have those first degree assaults run concurrent to each other. Thank you.
THE COURT: Salvador Nava, is there anything you would like to say or do you have any legal reason why the judgment of the court should not be pronounced?
MR. NAVA: No.

...

THE COURT: Well, the -- Antone's brother said this was a senseless act of violence. Clearly, a senseless act of violence is what it was. I don't know how many more senseless acts of violence we need to show us that there's a better way for people to live. I was born and raised in New York City. In the neighborhood that I grew up there was gang violence. Many of the people that I knew wound up like Antone and many of the people I knew wound up like Salvador. It was a terrible tragedy. It's not confined to Yakima. It's a big city issue, it's a small city issue, it's a small town issue. It happens everywhere, but it's a terrible tragedy. It's a plague on our valley right now and we have to explain to our young people that there's a better way to live. This is not the way to live. We don't have to have these senseless acts of violence. My job is to hold Salvador accountable for something that he did. Firing a weapon at a vehicle under the facts in this case has a tremendous impact on public safety. Such behavior is dramatic and brutal in its effect. A young man's life was lost. Other people in that car were put in the gravest of danger. The behavior that's before the court calls for extremely serious penalties to hold this defendant accountable for what he did and to send a message to the community that senseless acts of violence will be dealt with seriously and hopefully we'll be able to work with our young people and convince them that there is a better way to live. I don't have the answers on that. All I know is that those of us who are responsible as adults have to keep working with our young people. We can't give up. We won't. It's not in our nature as Americans to give up, so it's not going to happen. But the young man who's before me today, it's time to be held accountable.

With regard to the issue raised by Mr. Cotterell, which I think is a very important issue. I'm going to find that the imposition of the presumptive sentences as described

would clearly lead to an enormous set of penalties and I find that they would be excessive in light of the purpose of the chapter. If you add up all the enhancements and the recommended sentences by the State, it would lead to over a thousand months. I find that to be excessive. I'm going to find that the Counts 2 through 5 should run concurrently but they will need to run consecutively to Count 1. Count 6 would run concurrently with everything else.

In regard to Count 1, which is first degree murder, I'm going to impose the sentence of 300 months which is within the standard range plus the enhancement of 60 months which is within the enhanced range and that's 30 years. On Counts 2 through 5, I'm imposing a sentence of 100 months within the standard range plus 60 months for a total within the enhanced range of 160 months and this is a total of 520 months, which I think calculates to 43 plus years. Given his age, background, experience an and the nature of the harm that was done here, it seems to me after carefully thinking about this that I balance the equities that have been presented and I find that this would be an appropriate sentence.
(RP 19-21)

I hope you understand the logic of this sentence. A life was lost. A life that didn't deserve to be lost. This family that's sitting over here with tears in their eyes lost that life. They will never have the benefit of being close to their loved one. You are still alive. I've given you some measure of, as your lawyer asked me to, light at the end of the tunnel only because I have dedicated my life to the belief that people have the power to change. It's our hope that you -- you will have the benefit of seeing your family, speaking to them, being with them, but the Masoveros won't have that, but perhaps there's something in your future that you can build on whether it's your child or the rest of your family who sit here with tears in their eyes.
(RP 21-22)
...

THE COURT: We're on the record in the matter of State v. Salvador Nava, Cause No. 01-1-902-3. Today is Monday, June 15th, 2009. On Friday, June 12th, 2009, the court was faced with a decision on a sentence to be imposed in this case and the parties presented to me the standard ranges and the enhancements and the law that was available to the court in relation to the utilization of those standard ranges and the factors to be considered. Mr. Ramm presented the State's position as to what the State felt was appropriate given the nature of the facts and the charges and the convictions, and Mr. Cotterell on behalf of the defendant provided a reference to the statutory and case law authorities that will allow the court to run certain matters concurrently or consecutively and to also determine whether or not there should be any departures. And the -- even though I didn't have the benefit of all of that minutia on Friday, I had thought about this

case previously from the perspective of how I would arrive at a sentence within the guidelines that are given to me, that appropriately took into consideration a number of factors and I always try to be thoughtful, Salvador -- I want you to understand that I don't pull things out of the sky. I am bound by certain rules. The jury convicted you of certain matters and I'm bound by that and I wanted to create a sentence within the guidelines that had some rational behind it, some thought. And I was just in chambers with the lawyers because I wanted to see the paperwork that they came up with after our discussion on Friday.

On Friday, I said that I thought that it was appropriate that I come up with a total sentence of 520 months which involves a certain amount of acrobatics using the different standard ranges as well as the enhancements. There are five firearm enhancements here which each are five years and they must run consecutively to each other and I thought that a sentence of -- total sentence of 520 months which is approximately 43 years. I thought given the nature of the convictions of here, the nature of Salvador's prior record, his age at this time, and background, the nature of the impact on public safety, the loss of life, the facts involving this case which are very serious, motor vehicle with five people in it and multiple bullets fired at this motor vehicle resulting in one death, four people in the car exposed to serious injury or death, and the fact that there were other people in the area were also exposed -- exposed to the possibility -- led me to believe that consistent with my experience as a judge and making reference to other cases of a similar nature, that I thought that this sentence was appropriate, and so that's how I arrived at it.
(RP 23-25)

...

THE COURT: Yeah. Now, okay. I want to make it very clear that my intention Friday after the analysis I went through, considering the nature of the charges, nature of the impact on public safety, the nature of his background, criminal history, the facts of the case, led me to believe that a sentence of 520 months was appropriate and I thought it was within the standard range. I am now required to go below the standard range to make it work. Otherwise, I'd have to give you a greater sentence, Salvador. Now, I'm planning to sign the judgment and sentence today and this triggers your appeal rights but you have a right to speak now as I asked you Friday. Is there anything you'd like to say or do you have any legal reason why the judgment of the court should not be pronounced?
(RP 28)